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By ECF

The Honorable Brian Martinotti
United States District Judge
U.S. District Court for the
District of New Jersey
2 Federal Square
Newark, New Jersey 07102

Re: Mitchell Wax v. Cross River Bank, No. 2:24-cv-9510 (BRM) (JRA)

Dear Judge Martinotti:

We represent defendant Cross River Bank ("CRB") in this putative class action asserting claims under the Securities Exchange Act of 1934. In accordance with the Court's judicial preferences, I am writing on CRB's behalf to request a pre-motion conference with respect to its motion to dismiss the complaint for failure to state a claim. Under a stipulated scheduling order entered on January 23, 2025, CRB must respond to the complaint by March 24, 2025. *See* ECF Nos. 18, 19. CRB respectfully submits this letter now to provide the Court an opportunity to schedule a pre-motion conference, if necessary, before that deadline. Given the substantial pleading defects in the complaint, a pre-motion conference may not be needed, but we are available at the Court's convenience if the Court would prefer the parties to appear.

Plaintiff has asserted a claim against CRB for alleged violations of section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, on behalf of purchasers of the securities of Sunlight Financial Holdings, Inc. f/k/a Spartan Acquisition Corp. II ("Sunlight") – ***not*** any securities of ***CRB*** – between January 25, 2021 and October 31, 2023 based on allegedly false statements made ***by Sunlight*** in its periodic filings with the U.S. Securities and Exchange Commission ("SEC"). *See* Compl. ¶¶ 1, 49-70. CRB was not the issuer of any relevant securities. CRB is a private, New Jersey-chartered bank, *id.* ¶ 28, that does not have registered securities and does not make periodic SEC filings.

Sunlight was a "technology-enabled point-of-sale financing platform" for residential solar installations whose common stock was traded on the New York Stock Exchange. *Id.* ¶¶ 29-33. The underlying loans to finance these solar installation transactions allegedly "were funded by Sunlight's capital providers," including CRB. *Id.* ¶¶ 5-6, 29. According to the complaint, CRB served as "Sunlight's purported 'Bank Partner,'" as Sunlight used that term in its SEC filings. *Id.* ¶ 1. Plaintiff alleges CRB aided and abetted Sunlight "in a scheme to deceive Sunlight investors" by providing financing to Sunlight under an arrangement that Sunlight allegedly did not accurately disclose to investors. *See id.* ¶¶ 45, 49-70. Plaintiff contends that CRB "knowingly granted ever-increasing amounts of credit to Sunlight and its contractors . . . , repeatedly lifted its loan caps, and waived defaults under its agreement, all with knowledge that such defaults and Sunlight's unsustainable debt load were being concealed from Sunlight's investors," *id.* ¶ 48, allegedly to stave off the failure of Sunlight's business, *id.* ¶ 72. Sunlight ultimately filed a chapter 11 petition for bankruptcy on October 31, 2023. *Id.* ¶ 70. While alleging that CRB received a 12.5 percent equity stake in the reorganized Sunlight in exchange for "exit financing," *id.*, the complaint is notably silent about whether CRB suffered losses on pre-petition loans it originated for Sunlight.

Plaintiff's securities claim against CRB here is fatally defective for many reasons.

First, CRB was not the "maker" of any challenged statement, *i.e.*, "the person or entity with ***ultimate authority*** over the statement, including its content and whether and how to communicate it." *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (emphasis added). The complaint admits that every challenged statement was "made by Sunlight," not CRB, Compl. ¶ 91, and does not allege that CRB had "ultimate authority" over any of them. *Janus*, 564 U.S. at 142. That forecloses any securities fraud claim against CRB based on any alleged misstatement. *Id.* at 144.

Second, claims for "aiding and abetting liability" are barred for private plaintiffs under Rule 10b-5. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185, 191 (1994). The complaint alleges that CRB "enabled" or "allowed" Sunlight to mislead investors through CRB's purportedly undisclosed financing arrangement with Sunlight. Compl. ¶ 1, 9, 23, 72; *see also id.* ¶ 73 (alleging that CRB "*participated* in a scheme to defraud") (emphasis added). That is the very essence of an inactionable claim for aiding and abetting securities fraud.

Third, the complaint does not plead a claim for "scheme liability" under Rules 10b-5(a) and 10b-5(c). Compl. ¶ 88. The Supreme Court has firmly rejected efforts to extend "scheme liability" to third-party vendors and business partners of a securities issuer, as plaintiff improperly attempts to do here. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158, 159-60 (2008). Where, as here, a section 10(b) claim is premised on alleged conduct of a third party that is not disclosed to investors, the plaintiff "cannot show reliance upon any of" that third party's "actions except in an indirect chain that" is "too remote for liability." *Id.* at 160; *see id.* at 161.

