UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MITCHELL WAX, Individually and on behalf of All Others Similarly Situated, Plaintiff, v. CROSS RIVER BANK, Defendant.	Case No. 2:24-cv-09510-ES-JRA **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

Lead Plaintiff Mitchell Wax ("Plaintiff") submits this Memorandum of Law in opposition to Defendant Cross River Bank's ("CRB" or "Defendant") Motion to Dismiss for Failure to State a Claim ("Motion") under Fed. R. Civ. P. Rule 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff brought his Complaint ("Complaint"),[1] on behalf of all persons who purchased the common stock of Sunlight Financial Holdings, Inc. ("Sunlight") between January 25, 2021 and October 31, 2023 (the "Class Period), against CRB, Sunlight's "Bank Partner" as Sunlight referenced it in its SEC filings, for violations of the Securities and Exchange Act of 1934 (the ”1934 Act"). The Complaint alleges that CRB engaged in a scheme that, to the detriment of Sunlight investors, enabled Sunlight to originate and conceal from investors a massive amount of non-performing, mispriced, and unsaleable loans to unscrupulous solar panel installers, which CRB warehoused for Sunlight "off balance sheet." Sunlight retained full economic exposure for those problematic loans, but CRB's warehouse arrangement allowed Sunlight to keep the loans off of its books and hidden from investors.

CRB had every incentive to engage in the fraudulent scheme as it earned substantial profits from the loans for which—at least initially—it had no risk of loss.

[1] References to the Complaint (ECF 1), will be made herein as ¶ __. The capitalized terms throughout this brief have the same meaning as in the Complaint.

In addition to the substantial fees CRB charged to borrowers as a lender, Sunlight also paid CRB, its Bank Partner, a fee based on the balance of CRB–originated loans.

Unbeknownst to Plaintiff and other Sunlight investors, CRB allowed Sunlight to amend its CRB lending agreements to dramatically increase Sunlight's exposure to the fast–growing volume of mispriced, off-balance sheet loans as interest rates rose in 2021 and 2022. To substantially increase its fees charged to borrowers and Sunlight, which were based on the loan volume, CRB repeatedly facilitated that rapid growth, allowing Sunlight to greatly and unsustainably exceed the lending limits in its agreements with CRB. CRB's scheme to allow Sunlight to exceed its lending limits to unsustainable levels just as interest rates were rising was inherently fraudulent and designed to enrich CRB, and ultimately led to Sunlight's collapse.

CRB's arguments in favor of dismissal seek to incorrectly re-frame Plaintiff's scheme liability claim brought by Plaintiff under 1934 Act Rule 10b-5(a) and (c) – a claim of primary liability for CRB's own conduct – as one of aiding–and–abetting, a claim of secondary liability for Sunlight's conduct. CRB also inaccurately argues that Plaintiff's scheme liability claim lacks specificity and fails to plead scienter, despite the abundant factual allegations detailing CRB's conduct and showing both conscious or reckless behavior and motive and opportunity, as more fully detailed herein. CRB further argues that its own conduct was too remote for causation purposes, even though causation is not appropriately addressed at the motion to dismiss stage.

CRB then inaccurately claims that Plaintiff lacks standing to assert the claim due to the timing of his Sunlight purchases, while the facts show that CRB's actions at issue here occurred before Plaintiff's final purchases. Lastly, CRB's arguments that the Sunlight bankruptcy plan injunction and, in the alternative, the Sunlight class action settlement release foreclose Plaintiff's claims both fails, as more fully explained below. Defendant's Motion should be denied.

STATEMENT OF FACTS

A. Sunlight's Business Model

Sunlight was a technology-enabled point-of-sale financing platform that provided residential solar and home improvement contractors the ability to offer point-of-sale financing to customers. ¶¶ 4, 33. Sunlight earned revenue from a "platform fee" from each loan its app facilitated. ¶ 33. Sunlight relied on contractors to inform customers about financing through Sunlight. *Id.* Thus, to earn revenues, Sunlight had to convince contractors to use its financing platform. *Id.* Generally, in the industry, loans are funded after a contractor completes the work. *Id.* Sunlight attempted to differentiate itself by offering large cash advances to contractors. *Id.*

B. Defendant's Role as Sunlight's Bank Partner

Sunlight arranged for the origination of loans by third-party lenders in two ways. ¶ 34. On one hand, Sunlight arranged Direct Channel Loans whereby its Direct Channel Partners would originate the loans directly using their own credit criteria, retain those loans, and remit funds to Sunlight, which would pay the contractor. *Id.* On the other hand, Sunlight also arranged Indirect Channel Loans originated by its Bank Partner, CRB, whereby CRB was the owner of the loans and kept them on its balance sheet until they were sold to third-party purchasers; in these Indirect Channel Loans, Sunlight retained full economic exposure until the loans were sold. ¶¶ 34, 41. The Indirect Channel Loans held by CRB on its balance sheet, but for which Sunlight bore the risk of loss, were referred to as the "Backbook."

Initially, the CRB-originated Indirect Channel Loans were a minority of Sunlight's loans, most of which were Direct Channel Loans sold directly to lenders. However, the mix changed dramatically as interest rates rose starting in 2021. ¶ 35.

With regard to CRB's Indirect Channel Loans, Sunlight's "solar loan allocation engine direct[ed] the solar loans to be funded on the balance sheet" of CRB, and CRB charged Sunlight a fee based on the balance of loans CRB originated. ¶¶ 34, 37. CRB required Sunlight to be responsible for arranging the sale of Indirect Channel Loans to financial firms, guarantee the performance of those loans, and repurchase them if it was unable to facilitate the sale. ¶¶ 34, 36. Under CRB's agreement with Sunlight, the sale of the Indirect Channel Loans had to occur within

180 days from origination, otherwise Sunlight was required to repurchase them from CRB. ¶ 39. Thus, while CRB was the "owner" of the loans until they were sold, Sunlight retained full economic exposure and only profited when the price that the loan purchaser paid for the loan exceeded CRB's cost basis in the loan. ¶ 41.

