No. 26-1146

In the United States Court of Appeals for the Third Circuit

THE ALPINE FUNDS; THE SAND GROVE FUNDS; THE WESTCHESTER FUNDS; THE PENTWATER FUNDS,
Plaintiffs-Appellants,

v.

TORONTO-DOMINION BANK; BHARAT B. MASRANI; KELVIN VI LUAN TRAN; LEO SALOM; FIRST HORIZON CORPORATION, Defendant in 23-3024; D. BRYAN JORDAN, Defendant in 23-3024; HOPE DMUCHOWSKI, Defendant in 23-3024; MICHAEL BOWMAN; MIA LEVINE,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey
Case No. 1:23-cv-02763 (The Hon. Renée M. Bumb)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants are four groups of related private investment funds.

Plaintiff-Appellant the "Alpine Funds" consists of nine related private investment funds: Alpine Associates, L.P.; Alpine Dedicated, L.P.; Alpine Heritage II, L.P.; Alpine Heritage Japan Trust; Alpine Heritage Offshore Fund Ltd.; Alpine Heritage, L.P.; Alpine Institutional, L.P.; Alpine Merger Growth, L.P.; and Alpine Partners, L.P.

Plaintiff-Appellant the "Sand Grove Funds" consists of five related private investment funds: Sand Grove Opportunities Master Fund Ltd; Sand Grove Tactical Fund LP; QSMA Torus SP, a segregated portfolio of QSMA SPC; New Holland Tactical Alpha Fund LP; and 405 MSTV I LP.

Plaintiff-Appellant the "Westchester Funds" consists of six related private investment funds: JNL/Westchester Capital Event Driven Fund; The Merger Fund®; The Merger Fund® VL; Virtus Westchester Event-Driven Fund (a series of Virtus Event Opportunities Trust); Westchester Capital Master Trust; and the Westchester Merger Arbitrage Strategy Sleeve of the JNL Multi-Manager Alternative Fund.

Plaintiff-Appellant the "Pentwater Funds" consists of eight related private investment funds: Pentwater Merger Arbitrage Master Fund Ltd.; PWCM Master Fund Ltd.; Pentwater Equity Opportunities Master Fund Ltd.; Oceana Master Fund Ltd.; Pentwater Unconstrained Master Fund Ltd.; Crown Managed Accounts SPC acting for and on behalf of Crown/PW Segregated Portfolio; Investment Opportunities SPC for the account of Investment Opportunities 3 Segregated Portfolio; and LMA SPC for and on behalf of the MAP 98 Segregated Portfolio.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit Local Rule 26.1(d), Plaintiffs-Appellants disclose that none of the funds listed above has a parent corporation, that no publicly held company holds 10% or more of the stock of any of the Plaintiffs-Appellants, and that there is no publicly held corporation which is not a party to the proceeding before this Court with a financial interest in the outcome of the proceeding.

July 13, 2026

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INTRODUCTION

This securities-fraud action arises out of the implosion of a proposed merger between two banks, TD Bank and First Horizon. In 2022, TD Bank agreed to acquire First Horizon in an all-cash transaction that would have entitled First Horizon shareholders to receive $25 per share. The merger required the approval of federal banking regulators, and both TD Bank and First Horizon assured investors for months that they knew of no reason regulators would withhold or delay approval.

In fact, those assurances were false and misleading. For years leading up to the proposed merger, TD Bank had been hiding massive problems in the bank's system of internal anti-money laundering (AML) controls. Federal law requires such controls to ensure that U.S. banks do not become conduits for laundering money, evading sanctions, or financing terrorism. TD Bank's AML controls were woefully inadequate—as the bank would later admit in pleading guilty to multiple federal crimes. Regulators ultimately revealed that TD Bank had allowed more than $18 *trillion* to flow through its coffers without proper vetting.

TD Bank's historic AML failings had not yet come to light when the proposed merger was announced in February 2022. From the moment the deal was announced and for months afterwards, TD Bank knowingly and deliberately lied to investors about its AML program and falsely created the impression that regulators were likely to approve the deal—even though TD Bank knew that its hidden compliance problems could torpedo the deal at any time.

First Horizon employees discovered TD Bank's problems while planning to integrate the two banks' systems, and their concerns reached First Horizon's senior leadership. First Horizon was also entitled under the merger agreement to be kept abreast of TD Bank's interactions with regulators and to learn of any information that might delay or derail regulatory approval. First Horizon thus had direct access to information regarding TD Bank's deficient AML controls.

Ultimately, TD Bank could not outrun the sheer scale of its failings. Regulators discovered TD Bank's massive AML deficiencies while the merger was under review and informed TD Bank in a series of meetings in November 2022 that the merger would almost certainly be rejected. Rather than coming clean, TD Bank and First Horizon falsely led the market to believe that the deal remained on track to close in early 2023 after a routine delay. It was not until May 2023 when First Horizon finally announced that the merger was off due to TD Bank's inability to obtain regulatory approval. First Horizon's shares plummeted in response to the news. TD Bank later became the largest bank in U.S. history to plead guilty to criminal violations of the Bank Secrecy Act, and the first U.S. bank to plead guilty to conspiracy to commit money laundering.

The plaintiffs in this case are institutional investment funds that purchased shares in First Horizon after the merger announcement. They brought this putative class action against TD Bank, First Horizon, and executives at both banks to recover for the losses the funds suffered when First Horizon's share price cratered. As relevant here, the funds allege that TD Bank and First Horizon committed fraud by deceiving the market about the risk that regulators would reject the deal.

Regulatory approval was a key consideration for investors because First Horizon shareholders would be entitled to receive $25 in cash only if regulators approved the deal and allowed it to close. Any reasonable investor would therefore have considered it highly significant to learn that TD Bank's criminally deficient AML controls would surely derail the deal if discovered by regulators.

The district court nonetheless dismissed the funds' claims against both banks. As to TD Bank, the court relied on two recent out-of-circuit decisions about the purchaser-seller rule in securities-fraud actions to hold that the funds, as purchasers of First Horizon shares, could sue only for false and misleading statements "about" First Horizon. The court viewed TD Bank's misstatements as being "about" TD Bank alone. As to First Horizon, the court concluded that the complaint fails to allege facts that give rise to a strong inference of scienter—accepting First Horizon's self-serving view that it too was duped by TD Bank and lacked any intent to deceive the market. The district court erred in both respects.

First, the funds satisfy the purchaser-seller rule as established by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). They bought First Horizon shares; they are not mere offerees or holders. And even assuming for the sake of argument that the funds, as First Horizon purchasers, may sue only for statements "about" First Horizon, TD Bank's misstatements satisfy that novel limitation. The complaint alleges that TD Bank spent months deliberately deceiving the market about whether regulators would approve its proposal to acquire First Horizon at $25 per share. Those false and misleading statements were "about" the future of both banks and what First Horizon investors should expect to receive for their First Horizon shares.

Second, First Horizon cannot escape liability by professing ignorance of TD Bank's deficient AML controls. First Horizon had access to multiple sources of information about TD Bank's AML problems, and the complaint plausibly alleges that First Horizon knowingly joined TD Bank in deceiving the market about the likelihood of regulatory approval—even *after* regulators privately signaled that TD Bank's epic failures would preclude approval of the merger. At a minimum, if First Horizon was not a knowing participant in the fraud, it was only because First Horizon acted recklessly—which is sufficient for scienter.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the funds' securities-fraud claims under 15 U.S.C. § 78aa and 28 U.S.C. § 1331. The district court entered its final judgment on December 23, 2025. JA5–6. The funds filed a timely notice of appeal on January 22, 2026. JA1–4. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Purchaser-seller rule. Did the district court err in dismissing the funds' Section 10(b) claims against TD Bank on the basis of the purchaser-seller rule as recently expanded in two out-of-circuit decisions? *See* JA33–48.

2. Scheme liability. Did the district court err in dismissing the funds' Section 10(b) claims for scheme liability against TD Bank? *See* JA48–50.

3. Scienter. Does the funds' complaint plausibly allege facts giving rise to a strong inference that the defendants acted with scienter? *See* JA50–64.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court, and the funds are not aware of any other related cases or proceedings.

STATEMENT OF THE CASE

I. Legal background

Congress enacted the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, to "insure honest securities markets and thereby promote investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 658 (1997).[1] Section 10(b) of the Act makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in

[1] Unless otherwise noted, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout this brief.

contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe … for the protection of investors." 15 U.S.C. § 78j(b).