Further, based on the complaint, "the primary purpose and effect of" the alleged "scheme" was "to make a public misrepresentation or omission[.]" *Takata v. Riot Blockchain, Inc.*, 2023 WL 7133219, at *11 (D.N.J. Aug. 25, 2023) (quoting *In re Mindbody, Inc. Sec. Litig.*, 489 F. Supp. 3d 188, 216 (S.D.N.Y. 2020)). Plaintiff alleges the scheme's goal was to enable Sunlight to "conceal[]" information from Sunlight's stockholders and make misleading disclosures about the condition of Sunlight's business. Compl. ¶¶ 1, 9-10, 44-45, 60, 73, 75, 91. "[C]ourts have routinely rejected" efforts like this "to bypass the elements necessary to impose 'misstatement' liability under [Rule 10b-5(b)] by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'" *Takata*, 2023 WL 7133219, at *11 (cleaned up).

Fourth, plaintiff lacks "standing to pursue" the claims he has brought, which depend on alleged conduct arising after his last alleged purchase of Sunlight securities. *See Winer Family Trust v. Queen*, 503 F.3d 319, 325-26 (3d Cir. 2007). Plaintiff's latest purchases of Sunlight securities were made on September 29, 2022, Compl., Schedule A, but the complaint alleges that CRB only began to "grant[] ever-increasing amounts of credit to Sunlight and its contractors," "lift[] loan caps," and "waive[] defaults under its agreement" with Sunlight around December 13,

2022. Compl. ¶ 54. There is no plausible allegation that any of these actions were occurring at a time when plaintiff was acquiring Sunlight securities.

Fifth, plaintiff has not alleged facts supporting the required "strong inference" of scienter. *Henry v. Futu Holdings Ltd.*, 2024 WL 4285129, at *11 (D.N.J. Sept. 25, 2024). That standard requires particularized allegations giving rise to an "inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*; *see* 15 U.S.C. § 78u-4(b)(2). Plaintiff does not meet this demanding pleading burden by alleging CRB had "motive and opportunity" that amounted to no more than garden-variety profit motives. *Inst. Inv'rs Grp. v. Avaya, Inc.*, 564 F.3d 242, 278-79 (3d Cir. 2009); *see* Compl. ¶ 73 (alleging "CRB was earning substantial profits" and "benefitted financially" from its relationship with Sunlight).

Sixth, plaintiff has not pleaded loss causation, another required element of his claim. 15 U.S.C. § 78u-4(b)(4). As alleged in the complaint, the most significant drop in Sunlight's stock during the relevant period occurred on September 28, 2022, allegedly in connection with SEC disclosures by Sunlight that ***had nothing to do with CRB***. Compl. ¶ 49. "In the absence of any allegation of a causal link between the 'corrective disclosure' . . . and an economic loss," loss causation is missing. *Takata v. Riot Blockchain, Inc.*, 2020 WL 2079375, at *17 (D.N.J. Apr. 30, 2020).

Finally, the complaint should be dismissed for other reasons. As noted, Sunlight filed a chapter 11 bankruptcy petition in October 2023. Compl. ¶ 22. Its confirmed plan of reorganization contains an injunction broadly prohibiting any person who previously held an interest in Sunlight from pursuing any claim "affecting, directly or indirectly," the assets of the reorganized Sunlight. Sunlight Plan § 10.6. CRB, in turn, is entitled to indemnification from the reorganized Sunlight for the claims asserted in this case. This action therefore violates the plan injunction, as it plainly affects the assets of the reorganized entity.

In addition, months before Sunlight's bankruptcy, it was sued for securities fraud based on substantially similar allegations. *See Fung v. Sunlight Financial Holdings Inc.*, No. 1:22-cv-10658 (S.D.N.Y.). On December 16, 2024—*over plaintiff's objection*—the court approved a settlement of that action that includes a release of all claims against, among others, Sunlight's "shareholders" and "partners," arising out of, based upon, or in any way related to the purchase and sale of Sunlight common stock from January 25, 2021, through and including September 28, 2022. Fung Settlement ¶¶ 1.6, 1.27, 1.28, 1.35, 5.1. At a minimum, therefore, the complaint should be dismissed to the extent it is based on alleged conduct occurring between January 25, 2021, and September 28, 2022, inclusive (which is nearly the entire class period alleged, *see* Compl. ¶ 1).

* * *

In light of the foregoing, CRB respectfully submits that the claims asserted in the complaint are defective as a matter of law, and CRB looks forward to explaining those defects in greater detail in its anticipated motion to dismiss.

Respectfully submitted,

/s/ Steven M. Rosato

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