The CRB–held Backbook loans were segregated by Sunlight into solar ("Solar Backbook") and home improvement loans ("Home improvement Backbook"). ¶ 43. However, only the Home Improvement Backbook – but not the far larger Solar Backbook – was considered a derivative, subject to Fair Market Value accounting and reflecting fair market value changes on Sunlight's financial statements. *Id.* By contrast, ***fair market value changes in the Solar Backbook went unaccounted for on Sunlight's financial statements*** and were thus concealed by Sunlight from its stockholders.[2] ¶ 44.

The Backbook of Indirect Channel Loans CRB originated and held on its balance sheet was highly sensitive to fluctuations in interest rates and other macroeconomic factors. Thus, in the absence of an interest rate hedge to protect itself, Sunlight was exposed to significant losses when interest rates rose. ¶ 42.

[2] In its brief in support of the Motion to Dismiss (CRB's "Brief" or "CRB Br."), CRB repeatedly mischaracterizes or misconstrues Plaintiff Mitchell Wax's ("Plaintiff" or "Wax") allegations. Plaintiff does not allege, as CRB asserts, "that Sunlight did not accurately disclose the accounting method it employed to record the value of certain loans." CRB Br. at 6. Rather, Plaintiff alleges that the accounting method Sunlight employed "left Plaintiff and the other Sunlight stockholders in the dark about the rapid deterioration of the Solar Backbook." ¶ 44.

C. CRB's Scheme to Deceive Sunlight Investors with Sunlight

In addition to the foundational facts set forth above, the Complaint describes in detail CRB's scheme to deceive Sunlight investors. Specifically, CRB knowingly facilitated loans to disreputable solar panel installers of dubious credit quality and the build-up of the enormous Backbook of high-risk, mispriced, and unsaleable Indirect Channel Loans CRB warehoused for Sunlight on CRB's balance sheet, with Sunlight retaining the risk of loss. This scheme artificially inflated the price of Sunlight stock and operated as a fraud or deceit on Sunlight stock purchasers. ¶ 45.

CRB's conduct was particularly likely to deceive Sunlight's investors, as the Solar Backbook was increasingly comprised of loans of highly questionable quality. Indeed, two of Sunlight's primary vendors were subject to numerous consumer complaints and lawsuits, and also numerous federal and state regulatory investigations and actions for their illicit business practices. ¶¶ 46, 47, 49.

CRB, as Sunlight's Bank Partner, knowingly granted ever-increasing and unsustainable amounts of credit to Sunlight and its contractors, including contractors of dubious credit quality. CRB repeatedly lifted its loan caps and waived defaults under its agreement with Sunlight, with knowledge that such defaults and Sunlight's unsustainable debt load were being concealed by Sunlight from its investors. ¶ 48. CRB engaged in these inherently fraudulent transactions for no legitimate purpose or economic rationale other than to enrich itself with substantial lending fees and fees Sunlight was to pay to CRB based on loan volume.[3] *Id.*

As the Complaint details, CRB acted with the motive and opportunity to commit fraud. CRB earned substantial profits as Sunlight's Bank Partner, a lending relationship for which CRB initially had ***no risk***, as all of the economic risk for poor quality loans was shouldered by Sunlight. In addition to the substantial fees CRB charged to borrowers as a Bank Partner lender, it also benefitted by the large fees Sunlight was required on the loans CRB originated. ¶ 72. Thus, CRB benefitted financially as the volume of loans it made and warehoused for Sunlight increased regardless of the borrowers' credit quality. *Id.* However, as interest rates rose, the CRB Backbook loans became unsaleable except at a deep discount, putting Sunlight at risk for failure. *Id.* This meant that, although CRB was merely warehousing the Backbook loans and Sunlight was ultimately responsible upon default, CRB was now at risk for the loans' liability if Sunlight failed. *Id.* Rather than let Sunlight fail, CRB enabled Sunlight to continue to lend at ever-increasing levels that far exceeded its lending limits, amending the lending caps in those agreements after the fact. *Id.*

D. The Truth Is Revealed in a Series of Partial Disclosures

[3] Notwithstanding those detailed facts, CRB mischaracterizes Plaintiff's allegations as "entirely conclusory" (CRB Br. at 1) and wrongly contends that the Complaint describes the scheme in only "four conclusory paragraphs." (CRB Br. at 6).

Sunlight investors learned the truth about the Backbook scheme through a series of partial disclosures between September 28, 2022 and Sunlight's October 31, 2023 bankruptcy filing. Through the course of these unfolding revelations, Sunlight incrementally disclosed: 1) the existence of the Backbook; 2) that the buildup of the Backbook occurred prior to Sunlight's third quarter fiscal 2022, before Plaintiff Wax last purchased Sunlight stock; and 3) that the loans in the CRB warehouse facility reached a staggering ***$764 million*** by March 31, 2023. As a result of the scheme, the Sunlight shares purchased by Plaintiff and the proposed Class members became worthless. ¶¶ 49-71. The string of bad news started on September 28, 2022, when Sunlight announced it was taking a non-cash advance receivable impairment of $30 to $33 million stemming from liquidity issues by one of its major vendors. This caused Sunlight's stock price to plummet 57%, or $1.44 per share, falling from a closing price of $2.52 per share on September 28, 2022 to a close of $1.08 per share on September 29, 2022. ¶ 49.

The Complaint details a series of disclosures following the September 28, 2022 announcement, which incrementally revealed to investors the true state of Sunlight's loan portfolio. Such partially corrective facts include, without limitation, that rising interest rates were negatively impacting Sunlight's Indirect Channel Loan portfolio and that CRB had amended its loan agreements with Sunlight to raise the loan capacity CRB was willing to extend to Sunlight from $210 million to $450 million, then to $650 million, and such amendments included an omnibus waiver of certain potential breaches and defaults of the existing agreements. ¶ 54. In a Form 8-K filed on December 13, 2022, Sunlight for the first time revealed the existence of the Backbook, and further revealed that not only did CRB more than double the amount it was willing to lend to Sunlight: the amount of credit to Sunlight as of the date of the amendment was above the new increased limit. ¶¶ 55, 56. Sunlight, however, did not reveal what its actual exposure to the loans on CRB's balance sheet was. Instead, it couched its disclosures by stating that it was attempting to sell a portion of the loans held by CRB "to facilitate compliance" with the revised $450 million limit, and that it expected the amount of loans held by CRB *after the sale* to be $350 to $400 million, of which $275 to $300 million would be Backbook loans, leaving investors in the dark about the actual loan balance. *Id.*

The December 13, 2022 Form 8-K also revealed certain details about the timing of the buildup of the CRB Backbook, stating that "a significant portion" of it was "credit approved prior to certain pricing actions that the Company took in the third and fourth quarters. . ." ¶ 55. Thus, the buildup of the CRB Backbook occurred *before* actions taken during Sunlight's 2022 third quarter.