The SEC adopted Rule 10b-5 to implement Section 10(b). Echoing the statute, Rule 10b-5 makes it unlawful for any person to engage in specified forms of fraud "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. Subsection (b) targets deceptive statements and omissions, prohibiting "any untrue statement of a material fact" or the omission of a material fact necessary to make a statement not misleading. *Id.* § 240.10b-5(b). Subsections (a) and (c) target deceptive conduct, prohibiting "any device, scheme, or artifice to defraud" and "any act, practice, or course of business" that operates as a fraud or deceit. *Id.* § 240.10b-5(a), (c). Theories of fraud that rely on the latter two provisions are sometimes called "scheme liability" claims. JA32.

The Supreme Court and this Court "have long recognized" a private cause of action to enforce Section 10(b) and Rule 10b-5. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014); *see, e.g.*, *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 948 n.13 (3d Cir. 1985). In cases involving false statements or omissions, the plaintiff bringing such an action must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co.*, 573 U.S. at 267.

In addition, under the purchaser-seller rule established in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the private right of action to enforce Section 10(b) and Rule 10b-5 is available only to "actual purchasers and sellers." *Id.* at 731. The plaintiff in *Blue Chip* was neither. It had been offered shares but had been dissuaded from buying by the defendants' misstatements. *Id.* at 726–27. The plaintiff sought damages for its "lost opportunity." *Id.* at 727. The Supreme Court rejected that theory, holding that mere offerees (prospective investors who didn't buy) or holders (existing shareholders who didn't sell) cannot sue for damages under Section 10(b) and Rule 10b-5. *See id.* at 731–33.

II. Factual background

A. In 2022, TD Bank agrees to acquire First Horizon for $25 per share in all cash, pending regulatory approval.

On January 6, 2022, TD Bank made an unsolicited all-cash offer to acquire First Horizon for $25 per share. JA510. TD Bank and First Horizon announced the proposed merger on February 28, 2022. JA129. Had it gone through, the $13.4 billion merger would have been the most significant transaction in either bank's history. *Id.*

Shares in First Horizon had been trading at $18.25 before the announcement. JA130. The acquisition price of $25 per share thus represented a 37% premium, and First Horizon's share price immediately rose to $23.48 on news of the proposed deal. *Id.* Investors transacting at that price could do so knowing that, if and when the merger closed, TD Bank would pay $25 in cash for each share of First Horizon stock.

Given the prospect of $25 per share at closing, the price at which First Horizon shares traded after the merger announcement depended on the market's perception of whether the merger was likely to close—including whether it was likely to be approved by regulators. JA131–32. As First Horizon explained in an SEC filing during this period, "the market price of [its] common stock was and continues to be substantially impacted by the Pending TD Merger," and any new information suggesting that the merger was at risk of not being approved would have "a negative effect on [the] market price." JA277.

Both banks knew that obtaining the necessary "regulatory approvals" was a critical issue for the merger to come to fruition. JA510. TD Bank could not acquire First Horizon without the approval of two banking regulators, the Federal Reserve and the Office of the Comptroller of the Currency (OCC). JA132. The banks also knew that those regulators would likely scrutinize one issue in particular: the adequacy of TD Bank's anti-money laundering controls. *Id.*

Under the Bank Secrecy Act, U.S. banks must have systems of internal controls to ensure compliance with U.S. laws against money laundering and other financial crimes. 31 U.S.C. § 5318(h); 31 C.F.R. § 1020.210. For example, banks are required to have an AML compliance program for reporting certain large cash transactions (currency transaction reports) or suspicious banking activity (suspicious activity reports) to federal authorities, and banks must ensure that they are aware of the true identity of their customers. JA132–37.

Regulators had previously warned that a proposed bank merger would not be approved in the face of "significant unresolved" AML deficiencies. JA138–39. When the TD Bank-First Horizon merger was announced, regulators had recently delayed another large bank merger for three years after finding AML weaknesses, and the Federal Reserve had warned that "in future cases" it would expect banks to withdraw any merger application if AML concerns surfaced. JA139–40.

Here, TD Bank represented in the publicly filed merger agreement that it had "no knowledge of any reason" why it would not receive "regulatory approvals … to permit consummation of the Merger[] on a timely basis." JA420. TD Bank warranted that it had complied with all applicable laws, including the Bank Secrecy Act and laws relating to "money laundering prevention[]," and that it had established and maintained a system of AML controls. JA420–21; *see* JA301–02. TD Bank further represented that there were no "regulatory investigations" against it, JA420, and it was aware of no regulator considering action that would materially impact its ability to close the merger on the announced timeline, JA422.

The merger agreement also required TD Bank to keep First Horizon "apprised of the status of matters relating to completion" of the merger and to consult with First Horizon "in advance of any meeting or conference with any regulatory agency or governmental entity" concerning the merger. JA271. First Horizon had the right to "attend and participate" in those meetings and to receive "all information … as may be reasonably necessary or advisable in connection with the requisite regulatory approvals." *Id.* And TD Bank was required to "promptly advise" First Horizon of any communication from regulators suggesting "a reasonable likelihood that regulatory approval will not be obtained, or that the receipt of any such approval will be materially delayed." *Id.*

B. For months, both banks tout the strength of TD Bank's AML program and assure investors that regulators will approve the merger.

From the moment the deal was announced, TD Bank and First Horizon told investors that regulatory approval was on track. In their joint press release announcing the merger, the banks represented that they had "an aligned culture and risk-management framework" and that the merger was "expected to close" by January 2023. JA282. On an investor call that same day, TD Bank CEO Bharat Masrani assured investors that TD Bank had "excellent regulatory relationships," was "familiar with what the regulatory requirements are," and expected the deal to "get approved and get closed around the 9-month mark." JA283.

Both banks made further public assurances in the following months. On March 21, 2022, TD Bank filed its publicly available bank merger application with the OCC. JA297. TD Bank represented in the application that its AML program "align[ed] with enterprise AML policies," so that money-laundering risks were "appropriately identified and mitigated." JA298. TD Bank further represented that it had "comprehensive anti-money laundering and sanctions programs" in place to comply with federal law and that it had "review[ed] and assess[ed] key risks related to AML" as part of due diligence for the merger. *Id.*

To secure shareholder approval of the merger, First Horizon filed two proxy statements with the SEC in April 2022. JA301, 305–06. Both proxy statements told shareholders that "each of First Horizon and TD does not know of any reason … why the requisite regulatory approvals will not be received to permit the consummation of the merger on a timely basis." *Id.* The second proxy statement also represented that First Horizon had identified TD Bank's "legal and regulatory compliance" as a "Reason for the Merger" based on "information obtained through due diligence," and that TD Bank had "complied" with the Bank Secrecy Act. JA305–06. In response to the proxy statements, First Horizon shareholders voted to approve the merger on May 31, 2022. JA161.

C. In reality, TD Bank's AML program was in shambles.

Unbeknownst to investors, TD Bank's AML compliance program was woefully inadequate throughout the entire period the banks were assuring the market of the opposite, and it had been deficient for nearly a decade before that. According to a later report by one of TD Bank's regulators, the Financial Crimes Enforcement Network (FinCEN), TD Bank "failed to maintain an AML program that complied with the [Bank Secrecy Act]" from at least January 2014 to October 2023, thereby "allowing illicit activity to flow through the bank." JA169.

Between January 2018 and April 2024, the automated system that TD Bank was supposedly using to detect suspicious activity for AML purposes did not even monitor the overwhelming majority of transactions at the bank—92% of transactions by volume and 74% by value. JA170–71. In total for that period, TD Bank failed to monitor more than 14.6 billion transactions involving over $18.3 trillion. *Id.* The unmonitored transactions included routine domestic transfers, Zelle payments, and most check activity. JA171. Failing to monitor such transactions was, as TD Bank would later admit, a "fundamental" gap in the bank's AML program, which persisted for years with TD Bank's knowledge. *Id.*

TD Bank's automated transaction monitoring system relied on programmed "scenarios" (e.g., a pattern of unusual account activity) to flag transactions for further investigation. JA135–36. From 2014 to 2022, TD Bank did not add a single new monitoring scenario to the system, and it removed at least nine. JA171–72. Thus, for the limited universe of transactions that TD Bank actually monitored, the automated system was set to look for fewer and fewer suspicious patterns. *Id.*

TD Bank made those changes to reduce the cost of reviewing the alerts the system would otherwise generate, deliberately blinding itself to potential crimes. *Id.* More broadly, executives at TD Bank imposed a "flat cost paradigm" to constrain AML spending even as the bank's business and AML risks grew. JA169–70. FinCEN would later find that TD Bank "knowingly spent an order of magnitude less than … its peers" on AML compliance. JA169.

Even when TD Bank's systems flagged suspicious activity, the bank often failed to file timely and accurate reports to law enforcement, as required by federal law. JA172. Among its many missed reports, TD Bank failed to file necessary reports in connection with $470 million in fentanyl proceeds laundered by Chinese money-brokers from 2019 through 2021, and $39 million in illegal drug-trafficking proceeds funneled through TD Bank to Colombia. JA172–73, 229–30. FinCEN ultimately found that TD Bank had failed to file thousands of required suspicious activity reports and had willfully filed more than 1,000 inaccurate currency transaction reports that "misled law enforcement." JA173.

After the merger was announced, First Horizon personnel responsible for AML compliance began to discuss integration with their counterparts at TD Bank. JA242–43. According to a former First Horizon compliance officer, those discussions made it clear that TD Bank's compliance program was "too light" and that the combined bank would need to rely on First Horizon's compliance program, even though TD Bank was five times larger. JA116–17, 242–44. The former employee further reported that, by August 2022, First Horizon's compliance personnel had concluded that the merger would not be approved or would face major obstacles, and that these facts had been reported to First Horizon's leadership—which responded by holding a series of unconvincing internal town-hall meetings aimed at addressing widespread employee concerns. JA244–45.

D. The banks continue to falsely assure investors that the merger will likely be approved even as reports of TD Bank's AML deficiencies begin to surface.

When the proposed merger was announced in February 2022, TD Bank had been successfully hiding the full scope of its AML deficiencies for years. JA174–75, 260–61. But public questions about TD Bank's AML compliance began surfacing within months of the merger announcement. TD Bank and First Horizon nonetheless persisted in deliberately misleading the market about the likelihood of regulatory approval for the merger. JA106–08.

The first report came in May 2022, when the investigative news service *Capitol Forum* reported that TD Bank had been privately reprimanded by the OCC in 2017 for opening fake accounts and for enrolling customers in services without their permission. JA158–59. The May 2022 report questioned whether TD Bank's misconduct would "result in increased regulatory scrutiny of the First Horizon deal." *Id.* In July 2022, *Capitol Forum* issued a second report, this time on a years-long federal investigation into improper sales practices involving TD Bank's car-loan business. JA163. The July 2022 report likewise questioned whether regulatory approval of the merger was in jeopardy. *Id.*

TD Bank denied each report. After the May 2022 report, TD Bank issued a public statement asserting that it "followed industry-best practices" and that it "strongly disagree[d]" with any suggestion that its "fraud controls [were] somehow … inadequate." JA159–60. On a call later in May, TD Bank CEO Masrani assured analysts that the bank was "very comfortable" with the prospects for regulatory approval, having entered the transaction on the understanding that "it meets all the requirements of all the regulators." JA160–61. After the July 2022 report, TD Bank's general counsel issued a response calling the report "an accumulation of false claims, half-truths, rumor, innuendo, and completely unrelated information," and accusing the *Capitol Forum* reporter of defamation. JA163–64.

In a call with investors on August 2, 2022—less than a month after *Capitol Forum*'s second report—an analyst asked Masrani whether he had "any reason" to believe the deal might not close or knew of any "regulatory or other issues that may delay the deal." JA164–65. Masrani answered: "No, I have no reason to believe that." *Id.* On a call a month later, another analyst asked about the timeline for regulatory approval, which the analyst called "the elephant in the room." JA165. Leo Salom, the CEO of TD Bank U.S., responded that TD Bank was "extremely confident" in its ability to obtain approval "in short order" because of the "strength" of its regulatory applications. *Id.*; *see* JA124.

First Horizon kept up the same message. In a May 2022 press release, First Horizon told investors that it expected the deal to close "in the first quarter of TD's 2023 fiscal year subject to U.S. and Canadian regulatory approvals." JA317; *see id.* (similar representations in July 2022). On October 18, 2022, First Horizon repeated that it expected the deal to close on schedule and assured investors that the "[r]egulatory approval process remains on track." JA323.

E. The banks maintain the pretense of likely approval even while hearing otherwise in private from regulators.

On October 24, 2022, the OCC completed its annual supervisory examination of TD Bank's AML controls and delivered its findings directly to the bank's senior leadership. JA176, 180–81. The findings were sharply critical; the examination had uncovered serious lapses in TD Bank's AML program. JA176.

Over the next several weeks, TD Bank's executives and lawyers held at least four private meetings with high-ranking officials from the Federal Reserve and the OCC, beginning with a November 3, 2022, meeting "to discuss the merger application decision timing." JA176–77. The next day, TD Bank's general counsel held a one-on-one follow-up meeting with the OCC's deputy comptroller for licensing. JA177. Six days after that, the general counsel returned with TD Bank's outside counsel for yet another private meeting with the same deputy comptroller and the OCC's director for large bank licensing. *Id.* And on November 21, 2022, Salom, the CEO of TD Bank U.S., held a confidential, one-on-one meeting with the OCC's senior deputy comptroller for large bank supervision. JA177–78.

TD Bank's senior management heard from regulators in those multiple meetings that the AML deficiencies regulators had identified were severe, would take years to remedy, and would likely preclude approval of the merger—particularly on the timeline the parties had announced to investors. JA178. TD Bank's executives also learned, by no later than November 2022, that the bank's AML deficiencies were under investigation by the Department of Justice. *Id.*

Neither TD Bank nor First Horizon disclosed those developments to investors. On December 1, 2022, after the original 9-month timeline for closing the deal had expired, TD Bank CEO Masrani announced that the expected closing would be delayed to the first half of 2023, while claiming to be "confident" the merger would close on the revised timeline. JA180. When an analyst asked whether the delay reflected regulators "taking a closer look at anything," Masrani answered, "No," and stated that he was "not aware of anything of the sort you're mentioning." *Id.*

On January 17, 2023, the Federal Reserve privately notified TD Bank's outside counsel that the merger application could not be resolved "until board staff receives additional information from another agency that is necessary for the board to make a decision." JA182. The merger agreement required TD Bank to apprise First Horizon of any communications from regulators indicating that approval would be delayed or denied, and First Horizon's own personnel had raised internal concerns about TD Bank's AML deficiencies. *See supra* 9–10, 13. But First Horizon nonetheless joined TD Bank in continuing to mislead the market about the prospects of regulatory approval. Rather than disclose that regulators had put the deal on hold indefinitely, First Horizon and TD Bank issued a joint press release on February 9, 2023, announcing an extension of the merger deadline to May 27, 2023, while misleadingly suggesting that the extension was merely a routine exercise of an extension provision in the merger agreement. JA182–83.

On February 22, 2023, the OCC scheduled a private meeting for March 9, 2023, with Masrani and TD Bank's outside counsel—a meeting that signaled serious trouble because, as a former regulator later explained, "[b]ank CEOs attend such meetings with outside counsel only when matters are very serious." JA183.

F. The merger finally collapses, and First Horizon's share price plummets.

On March 1, 2023, First Horizon disclosed in its annual report that "TD does not expect that the necessary regulatory approvals will be received in time to complete the pending TD Merger" by the extended May 27 deadline, and that TD Bank could not provide a new projected closing date. JA184. First Horizon's stock fell more than 10% on the news. *Id.* Yet the banks still dissembled. On a call the next day, Masrani told investors that TD Bank remained "fully committed to the transaction." JA185. When an analyst asked whether the delay was merely "procedural" or "something more substantive," Masrani denied any cause for concern. JA185–86. First Horizon's CFO similarly assured analysts that the banks "remain[ed] in active discussions" about "merger integration plans." JA186.

Behind the scenes, however, the regulatory process had hit a wall. On March 13, 2023, a Federal Reserve supervisor emailed TD Bank's outside counsel and directed the bank to "submit a request for suspension" of the merger application—

consistent with the agency's general practice of allowing an applicant to withdraw an application that would otherwise be denied. JA187–89. Four days later, TD Bank's outside counsel submitted the suspension request, effectively ending any possibility of regulatory approval. JA189. The banks disclosed none of this to investors, continuing instead to insist that closing was a matter of "when," not "if." JA190.

On May 3, 2023, *Capitol Forum* reported for the first time that Masrani and TD Bank's outside counsel had secretly met with senior regulators on March 9, 2023. JA192–93. The report quoted former regulators and industry sources confirming that such a meeting was highly unusual and "did not bode well for the merger." *Id.* First Horizon's stock fell 7% on the report. *Id.*

The next morning, before the market opened, TD Bank and First Horizon finally announced that they had terminated the merger. JA193. Their joint press release stated that TD "does not have a timetable for regulatory approvals" and that there was "uncertainty as to when and if those regulatory approvals can be obtained." *Id.* On a call that followed, First Horizon CEO D. Bryan Jordan explained that "the fact that regulatory approvals weren't able to be obtained by May 27 did not relate in any way to First Horizon." JA194. TD Bank disclosed that it would pay First Horizon $200 million (on top of $25 million in merger-related expenses), even though the merger agreement did not contemplate any such break-up fee. JA193.