Next, on March 14, 2023, Sunlight revealed that "[d]espite the completion of the previously disclosed loan sale in December 2022, the Company is currently not in compliance with certain provisions of the Bank partner Agreements, including the total loan cap." ¶ 58. Yet Sunlight did not disclose how far out of compliance with the lending cap it was. On March 17, 2023, Sunlight revealed that it expected a significant change in results of operations for the fiscal year 2022, chiefly due to the deterioration in the market for Indirect Channel Loans held on CRB's balance sheet, but still did not reveal the magnitude of its exposure to the CRB loans. ¶ 59.

On April 3, 2023 Sunlight revealed that CRB had again: 1) dramatically increased its loan cap—this time from $450 to $650 million, yet still without revealing the balance; 2) granted Sunlight certain grace periods; and 3) extended Sunlight a $100 million loan facility to be used to repay Sunlight's borrowings from Silicon Valley Bank, following that bank's collapse. ¶61. In return, CRB received warrants from Sunlight representing 19.9% of the shares outstanding.

On May 4, 2023, Sunlight for the first time quantified the losses on the CRB Backbook loans, revealed that it may incur negative platform fees between $45 and $50 million for the portfolio of unsold loans held by CRB as of March 31, 2023, and issued an earnings release that revealed that as of that same date, its CRB warehouse facility balance had swollen to a staggering ***$764 million***, far in excess of the then-current lending cap of $450 million. ¶¶ 63, 64. While Sunlight sought to soften the news by simultaneously announcing that the balance had been reduced by $296 million through a sale of loans sometime in April 2023, even with the sale, the balance stood at $468 million, only within the new lending cap of $650 million—which reflected two increases of the limit. ¶ 64.

On August 9, 2023, Sunlight revealed that its net tangible assets were negative by about $37 million; in other words, Sunlight was essentially insolvent. ¶ 66.

On September 13, 2023, Sunlight announced yet another amendment of its agreements with CRB whereby CRB waived certain provisions of its prior loan agreements, including certain default provisions and the provisions that required Sunlight to maintain certain cash balances in its accounts with CRB. ¶ 68.

On September 28, 2023, Sunlight announced it was suspended from trading and delisted by the NYSE, and thereafter would be traded on the OTC market. ¶ 69.

Finally, on October 31, 2023, Sunlight announced it had filed for Chapter 11 bankruptcy with a pre-packaged plan whereby CRB would provide exit financing in return for 12.5% of the equity in the reorganized company. ¶ 70. Under the plan, the interests of Plaintiff and other stockholders were extinguished, meaning the stock held by Plaintiff and the other putative class members was worthless. *Id.*

On December 7, 2023, Sunlight announced that the reorganization plan was approved – which meant that CRB had profited from its scheme. Per that plan, CRB emerged as a 12.5% owner of Sunlight's new equity, while investors such as Plaintiff and the proposed Class members were left with nothing. ¶ 71.

LEGAL STANDARD

On a motion to dismiss for failure to state a claim, the moving party "bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (citation omitted). In reviewing a motion to dismiss under Civ. P. Rule 12(b)(6), "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (internal quotation marks and citation omitted). To survive a motion to dismiss, the plaintiff need only provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard requires the plaintiff to show "more than a sheer possibility that a defendant has acted unlawfully," but does not create what amounts to a "probability requirement." *Id.*

ARGUMENT

I. The Complaint Plausibly States a Claim for Relief

A. Plaintiff Adequately Pleads CRB's Scheme Liability

The Complaint sufficiently alleges a violation of Rule 10b-5(a) and (c) on the part of CRB. "[S]ubsections (a) and (c) [of Rule 10b-5] cover what is referred to as 'scheme liability' for allegedly deceptive conduct." *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, No. CV166509ESCLW, 2020 WL 3026564, at *14 (D.N.J. June 5, 2020) (citing *De Vito v. Liquid Holdings Grp., Inc.*, No. 15-6969, 2018 WL 6891832, at *41 (D.N.J. Dec. 31, 2018)). Scheme liability "is implicated when an individual, either directly or indirectly, 'employ[s] any device, scheme, or artifice to defraud, ... or [ ] engage[s] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.'" *Id.* at *16 (quoting 17 C.F.R. § 240.10b–5).

Unlike Rule 10b-5(b), which applies to deceptive ***statements***, Rule 10b-5(a) and (c) "make deceptive ***conduct*** actionable." *Id.* at *18 (emphasis added; citation omitted); *see also U.S. Sec. & Exch. Comm'n v. Mintz*, 723 F. Supp. 3d 386, 403 (D.N.J. 2024). Indeed, "[a] party can incur liability for employing a fraudulent scheme or engaging in any fraudulent act in connection with the purchase or sale of any security, even without making an oral or written statement." *Mintz*, 723 F. Supp. 3d at 406-07 (citation omitted). The Rule 10b-5(a) and (c) subsections "capture a wide range of conduct." *Lorenzo v. U.S. Sec. & Exch. Comm'n*, 587 U.S. 71, 79 (2019); *see also In re RenovaCare, Inc. Sec. Litig.*, No. 2:21-CV-13766, 2024 WL 2815034, at *24 (D.N.J. June 3, 2024) ("Subsections (a) and (c) of Rule 10b-5 encompass a 'wide range of conduct' and are not limited to the prohibition of market manipulation.") (citations omitted).

To bring a colorable claim for scheme liability, "a plaintiff must allege (1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance." *Cognizant*, 2020 WL 3026564, at *16 (internal quotation marks and citation omitted). Plaintiff's Complaint meets each of these elements.