The market reaction was immediate and severe. First Horizon's stock fell 33% in one day, from $15.05 per share on May 3 to $10.06 per share on May 4. JA194.

G. TD Bank's eventual guilty plea confirms what the banks had concealed.

On May 8, 2023, *The Wall Street Journal* and *Bloomberg* reported that regulators had refused to approve the merger because of TD Bank's AML compliance failures. JA196–97. In August 2023, TD Bank disclosed that it was responding to law-enforcement inquiries concerning its AML program. JA197. And on October 10, 2024, the bank pleaded guilty to criminal violations of the Bank Secrecy Act and conspiracy to commit money laundering. JA114, 200–01.

The guilty plea was historic. TD Bank became the largest bank in U.S. history to plead guilty to Bank Secrecy Act program failures, and the first U.S. bank to plead guilty to conspiracy to commit money laundering. JA114. TD Bank agreed to pay more than $3 billion in fines and penalties—the largest penalty ever imposed under the Bank Secrecy Act—and admitted to "willful" AML violations spanning nearly a decade, including the period during which TD Bank and First Horizon were publicly representing that TD Bank's AML controls met all regulatory requirements. *Id.*; *see* JA200–01. As the Attorney General put it in announcing the plea, TD Bank had "created an environment that allowed financial crime to flourish," and "by making its services convenient for criminals, TD became one." JA114–15.

After the merger collapsed, First Horizon faced questions about how it could have agreed to merge with TD Bank despite significant regulatory red flags. JA241. On an investor call on June 14, 2023, First Horizon's CFO admitted that First

Horizon's due-diligence process for the merger was "chaotic" and had been compressed into a 30-day window, even though "typically" the bank would "have a much longer" review process. JA241–42; *see* JA128.

III. Procedural background

This consolidated case arises out of two actions filed in 2023 on behalf of First Horizon investors. JA26. The lead plaintiffs are institutional investment funds that purchased First Horizon securities while the merger was pending and that suffered losses when it failed. JA119–21. As relevant here, the funds brought suit on behalf of a putative class of investors who purchased or otherwise acquired First Horizon securities from February 28, 2022, through May 3, 2023. JA353–54.

The funds sued TD Bank, First Horizon, and executives at both banks responsible for the statements and conduct at issue. JA121–28. After TD Bank's guilty plea and the public release of related regulatory findings, the funds filed the operative third amended complaint on January 31, 2025. JA26–27. The complaint alleges that the banks and their executives defrauded investors into believing that regulatory approval of the merger was likely, while concealing TD Bank's woefully inadequate AML program. JA103–18.

The complaint alleges violations of Section 10(b) and Rule 10b-5 premised on misleading statements as well as deceptive conduct (scheme liability). JA356–65. It also alleges violations of Section 20(a) of the Exchange Act by the individual executives. JA370–73. Section 20(a) creates a form of derivative liability, under which every person who "controls" a company that violates Section 10(b) is "jointly and severally liable" for the violation. 15 U.S.C. § 78t(a); *see, e.g.*, *Handal v. Innovative Indus. Props., Inc.*, 157 F.4th 279, 305 (3d Cir. 2025).[2]

The district court dismissed the complaint. JA76. For the Section 10(b) claims against TD Bank, the court's sole basis for granting dismissal was its conclusion that the funds lack what the court referred to as "statutory standing." JA33. As explained above, Section 10(b) prohibits fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). The funds had argued they could invoke Section 10(b) against the TD Bank defendants because those defendants committed fraud "in connection with" the funds' purchase of First Horizon securities under the test set forth by this Court in *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000). *See* Pls.' Suppl. Mem. in Opp. 23–27, D. Ct. Doc. 98 (May 9, 2025).

The district court declined to apply *Cendant*. JA41. Instead, the court adopted the reasoning of two out-of-circuit decisions to hold that the funds do not satisfy the purchaser-seller requirement for Section 10(b) claims against TD Bank. JA33–34 (citing *Menora Mivtachim Ins. Ltd. v. Frutarom Indus. Ltd.*, 54 F.4th 82 (2d Cir. 2022), and *In re CCIV/Lucid Motors Sec. Litig.*, 110 F.4th 1181 (9th Cir. 2024)). Under those decisions, the private right of action to enforce Section 10(b) and Rule 10b-5 is available only to

[2] The complaint also alleged a violation of Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), on behalf of First Horizon shareholders who were defrauded into voting to approve the merger. JA365–70. The district court dismissed the Section 14(a) claims, and the funds do not challenge that dismissal here. JA68–75.

plaintiffs who bought or sold the security "about which" a defendant's misstatements were made. JA38. The district court concluded that the funds, as purchasers of First Horizon stock, did not satisfy the new requirement for claims against TD Bank. JA45.

The district court rejected the funds' alternative argument that, even under *Menora* and *Lucid Motors*, at least some of TD Bank's misstatements were "about" First Horizon (and not just about TD Bank itself) because the misstatements concerned the proposed merger between the two banks. JA46. In the court's view, even TD Bank's misstatements about the merger and the timeline for regulatory approval were not "about" First Horizon. JA46–47. The court dismissed the funds' scheme-liability theory against TD Bank on the same rationale, even though neither *Menora* nor *Lucid Motors* addressed scheme liability. JA48.

The district court perceived no analogous standing problem for the funds' Section 10(b) claims against the First Horizon defendants, but it dismissed those claims on scienter grounds. JA50–64. Notwithstanding the complaint's allegations that First Horizon leadership learned of TD Bank's AML failings during integration planning (*e.g.*, JA242–45), as well as the various respects in which the merger agreement required information-sharing between the banks (*e.g.*, JA271), the district court found that the complaint did not plausibly allege a strong inference that the First Horizon defendants acted with the "intent to deceive." JA51. The court also stated that the complaint failed to allege a strong inference of recklessness, although it did not separately analyze that theory. JA56.

Finally, the court dismissed the funds' Section 20(a) control-person claims for lack of a predicate Section 10(b) violation. JA75–76. The court allowed the funds up to 30 days to file a fourth amended complaint, JA76, but the funds instead requested the entry of judgment so that they could appeal. *See* Pls.' Notice 1, D. Ct. Doc. 109 (Dec. 23, 2025). The court entered a final judgment on December 23, 2025. JA5–6.

SUMMARY OF ARGUMENT

I. The funds are proper plaintiffs to bring Section 10(b) and Rule 10b-5 claims against the TD Bank defendants.

A. The complaint plausibly alleges fraud by the TD Bank defendants "in connection with" the funds' purchase of First Horizon shares. 15 U.S.C. § 78j(b); *see* 17 C.F.R. § 240.10b-5. Under this Court's decision in *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000), a plaintiff establishes that connection by "showing that the misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely, and that they were material when disseminated." *Id.* at 176. The complaint alleges just that, identifying a months-long stream of misrepresentations that the TD Bank defendants disseminated through the channels investors rely on—such as SEC filings, proxy materials, and earnings calls—assuring investors that the merger was likely to be approved by regulators. Those statements were material to First Horizon shareholders, who stood to receive $25 per share in cash if the merger received approval and closed.

B. The funds also satisfy the purchaser-seller rule established in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The funds are actual purchasers of First Horizon shares and thus fall outside the categories of mere offerees or holders that *Blue Chip* excludes as potential plaintiffs. Nothing in *Blue Chip* requires that the defendant have issued the securities the plaintiff bought.

C. The district court nonetheless held that the funds—as purchasers of First Horizon shares—could sue only for fraud "about" First Horizon, and that TD Bank's misstatements were "about" TD Bank alone. That was error. Even accepting the dubious "about" limitation, which the district court drew from two out-of-circuit decisions, the complaint satisfies it. TD Bank's fraud concerned whether regulators would approve its proposal to acquire First Horizon at $25 per share in cash. Those statements were "about" the present value and future prospects of First Horizon, not just TD Bank. This Court can reverse on that basis without needing to decide whether to adopt the "about" limitation as the law of this circuit.

D. Alternatively, this Court should decline to adopt the "about" limitation as inconsistent with text and precedent. It appears nowhere in Section 10(b) or Rule 10b-5, neither of which uses the word "about." It finds no support in *Blue Chip*, which in fact cuts against the novel "about" limitation. And the other exacting requirements for private Section 10(b) suits already screen out the speculative claims that the "about" limitation purportedly guards against.

II. The district court erred in dismissing the funds' scheme-liability theory against the TD Bank defendants. The court treated that theory as merely a "[r]epackaged [m]isstatement [c]laim," JA48, but the complaint plausibly alleges distinct *misconduct* by the TD Bank defendants. And the district court's novel "about" limitation does not apply by its own terms to scheme-liability claims. A deceptive scheme is not necessarily "about" any particular subject or topic.

III. The complaint plausibly alleges facts giving rise to a strong inference that both TD Bank and First Horizon acted with scienter.

TD Bank has admitted that its senior management knew the bank's AML program was systemically deficient, even as those executives assured the market that the program met every regulatory requirement. The natural inference is that they knew their assurances were false when they made them.

The complaint also pleads a strong inference of scienter as to First Horizon. First Horizon had a contractual right to be kept informed of TD Bank's dealings with regulators, and it had every reason to want information about the most significant transaction in its history. Viewed as a whole, the complaint plausibly alleges that First Horizon learned of TD Bank's glaring AML deficiencies and knowingly joined TD Bank in misleading the market about the likelihood of regulatory approval. That inference grows especially compelling after November 2022, when regulators privately told TD Bank that its AML deficiencies would likely preclude approval. Even as the deal was twice delayed, First Horizon's executives kept portraying it as pending and on track. They could not plausibly have done so without asking TD Bank the obvious questions about the cause of the delay.

At a minimum, the complaint alleges that First Horizon recklessly disregarded obvious signs of TD Bank's problems. A strong inference of recklessness suffices for pleading scienter, and the district court never analyzed that theory.

STANDARD OF REVIEW

This Court reviews the dismissal of a complaint for failure to state a claim "*de novo*, accepting the facts alleged in the complaint and reasonable inferences drawn therefrom as true." *In re Walmart Inc. Sec. Litig.*, 151 F.4th 103, 112 (3d Cir. 2025). Under the Private Securities Litigation Reform Act of 1995, "any private securities complaint alleging that the defendant made a false or misleading statement must: (1) specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading, … and (2) state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 321 (2007).

ARGUMENT

I. The funds are proper plaintiffs to bring Section 10(b) and Rule 10b-5 claims against the TD Bank defendants.

TD Bank and its executives misled the market for months about TD Bank's criminally inadequate AML compliance program and the likelihood that regulators would approve the TD Bank-First Horizon merger. Whether the merger would be approved by regulators was highly material to First Horizon investors—and obviously so, since the closing of the merger would mean that anyone who held First Horizon shares would be cashed out at $25 per share. Under a straightforward application of Section 10(b) and Rule 10b-5, the funds may sue the TD Bank defendants for the fraud that those defendants perpetrated "in connection with" the funds' purchase of shares in First Horizon. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

Indeed, TD Bank did not dispute either materiality or falsity below. Its arguments for dismissal instead rested on an unwarranted expansion of the purchaser-seller rule. The funds satisfy the purchaser-seller rule because they are actual purchasers, not mere offerees or holders. JA119–21. That was not enough for the district court. Following two recent out-of-circuit decisions, the district court held that the purchaser-seller rule limits the funds to suing only for misstatements "about" First Horizon. JA34.

Even assuming for the sake of argument that any such limitation exists, the complaint plausibly alleges statements by TD Bank "about" First Horizon. When TD Bank misled the market about the likelihood of regulatory approval of the merger, it was deceiving investors about First Horizon's present value and future prospects. Alternatively, if this Court chooses to reach the issue, it should reject the district court's novel "about" limitation. Either way, the decision below should be reversed.

A. The complaint plausibly alleges fraud by the TD Bank defendants "in connection with" the funds' purchase of First Horizon securities.

Section 10(b) prohibits fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). The funds' Section 10(b) claims against TD Bank satisfy that requirement as construed by this Court.

In *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000), this Court applied the "in connection with" requirement to the specific context of a corporate merger derailed by fraud. The plaintiffs in that case had purchased shares in a company called ABI during a takeover battle in which ABI ultimately agreed to be acquired by the defendant, Cendant. *Id.* at 170–71. Cendant then disclosed a series of accounting irregularities, and the merger fell apart. *Id.* Investors who had bought ABI stock at prices artificially inflated by Cendant's fraud sued, alleging that Cendant had made "fraudulent misrepresentations concerning [its] financial condition" and "its willingness to complete the proposed merger." *Id.* at 171. The district court held that the ABI purchasers' allegations about Cendant could not satisfy the "in connection with" requirement, but this Court disagreed. *Id.* at 172, 187.

This Court explained that "the 'in connection with' language requires a causal connection between the claimed fraud and the purchase or sale of a security," but it does not require that the defendant's misrepresentations "refer to [the] particular security" the plaintiff bought or sold. *Id.* at 175. Instead, the Court held that a plaintiff may show the requisite connection by "showing that the misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely, and that they were material when disseminated." *Id.* at 176. That construction, the Court explained, "recognizes the realistic causal effect that material misrepresentations, which raise the public's interest in particular securities, tend to have on the investment decisions of market participants who trade in those securities." *Id.*

The complaint in this case satisfies the "in connection with" requirement under *Cendant*. The complaint alleges that the TD Bank defendants repeatedly disseminated misleading statements "to the public in a medium upon which a reasonable investor would rely." *Id.* For example, TD Bank misled the market in its bank-merger application, JA297–98; in SEC filings, JA326–27, 337–38; in calls with investors and analysts, JA282–84, 311, 319–20, 330, 336–37; and in other public statements, JA282, 320–21, 333–35. The complaint also alleges that TD Bank's misleading statements were "material when disseminated." *Cendant*, 223 F.3d at 176; *see Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (materiality standard). TD Bank was misleading the market about the likelihood of regulatory approval when the viability of the merger was *the* critical issue for investors.

"It is well established that information concerning a tender offer or a proposed merger may be material to persons who trade in the securities of the target company." *Cendant*, 223 F.3d at 177. After a proposed all-cash merger is announced, the market price of the target's securities is largely a function of investors' perceptions about whether the merger will be completed, at which point the shares will be worth exactly the acquisition price in cash. *See*, *e.g.*, *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 663 F. Supp. 3d 334, 368 (S.D.N.Y. 2023) (explaining that price activity in a signed cash merger "logically reflects that, were the [m]erger approved, each share would be exchanged for that precise sum, but that the market [may] slightly discount[] that sum to capture the possibility that the [m]erger would not reach completion"); *Sayce v. Forescout Techs., Inc.*, 754 F. Supp. 3d 878, 892 (N.D. Cal. 2024) (similar).

Here, TD Bank's all-cash offer to acquire First Horizon at $25 per share represented a 37% premium over First Horizon's pre-announcement share price, which quickly jumped up to $23.48 on news of the deal. JA130. During the class period, investors repeatedly asked about the likelihood of regulatory approval—questions that TD Bank executives brushed off with false denials or misleading omissions. *See, e.g.*, JA164–65, 180–81. The "total mix of information," *Basic*, 485 U.S. at 232, would have looked vastly different had investors known that TD Bank was hiding AML deficiencies that made regulatory approval highly unlikely.

B. The funds satisfy the *Blue Chip* purchaser-seller rule.

The Supreme Court has held that the private right of action to sue for damages under Section 10(b) and Rule 10b-5 is available only to investors who actually bought or sold securities. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730–31 (1975). The funds satisfy that requirement as well, because they purchased First Horizon shares at prices that were artificially inflated by TD Bank's fraud. JA119–21.

That conclusion follows directly from the reasoning of *Blue Chip*. The Supreme Court explained there that the purchaser-seller rule excludes "[t]hree principal classes of potential plaintiffs." 421 U.S. at 737. First, "potential purchasers" who are dissuaded from buying securities by a fraud that makes the investment appear to be "less favorable … than it actually was" cannot sue for damages for their lost opportunity to buy. *Id.* Second, "actual shareholders … who allege that they decided not to sell" because of a fraud cannot sue for their lost opportunity to sell. *Id.* at 737–38. And third, non-buying, non-selling investors, creditors, and others who are indirectly harmed by "corporate or insider activities in connection with the purchase or sale of securities" cannot invoke Section 10(b). *Id.* at 738.

The Supreme Court acknowledged in *Blue Chip* that excluding those categories "excludes plaintiffs who have in fact been damaged by violations of Rule 10b-5." *Id.* at 743. But the Court found that countervailing "policy considerations" favored adopting the purchaser-seller rule. *Id.* at 737. In particular, the Court was concerned that allowing suits by non-buyers and non-sellers would invite "vexatious litigation" by individuals claiming that they *would have* transacted in the securities at issue had they known the truth—a claim that could be easy to allege but difficult to dispute. *See id.* at 743–46. Limiting the cause of action to actual buyers or sellers avoids those difficulties because the plaintiff's transaction is an "objectively demonstrable fact" that is "capable of documentary verification." *Id.* at 746–47.