First, Plaintiff alleges a series of deceptive acts by CRB. This deceptive conduct includes, for example, that CRB: "knowingly allow[ed] and enable[ed] Sunlight to hide its exposure to the solar Backbook from its investors," (¶ 23); and "deceived the investing public as to Sunlight's business and prospects." *Id.*

Second, Plaintiff alleges that CRB's deceptive acts were in furtherance of a scheme to defraud Sunlight's investors. That scheme consisted of enabling Sunlight to make its financial health appear stronger than it was, which artificially inflated Sunlight's stock price and allowed CRB to earn significant fees that, absent CRB's fraud, would have been unavailable. *See, e.g.* ¶ 10 ("CRB's repeated extensions of credit and agreement to help Sunlight conceal its true indebtedness from investors by having it recorded in CRB's books, coupled with Sunlight's false statements about its true loan exposure, kept Sunlight's true financial distress a secret from investors, which kept the price of Sunlight's shares artificially inflated during the Class Period.").

Third, Plaintiff alleges that CRB acted with scienter in that (a) CRB's deceptive conduct was conscious (or at a minimum reckless), and (b) CRB had the motive and opportunity to engage in the deceptive conduct. *See Mintz*, 723 F. Supp. 3d at 408. As to conscious misbehavior or recklessness, the Complaint alleges that "CRB had actual knowledge of the misleading nature of the statements made by Sunlight or acted in reckless disregard of the true information known to them at the time." ¶ 73; *see also* ¶ 23 ("CRB further increased its loan limits and enabled Sunlight to exceed those limits, and held such loans on its own balances sheet, thus ***knowingly allowing*** and enabling Sunlight to hide its exposure to the solar Backbook from its investors.") (emphasis added); ¶ 45 ("CRB ***knowingly*** facilitated loans to disreputable solar contractors of dubious credit quality, as well as the build-up of an enormous Backbook of high-risk Indirect Channel Loans Defendant warehoused for Sunlight on CRB's balance sheet but for which Sunlight retained the risk of loss.") (emphasis added); ¶ 48 ("CRB, as Sunlight's Bank Partner, knowingly granted ever-increasing amounts of credit to Sunlight and its contractors …, repeatedly lifted its loan caps, and waived defaults under its agreements with Sunlight, all ***with knowledge*** that such defaults and Sunlight's unsustainable debt load were being concealed from Sunlight's investors.") (emphasis added).

The Complaint also alleges that CRB "had both the motive and opportunity to commit fraud," "was earning substantial profits as Sunlight's Bank Partner" without risk, and earned more in interest and fees as the volume of loans originated by CRB increased. ¶ 72; *see also* ¶ 2 ("CRB benefitted financially on multiple fronts as the volume of loans it made increased."), ¶ 48 (CRB "granted ever-increasing amounts of credit to Sunlight and its contractors …, repeatedly lifted its loan caps, and waived defaults," "engag[ing] in these inherently fraudulent transactions for no legitimate purpose other than to enrich itself with substantial fees as a lender, as well as the fee Sunlight was obligated to pay to CRB based on loan volume.").

Fourth, Plaintiff alleges reliance – specifically, a "causal connection between [CRB]'s alleged misconduct and [P]laintiff's injury," which is all that is required by the scheme liability reliance element. *See Cognizant*, 2020 WL 3026564, at *19. The Complaint alleges that CRB's scheme caused Sunlight's shares to be artificially inflated. *See, e.g.* ¶ 23 ("CRB's scheme deceived the investing public as to Sunlight's business and prospects, artificially inflated the price of Sunlight common stock, and caused Plaintiff and the other members of the Class (as defined below) to purchase Sunlight stock at artificially inflated prices and suffer economic loss when the revelations set forth herein reached the market"); *see also* ¶¶ 7, 10.

As shown below, none of CRB's challenges to these well-pled allegations defeat its liability under the Exchange Act.

1. Plaintiff Sufficiently Pleads Reliance on CRB's Conduct

The reliance element of a scheme liability claim only requires a "***causal connection*** between a defendant's alleged misconduct and a plaintiff's injury." *Cognizant*, 2020 WL 3026564, at *19 (citation omitted) (emphasis added). This is not an onerous burden for a plaintiff. Scheme liability reliance is adequately alleged where a scheme defendant's participation in the scheme makes it "'necessary or inevitable' that falsehoods on the part of [the issuer] would result." *In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 472 (S.D.N.Y. 2017) (citation omitted).[4]

Here, Plaintiff alleges that CRB engaged in a scheme to allow Sunlight to accumulate a large pool of risky loans, which enabled Sunlight to conceal its true financial position from the market and thus caused Sunlight's share price to be artificially inflated. This connection is abundantly alleged throughout the Complaint. *See, e.g.* ¶ 7 ("CRB engaged in a scheme to extend loans to disreputable solar contractors of dubious credit quality and facilitate Sunlight's accumulation of a large loan pools of fixed-rate loans on CRB's balance sheet for which Sunlight retained the risk of loss"), ¶ 10 (CRB's conduct "kept Sunlight's true financial distress a secret from investors (including Plaintiff), which kept the price of Sunlight's shares

[4] Notably, the S.D.N.Y. Court has commented: "Although it often is said that reliance is an element of a private cause of action under Rule 10b–5, that formulation typically arises in the context of Rule 10b–5 actions based on misstatements and omissions—in other words, conduct in violation of Rule 10b–5(b) rather than (a) and (c)." *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 508 (S.D.N.Y. 2005).

artificially inflated”), ¶ 23 (“CRB’s scheme deceived the investing public as to Sunlight’s business and prospects, artificially inflated the price of Sunlight common stock, and caused Plaintiff and the other members of the Class … to purchase Sunlight stock at artificially inflated prices and suffer economic loss when the revelations set forth herein reached the market”).

These allegations are in line with the reliance allegations the Court found sufficient in *Cognizant*. There, the defendant was alleged to have participated in a scheme to disguise the nature of bribe payments, which he knew would result in the issuer reporting overstated capitalized expenditures and overstated earnings. *Cognizant*, 2020 WL 3026564, at *17. The Court held that reliance was adequately alleged because “but-for [the scheme defendant’s] misconduct … [the issuer] would not have overstated its earnings, which then resulted in Plaintiffs’ alleged injuries.” *Id.* at *19. The same is true here, where CRB’s conduct made it inevitable that falsehoods on the part of Sunlight would result.