The funds do not fall into the categories of excluded "potential plaintiffs" identified in *Blue Chip*, *id.* at 737, and the funds' claims do not implicate any of the "considerations of policy" that led the Supreme Court to adopt the purchaser-seller rule, *id.* at 749. The funds are actual buyers, not mere offerees or holders. And the funds' asserted injuries rest on actual, verifiable market transactions, not speculation about what they would have done in the absence of the defendants' fraud.

Notably, the purchaser-seller rule does not require that TD Bank be the issuer of the securities that the funds bought. Section 10(b) and Rule 10b-5 apply to "any person" and "any security," 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5, and the Supreme Court has recognized that non-issuers can be liable. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court explained that "[a]ny person or entity, including a lawyer, accountant, or bank," may be liable for making material misstatements on which investor rely. *Id.* at 191. And in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), the Court recognized that a Section 10(b) action may be brought by a purchaser or seller of "any security" against "any person" who uses a manipulative or deceptive device in connection with a securities transaction. *Id.* at 382. The purchaser-seller rule requires only that the plaintiff traded in the securities "in question." *Blue Chip*, 421 U.S. at 742; *accord Deutschman v. Beneficial Corp.*, 841 F.2d 502, 505–06 (3d Cir. 1988) (explaining that the "only standing limitation" imposed by *Blue Chip* is "that the plaintiff be a purchaser or seller of a security," and allowing suit by options purchaser against parties that didn't issue the options).

C. The complaint plausibly alleges misstatements by TD Bank "about" First Horizon.

The district court dismissed the funds' Section 10(b) claims against the TD Bank defendants on the theory that, as purchasers of First Horizon shares, the funds could sue only for fraud "about" First Horizon. JA45–47. The court drew that understanding of the purchaser-seller rule from two recent out-of-circuit decisions, *Menora Mivtachim Insurance Ltd. v. Frutarom Industries Ltd.*, 54 F.4th 82 (2d Cir. 2022), and *In re CCIV/Lucid Motors Securities Litigation*, 110 F.4th 1181 (9th Cir. 2024).

In the interest of streamlining this dispute, the funds argued below—and maintain on appeal—that their claims would satisfy the purchaser-seller rule even under the dubious reasoning of *Menora* and *Lucid Motors*. *See* Pls.' Suppl. Mem. in Opp. 27–29. Reversing on that basis would obviate any need for this Court to resolve whether to adopt *Menora* and *Lucid Motors* as the law of this circuit going forward. Either way, the district court's dismissal should be reversed.

1. In *Menora,* the plaintiffs had purchased shares in a company called IFF during its acquisition of Frutarom. *Menora*, 54 F.4th at 84. After the acquisition, IFF disclosed that Frutarom had engaged in foreign bribery, causing a steep decline in the price of IFF shares. *Id.* at 84–85. The IFF purchasers brought Section 10(b) claims premised on Frutarom's misstatements and omissions regarding its compliance with anti-bribery laws. *Id.* at 85. A divided panel of the Second Circuit affirmed the dismissal of the IFF purchasers' claims. *Id.* at 84. The panel majority understood the purchaser-seller rule to mean that a plaintiff must "have bought or sold the security about which a misstatement was made in order to have standing to sue." *Id.* at 86. And the majority viewed the IFF purchasers' allegations in that case as resting on misstatements by Frutarom about itself, not about IFF. *Id.* at 89.

Judge Pérez concurred in the judgment. Although she would have affirmed on other grounds, she faulted the majority for "creat[ing] new law" and for "provid[ing] no explanation as to why it is now necessary to alter the language that the Supreme Court and this Circuit have used for decades." *Id.* at 89, 91 (Pérez, J., concurring in the judgment). The majority's "new standard," she explained, "only adds confusion" to what had been a simple inquiry. *Id.* at 91.

In *Lucid Motors*, the Ninth Circuit endorsed and adopted *Menora* to affirm the dismissal of Section 10(b) claims in another merger case. 110 F.4th at 1185. But it was "undisputed" in that case that the misstatements at issue were only about the target of the acquisition (Lucid), not about the acquisition itself. *Id.* at 1187. The plaintiffs were purchasers of shares in the acquiring company (not Lucid). *Id.*

2. Even accepting for the sake of argument the questionable proposition that "[t]he purchaser-seller rule requires plaintiffs to have bought or sold the security about which a misstatement was made," *Menora*, 54 F.4th at 86, the funds are proper plaintiffs here because they allege that TD Bank made misstatements "about" First Horizon. In particular, the complaint contains numerous plausible allegations of misstatements by TD Bank about whether regulators were likely to approve its acquisition of First Horizon. From day one, TD Bank assured investors that the merger would "get approved and get closed around the 9-month mark" and claimed to be unaware of anything "unique in this deal" that might delay regulatory approval—all while hiding its massive AML shortcomings. JA282–84. Throughout the class period, the TD Bank defendants assured the market that they knew of no reason regulators would withhold approval; dismissed delays as benign; and insisted that closing was a matter of "when," not "if." *See* JA155–57, 160–61, 164–65, 180–83, 185, 190–91, 282–84, 301–02, 305–06, 311, 319–21, 330, 333–37, 344–45.

Perhaps most damningly, senior executives at TD Bank held a series of secret discussions with OCC officials in November 2022. JA176–78. Regulators informed TD Bank's senior management in those meetings that the bank's AML deficiencies would likely preclude approval of the merger. JA178. Yet on a call on December 1, 2022, TD Bank CEO Masrani falsely denied being "aware of anything" about the possible reasons regulators might be delaying approval:

> Question: I mean are the regulators taking a closer look at anything? Are you anticipating having to make any adjustments to your product lineup or your fee schedule in advance of the close?
>
> Masrani: No, I'm not aware of anything of the sort you're mentioning.

JA330. All the while, First Horizon's stock price approached $25 per share. *See* JA166 (price of $24.85 on November 30, 2022).

The complaint also contains four pages of detailed allegations explaining why TD Bank's misleading statements regarding regulatory approval of the merger were "about First Horizon securities," not just about TD Bank. JA277–80. After the proposed all-cash merger was announced, whether the deal would be approved by regulators was of paramount importance to any reasonable investor. First Horizon itself identified the merger as a "Principal Investment Risk[]" to First Horizon investors. JA277. First Horizon also warned investors that termination of the merger "as a result of failure to obtain all needed regulatory approvals" would "likely have a negative impact" on the market price of First Horizon shares, *id.*, because the post-announcement market price of First Horizon's stock was largely a function of investors' expectations that the deal would be approved and would close. *See supra* 30–31. And after the merger announcement, First Horizon entered a "quiet period" in which it deliberately stopped holding regular conference calls to discuss the merger, leaving investors in First Horizon particularly dependent on statements by TD Bank for information about the regulatory process. JA274; *see* JA279–80.

When TD Bank misled the market about the likelihood that regulators would approve the merger, it was speaking "about" both TD Bank and First Horizon. Indeed, the merger was at bottom an agreement for TD Bank to acquire all outstanding shares of First Horizon's common stock at $25 per share. JA103. When TD Bank falsely assured the market that regulatory approval of the deal was on track, TD Bank was telling investors that regulators would allow it to purchase all outstanding shares of First Horizon at $25 per share. Those misleading statements were "about" First Horizon's present value and future prospects.

3. The district court acknowledged the funds' argument that their claims against the TD Bank defendants could proceed even under *Menora* and *Lucid Motors*, but it wrongly dismissed the argument as a "veiled attempt to relitigate" *Menora* and *Lucid Motors*. JA46. The court concluded that "[e]ven TD Bank's comments regarding its commitment to the merger and the timeline for obtaining regulatory approval of the merger were not about First Horizon." JA47. That was error.

The merger-related statements at issue here are materially different from the statements at issue in *Menora* and *Lucid Motors*. The misstatements in those cases exclusively concerned the acquired company's internal business affairs—Frutarom's compliance with anti-bribery laws, for example. *Menora*, 54 F.4th at 84–85; *see Lucid Motors*, 110 F.4th at 1183. Here, by contrast, purchasers of First Horizon shares are alleging misstatements by TD Bank and its executives about the merger between TD Bank and First Horizon—about whether the merger would close, on what terms, and subject to what regulatory contingencies. First Horizon itself was "the subject of the misrepresentation[s]" that TD Bank made. JA47.