CRB mistakenly bases its entire reliance challenge on the Supreme Court’s decision in *Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148 (2008), but case is factually inapposite. In *Stoneridge*, the scheme defendants were only “suppliers, and later customers, of” the issuer. *Id*. at 153. By contrast, as Sunlight’s Bank Partner and sole indirect channel provider, CRB “regularly provid[ed] financing through Sunlight for consumers’ purchases of solar power systems from solar contractors." *See, e.g.* ¶ 46; *see also* ¶ 6. In discussing the reliance requirement in *Stoneridge*, the Supreme Court noted that "nothing [the scheme defendants] did made it necessary or inevitable for [the issuer] to record the transactions as it did." 552 U.S. at 161. The opposite is true with CRB, which—as the Complaint spells out—housed loans on its balance sheet so that Sunlight's liabilities would be hidden from its investors and CRB could continue to enjoy fees from indirect channel loans. *See, e.g.* ¶¶ 1, 7, 45. The Complaint alleges CRB's role as indirect channel loan Bank Partner, as described in Sunlight's SEC disclosures:

> Indirect Channel Loans—Sunlight arranges for Loans to be originated by Sunlight's issuing Bank Partner. Sunlight entered into program agreements with Bank Partners. Sunlight pays its Bank Partner a fee based on balance of Loans originated by the Bank Partner. The Bank Partner funds loans by remitting funds to Sunlight, and Sunlight is responsible for making payments to the contractor. Sunlight arranges for sale of Indirect Channel Loans to third party purchasers.

¶ 34. Likewise, the Complaint further specifies how the indirect channel loans—*i.e.*, loans through CRB as Sunlight's only indirect channel provider—directly impacted the financial performance that Sunlight publicly disclosed. For instance:

> Revenue Recognition—Sun recognizes revenue from (a) platform fees on Indirect Channel Loans when the Indirect Channel Purchaser buys the Loans from the balance sheet of the Bank Partner, and loan portfolio and management services monthly as Sun provides such services.

¶ 36. Lastly, CRB argues that scheme liability does not attach to its conduct because there is no allegation that CRB issued or had any role in the dissemination of any public statement. CRB Br. at 17. As shown above, Rule 10b-5(a) and (c) "make deceptive ***conduct*** actionable." *Mintz*, 723 F. Supp. 3d at 403, 406-07 (emphasis added). The making of a statement is unnecessary. Plaintiff has sufficiently alleged that deceptive *conduct*, which made Sunlight's misstatements and omissions inevitable, deceiving the public and artificially inflating its securities.

2. The Complaint Does Not Repackage Rule 10b-5(b) Claims

CRB incorrectly argues that Plaintiff's scheme liability claim is an improperly reframed misrepresentations and omissions claim under Rule 10b-5(b). CRB Br. at 18-19. This is flatly contradicted by the Complaint's well-pled allegations.

The gravamen of this case is not the making of misrepresentations. Rather, the conduct alleged is that of a bank scheming, for its own economic gain, to enable an entirely separate entity (*i.e.*, the issuer, Sunlight) to originate loans which it knew were of dubious credit quality. In so doing, CRB helped make another company's financial health appear stronger than it was, a scheme which artificially inflated the price of that issuer's securities—precisely the type of deceptive scheme deemed actionable under Rules 10b-5(a) and (c). *See e.g.*, *Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp.*, Inc., No. 10-CV-864 (SLT) (RER), 2014 WL 3569338, at *9 (E.D.N.Y. July 18, 2014) (motion to dismiss denied where the complaint alleged that defendants "sought to mask the increasing delinquency in SBI's loan portfolio—the core of its business—by commissioning fraudulent property appraisals, holding back corrective appraisals," among other things); *In re Parmalat*

Sec. Litig., 376 F. Supp. 2d 472, 504 (S.D.N.Y. 2005) (denying motion to dismiss where bank defendants engaged in deceptive transactions with the issuer which, in turn, allowed the issuer to publish misleading financial statements).

Takata v. Riot Blockchain, Inc., No. CV182293GCRLS, 2023 WL 7133219 (D.N.J. Aug. 25, 2023), upon which CRB relies, is factually inapplicable. In *Takata*, the scheme liability claims were against ***officers and directors of the issuer*** who, while engaged in a pump-and-dump scheme, caused the issuer "to issue materially false and misleading statements in SEC filings." *Id.* at *3. In other words, the alleged scheme—perpetrated by the issuer's own executives and Board members—consisted of preparing and publishing misrepresentations and making omissions to investors. The *Takata* court found that, because the alleged scheme consisted of making misstatements and omissions, the scheme could not give rise to liability under Rule 10b-5(a) and (c). *See id.* at *11. This is consistent with the well-established distinction between deceptive ***statements***, which fall under Rule 10b-5(b), and deceptive ***conduct***, which falls under Rule 10b-5(a) and (c). *See, e.g. Cognizant*, 2020 WL 3026564, at *18.

Here, by contrast, the scheme—perpetrated by the issuer's Bank Partner, not its own executives or directors—consisted of deceptive conduct: it was designed to improperly allow the issuer to take on more risky debt carried in the Bank Partner's (CRB) books, while CRB sat back and collected fees. CRB's conduct did not involve causing or making any misrepresentations or omissions to investors, as the *Takata* officers and directors did. CRB's attempt to couch these claims as premised on statements is inappropriate and should be rejected. *See Shih v. Maselli, Mills & Fornal, P.C.*, No. CV 24-6300 (ES) (MAH), 2025 WL 957680, at *2 (D.N.J. Mar. 31, 2025) (citation omitted) (Salas, J.) ("In evaluating the sufficiency of a complaint, a court must accept all well-pleaded factual allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-moving party.").

3. The Complaint Alleges Facts Giving Rise to a Strong Inference of Scienter

To sufficiently plead scienter in a scheme liability action, a plaintiff needs to either (a) "identify circumstances indicating conscious or reckless behavior by" the defendant, or (b) "allege facts showing both a motive and a clear opportunity for committing the fraud." *Mintz*, 723 F. Supp. 3d at 408 (citation omitted). As this Court has observed, "[t]he relevant question is '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.'" *Cognizant*, 2020 WL 3026564, at *21 (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007)) (emphasis added). A plaintiff needs not supply "'smoking-gun' evidence to support the inference of scienter." *Id.* (citing *Tellabs*, 551 U.S. at 324).

Plaintiff here has pleaded sufficient facts to support a strong inference of scienter. First, the Complaint is replete with allegations of CRB's deceptive conduct perpetrated knowingly or, at a minimum, extremely recklessly. *See, e.g.*, ¶ 73 ("CRB had actual knowledge of the misleading nature of the statements made by Sunlight or acted in reckless disregard of the true information known to them at the time."); ¶ 23 ("CRB further increased its loan limits and enabled Sunlight to exceed those limits, and held such loans on its own balances sheet, thus knowingly allowing and enabling Sunlight to hide its exposure to the solar Backbook from its investors."); ¶ 45 ("CRB knowingly facilitated loans to disreputable solar contractors of dubious credit quality, as well as the build-up of an enormous Backbook of high-risk Indirect Channel Loans Defendant warehoused for Sunlight on CRB's balance sheet but for which Sunlight retained the risk of loss."); ¶ 48 ("CRB, as Sunlight's Bank Partner, knowingly granted ever-increasing amounts of credit to Sunlight and its contractors …, repeatedly lifted its loan caps, and waived defaults under its agreements with Sunlight, all with knowledge that such defaults and Sunlight's unsustainable debt load were being concealed from Sunlight's investors.").[5]

Of note, scienter was found adequately pled in a 10b-5(a) and (c) case where the complaint alleged that the scheme defendants "sought to mask the increasing delinquency in SBI's loan portfolio—the core of its business." *Waterford Twp.*, 2014

[5] These are not simple "[c]onclusory allegations that the defendant[] 'knew' or 'should have known,'" disapproved of by CRB's authority, *In re Bio-Technology Gen. Corp. Sec. Litig.*, 380 F. Supp. 2d 574, 589 (D.N.J. 2005), which does not concern scheme liability anyway. CRB Br. at 21.

WL 3569338, at *9. The court considered "all of the facts collectively," and found that the complaint pleaded "a strong inference that Defendants engaged in conduct and/or made statements with 'a mental state embracing intent to deceive, manipulate or defraud.'" *Id.* (quoting *Tellabs*, 551 U.S. at 319). Here too, CRB's conduct concealed from investors the credit quality of Sunlight's loan portfolio. Scienter should likewise be found.

Second, Plaintiff alleges that CRB "had both the motive and opportunity to commit fraud," as it "was earning substantial profits as Sunlight's Bank Partner" without risk, and, significantly, ***earned more in interest and fees as the volume of loans originated by CRB increased***. ¶ 72; *see also* ¶ 2 ("CRB benefitted financially on multiple fronts as the volume of loans it made increased."), ¶ 48 ("CRB engaged in these inherently fraudulent transactions for no legitimate purpose other than to enrich itself with substantial fees as a lender, as well as the fee Sunlight was obligated to pay to CRB based on loan volume.").

Such well-pled facts are not, contrary to CRB's assertion, mere "catch-all allegations that [a] defendant[] stood to benefit," CRB Br. at 20 (quoting *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 237 (3d Cir. 2004)), but rather specific allegations detailing the steps CRB knowingly took to wrongly (and handsomely) benefit at the expense of Sunlight's shareholders. The financial rewards reaped by CRB satisfy the pleading standard. *See Tellabs*, 551 U.S. at 310 ("The

Court agrees that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference.”).[6]

As in *Cognizant*, the Court should “find[] that cumulatively, Plaintiff[’s] allegations regarding [CRB] reflect a strong inference of scienter.” 2020 WL 3026564, at *22.

4. CRB’s Conduct Was Inherently Deceptive

CRB contends that the Complaint fails to allege inherently deceptive conduct on the part of CRB, and instead pleads conduct that consists of “legitimate business transactions.” CRB Br. at 21-22. This is wrong. To the contrary, the Complaint sets forth a wealth of inherently deceptive conduct by CRB, including, for example, that it: aggressively raised the loan capacity extended to Sunlight “to conceal Sunlight’s exposure to its loan portfolio,” (¶ 12); “knowingly allow[ed] and enable[ed] Sunlight to hide its exposure to the solar Backbook from its investors,” (¶ 23); and “deceived the investing public as to Sunlight’s business and prospects.” (*id.*).

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[6] CRB’s purported authority gains it no ground. For one thing, Plaintiff has alleged much more than just the desire “to show profitability, which is common to all for-profit enterprises.” CRB Br. at 20 (quoting *Fulton Fin. Advisors, Nat’l Ass’n v. NatCity Invs., Inc.*, 2013 WL 5635977, at *11 (E.D. Pa. Oct. 15, 2013)). Moreover, *Lewakowski v. Aquestive Therapeutics, Inc.*, 2023 WL 2496504 (D.N.J. Mar. 14, 2023) is inapposite—it does not even concern scheme liability. And the language from *Lewakowski* selectively quoted by CRB is from a parenthetical quoting another case (*In re N. Telecom Secs. Litig.*, 116 F. Supp. 2d 446 (S.D.N.Y. 2000)) discussing 10b-5(b), not 10b-5(a) and (c), claims against individual defendants, who were officers of the issuer.

This is fraudulent conduct, plain and simple. There would be no legitimate reason for CRB to allow Sunlight to exceed the credit limits in their loan agreements, nor would there be any legitimate reason for CRB to "warehouse" these elevating loan levels on its "Backbook." Such conduct is inherently deceptive and makes Plaintiff's "claim for scheme liability [] appropriate under subsections (a) and (c)." *Cognizant*, 2020 WL 3026564, at *19 (citing *JAC Holding Enters., Inc. v. Atrium Capital Partners, LLC*, 997 F. Supp. 2d 710, 735 (E.D. Mich. 2014), which found that the plaintiffs adequately pled scheme liability where the alleged conduct included a scheme to mislead the buyers as to JAC's value"); *see also U.S. Sec. & Exch. Comm'n v. Kearns*, 691 F. Supp. 2d 601, 618 (D.N.J. 2010) (finding sufficient allegations that the defendant "engaged in inherently deceptive conduct, separate and apart from his direct statements to the public, designed to secretly and artificially inflate [the issuer's] revenues"); *cf. In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 471 (S.D.N.Y. 2017) (finding a failure to adequately plead scheme liability where "the plaintiffs focus[ed] only on [certain] defendants' alleged misstatements or omissions, and therefore fail[ed] to state that they committed an inherently deceptive act that is distinct from an alleged misstatement") (internal quotation marks and citation omitted).