D. Alternatively, this Court should reject any novel "about" limitation as inconsistent with text and precedent.

Because the complaint plausibly alleges misstatements by the TD Bank defendants "about" First Horizon, this Court can reverse and remand on that basis without needing to decide whether to adopt the reasoning of *Menora* and *Lucid Motors* as the law of this circuit. The Court can defer that question for a future case where it may have more practical significance. Alternatively, if the Court views the issue as outcome-determinative, it should reject *Menora* and *Lucid Motors* rather than allow those decisions to bar the funds' valid Section 10(b) claims against TD Bank.

The rule those decisions announced has no basis in the text of Section 10(b) or Rule 10b-5, neither of which uses the word "about." The statute and rule *do* require a nexus between the alleged fraud and the company whose shares the plaintiff bought or sold, but that limitation is supplied by the "in connection with" requirement—not the purchaser-seller rule. And as this Court established in *Cendant*, a misstatement "made in the context of … a proposed merger" can have the requisite connection even if the misstatement did not "specifically refer to the investment value of the security that was bought or sold." *Cendant*, 223 F.3d at 177.

The Second Circuit was wrong to describe its expansion of the purchaser-seller rule as a question of "statutory standing," *Menora*, 54 F.4th at 84, at least if that label implies a limitation derived from the statute itself. The Supreme Court has made clear that the purchaser-seller rule does not "stem[] from the text" of Section 10(b) or Rule 10b-5. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 84 (2006). It is a judge-made limitation on the private right of action to enforce those provisions—a limitation the Court adopted in *Blue Chip* based "chiefly, and candidly, on policy considerations." *Id.*; *see Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 289–90

(1992) (Scalia, J., concurring in the judgment) (describing the purchaser-seller rule as "essentially a legislative judgment rather than an interpretive one").

Nothing in *Blue Chip* itself supports the novel "about" limitation endorsed in *Menora* and *Lucid Motors*. The Supreme Court did not use that term to describe any necessary link between the alleged fraud and the securities the plaintiff bought or sold. In passing, the Court stated that one "virtue" of the purchaser-seller rule "is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission *relates*." *Blue Chip*, 421 U.S. at 747 (emphasis added). But *Menora* and *Lucid Motors* did not purport to be based on that language, and the "about" limitation they imposed is not satisfied merely by the fact that a misstatement has a "relation" to the shares the plaintiff bought or sold. *Menora*, 54 F.4th at 91 (Pérez, J., concurring in the judgment).

If anything, the policy considerations discussed in *Blue Chip* cut against engrafting a novel "about" limitation onto the purchaser-seller inquiry. The purchaser-seller rule was designed to avoid "conjectural and speculative" damages inquiries by limiting suit to investors who actually traded. *Blue Chip*, 421 U.S. at 734–35. The "about" requirement does nothing to serve that purpose. It denies a cause of action even to plaintiffs who indisputably bought or sold the securities at issue at specific prices and times. Worse, the new requirement complicates an inquiry meant to be simple. *Menora* and *Lucid Motors* will necessarily generate "challenging issues" for courts and litigants forced to undertake a new inquiry into what a misstatement is "about," with no guidance in text or precedent. Marc I. Steinberg & Antonio Partida, *Undue Limitations in the Section 10(b) Purchaser-Seller Requirement*, 99 Tul. L. Rev. 1, 18 (2024). And courts would be required to confront those issues for no good reason.

The panel majority in *Menora* sought to justify its approach by citing the principle that "judicially created private rights of action should be construed narrowly." 54 F.4th at 86. But that principle is not an invitation for the lower courts to invent new judge-made limitations to undermine a cause of action that the Supreme Court has already recognized and Congress has "ratified." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). Nor is the novel "about" limitation necessary to guard against "case-by-case erosion" of the purchaser-seller rule. *Contra Menora*, 54 F.4th at 87. As just explained, the "about" limitation does nothing to distinguish between actual purchasers and sellers and mere market bystanders; instead, it deprives plaintiffs of a cause of action even when they bought or sold at prices directly affected by the defendant's fraud.

More broadly, any concerns about attenuated theories of fraud are already fully addressed by the other requirements for private Rule 10b-5 suits. A private plaintiff must plead misleading statements or omissions "with particularity" and must "state with particularity facts giving rise to a strong inference that the defendant acted with" scienter. 15 U.S.C. § 78u-4(b)(1), (b)(2)(A). And to prevail, the plaintiff must plead and prove other elements that already ensure a "proper connection between [the] defendant's misrepresentation and [the] plaintiff's injury," *Halliburton Co. v.*

Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014), including both reliance and loss causation, *see id.*; *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005). The "about" limitation adds nothing but confusion.

II. The funds also have a cause of action under Section 10(b) and Rule 10b-5 against the TD Bank defendants for scheme liability.

The complaint alleges that the TD Bank defendants violated Section 10(b) and Rule 10b-5 both through misleading statements and through a scheme of deceptive conduct. JA357–65. The district court viewed the funds' scheme-liability theory as merely a "[r]epackaged" version of the funds' misstatement theory, subject to dismissal under *Menora* and *Lucid Motors* for the same reasons. JA48. If this Court rejects the district court's application of *Menora* and *Lucid Motors*, it should reverse with respect to scheme liability as well. And in any event, those decisions do not apply to scheme-liability claims.

The TD Bank defendants engaged in a scheme to deceive investors and regulators about the bank's AML controls (or lack thereof), which involved both statements and additional misconduct. Among other things, the TD Bank defendants decimated the bank's compliance program by spending an order of magnitude less than peer banks. JA360–61. They concealed the bank's AML failures from regulators, including by falsely certifying TD Bank's compliance in regulatory filings and by meeting repeatedly with regulators while withholding the truth. JA359–63. They mounted a public-relations campaign to prop up the deal. JA361–62. And after regulators told them the merger would not be approved, they kept the rejection secret for months. JA363.

Those allegations support scheme liability. Contrary to the district court's suggestion, JA50, the scheme-liability provisions in Rule 10b-5 apply even when the fraudulent scheme relies on false statements. The Supreme Court recognized as much in *Lorenzo v. SEC*, 587 U.S. 71 (2019), when it upheld a theory of scheme liability in which "the only conduct involved concern[ed] a misstatement," *id.* at 77.

The district court was also wrong to extend *Menora* and *Lucid Motors* to scheme liability, which neither addressed. *Menora*'s rule is expressly framed in terms of misstatements, limiting suit to purchasers or sellers of "the securities about which *misstatements* were made." 54 F.4th at 88 (emphasis added). That novel limitation is unsound for the reasons discussed above, but it would be especially wrong to transpose it to scheme liability. The scheme-liability provisions in Rule 10b-5 target misconduct, like a deceptive "course of business," 17 C.F.R. § 240.10b-5(c), which doesn't necessarily have any particular topic or subject. As one court observed in declining to apply *Menora* to a scheme-liability claim, "conduct does not expressly communicate its object." *In re CarLotz, Inc. Sec. Litig.*, 2024 WL 3924708, at *2 n.3 (S.D.N.Y. 2024). For that additional reason, the dismissal of the funds' scheme-liability claims should be reversed.

III. The complaint plausibly alleges that both TD Bank and First Horizon acted with scienter.

Both TD Bank and First Horizon contended below that the complaint fails to "state with particularity facts giving rise to a strong inference that the defendant acted with" scienter. 15 U.S.C. § 78u-4(b)(2)(A). The district court did not reach TD Bank's scienter argument, but it accepted First Horizon's. Indeed, the court relied on scienter—and scienter alone—to dismiss the funds' Section 10(b) claims against the First Horizon defendants. JA50.

That dismissal should be reversed, so that the funds' Section 10(b) claims may proceed against both banks and their executives. TD Bank intentionally deceived the market about its AML deficiencies and the likelihood of regulatory approval. First Horizon either joined in the deception or, at a minimum, proceeded recklessly by turning a blind eye to the information available to it as part of the merger.

Recklessness is sufficient. "To establish liability under § 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter." *Tellabs*, 551 U.S. at 319. That mental state embraces not only intentional deception but also recklessness, i.e., conduct involving "an extreme departure from the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Ikon Off. Sols., Inc.*, 277 F.3d 658, 667 (3d Cir. 2002). The inference of scienter need only be "at least as compelling as any opposing inference of nonfraudulent intent," and the court asks whether "all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs*, 551 U.S. at 322–23.

TD Bank. In its guilty plea, TD Bank admitted that its "high level executives" and "senior executive management" knew of "long-term, pervasive, and systemic deficiencies" in the bank's AML controls. JA167–68, 200–01, 256–57. The bank also admitted to "willful" violations of its AML obligations—intentional criminal conduct that spanned nearly a decade and covered the entire class period. JA200.