CRB reliance on *U.S. Sec. & Exch. Comm'n v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342 (D.N.J. 2009), is misplaced. CRB Br. at 22. There, the business transactions deemed legitimate were "oral assurances"—by employees of the issuer, as opposed to a Bank Partner here—regarding "rights of return or pricing concessions in connection with the sales." *Lucent*, 610 F. Supp. 2d at 360. Representations regarding return conditions and pricing obviously relate to ordinary business transactions, so it follows that the court in *Lucent* rejected "the SEC's alternative theory of [scheme] liability…." *Id.* at 361 (holding that such allegations could "not breathe new life into the defunct primary liability claims against [the same individual defendants]").

Here, by contrast, the transactions at issue are inherently fraudulent, as they were devised for the sole purpose of generating fees for CRB through an unsustainable risky pool of loans.

5. Plaintiff Has Standing to Bring His Claim and Sufficiently Pleads Loss Causation

CRB asserts that Plaintiff does not have standing to pursue his claim because it hinges on conduct that occurred after he purchased his Sunlight shares. CRB Br. at 22. This baldly conflicts with the allegations in the Complaint. Plaintiff alleges that CRB's fraudulent scheme commenced on January 25, 2021 – ***more than a year and a half before*** Plaintiff's final purchases of Sunlight securities on September 29, 2022.[7] *See* ¶ 45 ("Between January 25, 2021 and October 31, 2023, CRB knowingly

[7] *See* Complaint, Ex. A, Schedule A showing that Wax's Sunlight share purchases on September 29, 2022 (ECF No. 1-2 at 8-9).

(at a minimum, extremely recklessly) engaged in a scheme to deceive Sunlight investors…").[8] *See also* ¶¶ 1, 3, 8, 46-48, 49 (alleging that "Sunlight investors were first tipped off as to CRB's scheme" on September 28, 2022—*i.e.*, the scheme was in progress before that date).

Moreover, Plaintiff alleges a partial corrective disclosure that occurred on September 28, 2022—prior to Plaintiff's final purchases of Sunlight securities. ¶ 49 (describing Form 8-K filing with the SEC and its effect on Sunlight's stock price). In addition, Sunlight disclosed that the Backbook consisted of loans that were credit-approved *before* certain purportedly remedial actions taken by Sunlight in the 2022 third quarter. ¶ 55. Plaintiff has standing to assert the claims in this litigation.[9]

Given the well-pled allegations in the Complaint, to find that Plaintiff lacks standing here would be to construe the pleading against Plaintiff, against the principles applicable on a motion to dismiss. *See, e.g.*, *Mintz*, 723 F. Supp. 3d at 398 ("When considering a Rule 12(b)(6) motion to dismiss, a court must accept as true

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[8] CRB's citation of ¶ 54 of the Complaint for this point is confusing. That paragraph alleges a Form 8-K filed by CRB on December 13, 2022. Paragraph 54 in no way alleges that CRB's misconduct "did not begin" until that time. *See* CRB Br. at 22.

[9] In another hiccup, the quote that CRB attributes to *In re Dr. Reddy's Lab. Ltd. Sec. Litig.*, in fact, references a discussion of a different case. *See* CRB Br. at 22 (misquoting *In re Dr. Reddy's Lab. Ltd. Sec. Litig.*, 2019 WL 1299673, at *13 (D.N.J. Mar. 21, 2019)). Nevertheless, *Dr. Reddy's* is inapposite because it discusses the timing of an issuer's misstatements, not scheme conduct in violation of Rule 10b-5(a) and (c).

all well-pleaded allegations in the complaint, including all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff.").

Next, CRB argues that the Complaint fails to plead loss causation. Putting aside the fact that loss causation is not an element of a scheme liability claim,[10] and that in any event, loss causation is typically not an issue to be resolved at the pleading stage, CRB's contention is simply false.

In *RenovaCare*, Judge Martinotti enumerated the standard for establishing loss causation at the pleading stage. It is not a taxing burden:

> Allegations of loss causation are not subject to the heightened pleading requirements of Rule 9(b) and the PSLRA: all that is required is that plaintiff ***provide some indication*** of the loss and the causal connection that the plaintiff has in mind, consistent with Rule 8(a). Further, ***[t]he issue of loss causation is usually not resolved on a motion to dismiss***.

2024 WL 2815034, at *25 (internal quotation marks and citations omitted; emphasis added); *see also Gross v. GFI Grp., Inc.*, 162 F. Supp. 3d 263, 269 (S.D.N.Y. 2016) ("[Plaintiff]'s burden to plead loss causation is 'not a heavy one,' and when it is unclear whether the plaintiff's losses were caused by the fraud or some other intervening event, 'the chain of causation is … not to be decided on a Rule 12(b)(6)

[10] Loss causation is not a separate enumerated element of a scheme liability claim. *See Cognizant*, 2020 WL 3026564, at *16 (listing the elements of scheme liability: "a plaintiff must allege (1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance.") (internal quotation marks and citation omitted).

motion to dismiss.'") (quoting *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 187 (2d Cir. 2015)).

Here, Plaintiff alleges a series of partial disclosures through which Plaintiff and the class of Sunlight investors he seeks to represent learned of CRB's scheme to artificially inflate the price of Sunlight's shares for CRB's own economic benefit. ¶¶ 49-70 (describing disclosures in September, November, and December 2022; March, April, May, August, September, and October 2023); *see also* Sec. I.B.1., *supra* (detailing the causal connection between CRB's misconduct and Plaintiff's injuries). Such allegations are sufficient at the pleading stage. *See Zhengyu He v. China Zenix Auto Int'l Ltd.*, No. 2:18-cv-15530 (KM) (JAD), 2020 WL 3169506, at *11 (D.N.J. June 12, 2020) ("the truth may be revealed through a series of partial disclosures through which the truth gradually 'leaks out.'") (internal citations omitted).

Ultimately, "[t]he Third Circuit has stated that ***loss causation is ordinarily an issue for the trier of fact***." *Id.* at *12 (emphasis added). To sufficiently allege loss causation, "Plaintiff[] need only 'provide some indication of the loss and the causal connection,'" *RenovaCare*, 2024 WL 2815034, at *26 (quoting *Dura Pharms., Inc. v. Broudo,* 544 U.S. at 336, 347 (2005)), which Plaintiff has surely done here.