Yet, as the complaint alleges, TD Bank falsely represented in its bank-merger application that it had "comprehensive anti-money laundering and sanctions programs" that were "designed to secure compliance with the [Bank Secrecy Act]." JA155. TD Bank executives also repeatedly and falsely told investors that TD Bank knew of no reason why regulators would withhold approval of the proposed merger. JA190–91. And even after regulators told TD Bank in November 2022 that its AML deficiencies would likely preclude approval, the TD Bank defendants continued to falsely assure the market that the deal was on track. JA176–81.

The complaint thus pleads facts giving rise to a compelling inference that TD Bank was intentionally deceiving its regulators and the market about its AML failings and the risk those failings posed to the merger. TD Bank has contended that the complaint fails to establish any motive for the bank to agree to a merger if the bank thought the merger likely to be rejected. *See* Defs.' Suppl. Mem. of Law 17–19, D. Ct.

Doc. 86 (Mar. 21, 2025). But the complaint alleges (and the guilty plea confirms) that TD Bank successfully hid its AML failings for years. JA173–75. Those facts support a compelling inference that TD Bank knew of its own AML failings and knew the problems would derail the merger if detected, but TD Bank nonetheless proceeded with the merger in the hope that it could continue to deceive regulators and the public. The plaintiffs here are direct victims of that fraud, along with all the other investors who purchased First Horizon shares expecting to receive $25 per share when the merger closed.

First Horizon. First Horizon learned of TD Bank's AML deficiencies during the class period and joined TD Bank in deliberately misleading First Horizon investors about the likelihood of regulatory approval. JA270–73. At a minimum, if First Horizon did not discover TD Bank's AML deficiencies, it was only because First Horizon acted recklessly.

The complaint alleges the following sets of facts concerning First Horizon's access to information about TD Bank's inadequate AML program:

- **Pre-merger due diligence**. According to its own proxy statement, First Horizon had "information obtained through due diligence" regarding TD Bank's "legal and regulatory compliance," which First Horizon touted to its shareholders as a reason to approve the merger. JA305.
- **Merger agreement**. The merger agreement entitled First Horizon to know "the status of matters relating to completion" of the deal and to

receive from TD Bank all "reasonably necessary" information "in connection with the requisite regulatory approvals." JA271. First Horizon was also entitled to be apprised of any communication indicating a "reasonable likelihood that regulatory approval will not be obtained." *Id.*

- **Integration planning.** After the merger was announced, First Horizon employees responsible for AML compliance began to discuss integration with their counterparts at TD Bank, and those discussions confirmed that TD Bank's program was far "too light" to properly mitigate AML risks. JA242–43. According to a confidential witness who worked in First Horizon's compliance program at the time, internal concerns about TD Bank's AML deficiencies reached First Horizon's senior leadership and were widespread within the bank. JA244. The witness's supervisor, a vice president who reported up to First Horizon's most-senior compliance personnel, was "shocked by TD's approach" to AML. *Id.*[3]

Those specific factual allegations must also be viewed in light of "the complaint in its entirety." *Tellabs*, 551 U.S. at 322. As the complaint alleges, First Horizon's merger with TD Bank would have been the largest and most important

[3] The district court downplayed these allegations because the complaint does not state that the confidential witness "was personally involved in the merger or any of the meetings mentioned." JA59. But confidential-witness allegations are properly considered when a complaint describes the witness's former position and explains the basis for the witness's access to the relevant information—which this complaint does. *Inst. Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 261 (3d Cir. 2009); *see* JA242, 244–45.

transaction in either bank's history. JA101, 253. The merger would have triggered "golden parachute" payouts to senior First Horizon executives totaling over $95 million. JA104. Several First Horizon executives sold millions of dollars' worth of First Horizon shares during the class period. JA273–74. First Horizon's CEO (a named defendant) sold $2.3 million worth of shares on February 24, 2023—just two days after the OCC scheduled its highly unusual call with Masrani and TD Bank's outside counsel. JA245–46. Those sales occurred pursuant to a Rule 10b5-1 trading plan, but the CEO had entered into the plan while the merger was pending. JA246. The complaint further alleges that First Horizon executives remained in close contact with TD Bank executives, that the banks' CEOs were longtime personal friends, and that First Horizon was "contemporaneously informed of all TD's interactions with regulators." JA271; *see* JA275–76.

Taken together, the allegations in the complaint support a strong inference that First Horizon had a right to be kept informed of TD Bank's discussions with regulators, had every reason to wish to be informed about such a significant deal, and was in fact informed. First Horizon's claim that it nonetheless remained in the dark is not a "plausible, nonculpable explanation" based on the facts as alleged, particularly after the merger was delayed. *Tellabs*, 551 U.S. at 324. And even if it were plausible that First Horizon somehow missed the same AML failings that led to TD Bank's historic guilty plea, the inference that First Horizon knew and went along is "strong" even "in light of other" possible inferences. *Id.*

The district court took the view that the size and magnitude of TD Bank's fraud did not support an inference of scienter for First Horizon because of what the court called "the competing allegations that TD Bank actively concealed these problems from regulators for years." JA56. But First Horizon was not in the same position as an outside regulator; the two banks were internally discussing plans to merge their operations and exchanging confidential information in connection with those plans. And in any event, the district court's logic fails even on its own terms: Regulators *did* discover TD Bank's AML deficiencies during the class period. *See supra* 16–18. The complaint supports a strong inference that First Horizon did too.

The inference of First Horizon's scienter is particularly compelling after November 2022, when regulators privately informed TD Bank that its pervasive AML deficiencies would likely preclude approval of the merger. JA176–80. TD Bank's inability to obtain regulatory approval forced the banks to issue a joint press release, in February 2023, announcing an extension of the merger deadline to May 2023. JA182–83. And in March 2023, First Horizon announced that TD Bank did not expect to receive regulatory approval by that extended date, even while continuing to falsely portray the deal as on track. JA185, 186–87. It is wholly *implausible* that First Horizon and its executives made those public statements without ever asking TD Bank any of the obvious follow-up questions about *why* regulators were balking at approving the most significant transaction in the history of either bank—questions that First Horizon was entitled to ask, and TD Bank was required to answer, under the express terms of the parties' merger agreement. JA271.

At the very least, the complaint plausibly alleges facts supporting a strong inference of recklessness. Recklessness can include "an egregious refusal to see the obvious, or to investigate the doubtful." *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000). As this Court has explained, "[w]hen the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk." *Inst. Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 270 (3d Cir. 2009). An inference of recklessness can also be supported by a person's "access to information contradicting [his] public statements." *Novak*, 216 F.3d at 308; *see, e.g.*, *In re Innocoll Holdings Pub. Ltd. Co. Sec. Litig.*, 2020 WL 1479128, at *12 (E.D. Pa. 2020). If First Horizon somehow missed the massive gaps in TD Bank's AML controls, it could only have been because First Horizon's conduct constituted "an extreme departure from the standards of ordinary care." *Ikon*, 277 F.3d at 667.

The inference of recklessness is further supported by a key admission. In June 2023, after the merger collapsed, First Horizon's CFO told investors that the bank's due diligence process before agreeing to the merger had been "a little bit chaotic." JA241–42. She explained that, at the time of TD Bank's unsolicited offer, First Horizon had only recently completed another merger. *Id.* And for the TD Bank merger, First Horizon crammed its diligence into a mere 30 days, whereas "[t]ypically, you have a much longer due diligence." *Id.*

The district court acknowledged that admission but dismissed it as merely a "rote allegation" that First Horizon "must have had knowledge of the true facts" because it conducted due diligence. JA57. The court thus failed to grapple with the recklessness of conducting an admittedly "chaotic" and abbreviated due-diligence process before agreeing to the largest transaction in First Horizon's history. That failing is emblematic of the court's mistaken approach. Although the court referred to recklessness in its overview of the applicable law, *see* JA51, it never applied that standard in a meaningful way. In a single sentence, the court merely asserted that it "cannot infer scienter—either conscious misbehavior or recklessness—on the part of the" First Horizon defendants. JA56. Recklessness is a distinct basis for establishing scienter, not an afterthought, and it fits the facts as alleged here like a glove. The district court's failure to meaningfully analyze recklessness warrants reversal.

*   *   *

For the foregoing reasons, this Court should reverse the dismissal of the funds' Section 10(b) claims against both TD Bank and First Horizon. The Court should also reverse the dismissal of the associated Section 20(a) control-person claims. Section 20(a) creates a form of derivative liability, and the district court dismissed the funds' Section 20(a) claims solely because it concluded, incorrectly, that the funds had failed to state an underlying Section 10(b) violation. JA75–76. The Section 20(a) claims should therefore proceed as well.

CONCLUSION

This Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. This brief complies with Local Rule 46.1(e) because Deepak Gupta, counsel for the appellants, is a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,970 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

3. I hereby certify that on July 13, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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