6. The Complaint Pleads Fraud with the Requisite Particularity

The Complaint provides appropriate detail to satisfy PSLRA's particularity requirement. "[A] complaint must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which [it is] charged." *Cognizant*, 2020 WL 3026564, at *10 n.6 (quoting *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007)) (quotation marks omitted); *see also Mintz*, 723 F. Supp. 3d at 405 (same), 407 (finding unconvincing the defendants' argument "that reliance on scheme liability cannot save the SEC's failure to identify particular misstatements attributable to each Defendant").

Here, the allegations of CRB's scheme are far from lacking in particularity. For example, the Complaint alleges that: "CRB's repeated extensions of credit and agreement to help Sunlight conceal its true indebtedness from investors by having it recorded in CRB's books, coupled with Sunlight's false statements about its true loan exposure, kept Sunlight's true financial distress a secret from investors, which kept the price of Sunlight's shares artificially inflated during the Class Period." (¶ 10); CRB aggressively raised the loan capacity extended to Sunlight in order "to conceal Sunlight's exposure to its loan portfolio" (¶ 12); "CRB further increased its loan limits and enabled Sunlight to exceed those limits, and held such loans on its own balances sheet, thus knowingly allowing and enabling Sunlight to hide its exposure to the solar Backbook from its investors." (¶ 23); "CRB knowingly facilitated loans to disreputable solar contractors of dubious credit quality, as well as the build-up of an enormous Backbook of high-risk Indirect Channel Loans Defendant warehoused for Sunlight on CRB's balance sheet but for which Sunlight retained the risk of loss." (¶ 45); and ("CRB, as Sunlight's Bank Partner, knowingly granted ever-increasing amounts of credit to Sunlight and its contractors …, repeatedly lifted its loan caps, and waived defaults under its agreements with Sunlight, all with knowledge that such defaults and Sunlight's unsustainable debt load were being concealed from Sunlight's investors.") (¶ 48); *see also* Secs. I.B, I.B.1, I.B.3.-I.B.5., *supra*.

These facts are more than sufficient to put CRB on notice of the misconduct at issue, and Plaintiff's scheme liability claim against CRB should proceed.

B. The Complaint Does Not Assert a Claim for Aiding and Abetting

Notwithstanding the well-pled facts setting forth the existence of a scheme, CRB weakly attempts to recast the Complaint as a claim for aiding and abetting the making of false or misleading statements under Rule 10b-5(b). CRB Br. at 12. Having asserted this straw man argument, CRB proceeds to exhaust three pages knocking that straw man down. Aiding and abetting simply does not apply here. Plaintiff has alleged a scheme under Rule 10b-5(a) and (c), not the issuance of misrepresentations, let alone the aiding and abetting thereof. CRB's contention here directly conflicts with the facts as pled and is not supported by the law.

As an initial matter, CRB poses the incorrect premise that a scheme liability claim "is just another way" of seeking to hold CRB accountable for aiding and abetting Sunlight's issuance of false or misleading statements, a claim barred by the

U.S. Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185, 191 (1994). *See* CRB Br. at 12. However, not only does *Central Bank*'s rejection of aiding and abetting liability not apply here—as Plaintiff does not allege any aiding and abetting on CRB's part—but *Central Bank* explicitly states that liability lies for the very conduct alleged here:

> [t]he absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, ***or bank***, ***who employs a manipulative device*** . . . on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.

Central Bank of Denver, 511 U.S. at 191-92 (citations omitted) (emphasis added). In other words, the Supreme Court explicitly acknowledges that "scheme liability" exists under Rule 10b-5(a) and (c), a claim that was not in issue in *Central Bank*.[11] *Central Bank*, thus, is of no relevance here and does not help CRB.

CRB's other authorities are equally unpersuasive. For example, the issue before the court in *Janus Cap. Grp., Inc. v First Deriv. Traders*, 564 U.S. 135, 144 (2011), was who constitutes a "maker" of a statement for purposes of a misrepresentation claim under Rule 10b-5(b). *See id.* at 142-144. Claims for

[11] Unlike here, the Respondents in *Central Bank* conceded that Central Bank did not commit a manipulative or deceptive act within the meaning of § 10(b), and instead "in the words of the complaint, Central Bank was 'secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud.'" *See id.*

"scheme liability" under Rule 10b-5(a) and (c), as Plaintiff asserts here, were not before the court in *Janus*.[12]

CRB further suggests that *Wright v. Ernst & Young LLP*, 152 F.3d 169,175 (2d Cir. 1981), and *United States v. Schiff*, 602 F.3d 152, 167 (3d Cir. 2010), stand for the blanket proposition that all claims under Section 10(b) of the Exchange Act require a false or misleading statement, and any other conduct is merely aiding and abetting, which is not a cognizable claim under *Central Bank*. CRB Br. at 13-14. This is not so. Both *Wright* and *Schiff* addressed the issue of who is a "maker." The entire analysis in those cases were in the context of a claim under Rule 10b-5(b), not Rule 10b-5(a) and (c). *See Wright*, 152 F.3d at 175; *Schiff*, 602 F.3d at 167.

Finally, CRB's reliance on *In re RenovaCare, Inc. Sec. Litig.*, *supra*, is misplaced. In the passage cited by CRB, Judge Martinotti dismissed one of two individual defendants because he was not a "maker" of the alleged false and misleading statement. CRB tellingly fails to note that the court sustained the plaintiffs' claim for scheme liability under Rule 10b-5(a) and (c) ***against other defendants from that same group***. *See RenovaCare*, 2024 WL 2815034, at *24-26.

[12] Similarly, *Copeland v. Grumet*, 88 F. Supp. 2d 326, 332-34 (D. N.J. 1999) and *Shapiro v Cantor*, 123 F. 3d 717, 720 (2d Cir. 1977), addressed the question of who is a "maker" of a statement for purposes of Rule 10b-5(b). Likewise, the issue in *Sbarra v Horizontal Expl., LLC*, No. CIV.A. 14-866, 2015 WL 1201329, at *8-9 (W.D. Pa. Mar. 16, 2015) was whether the defendant "participated" in making the alleged misstatement. None of the cases addressed whether the defendants participated in a scheme to defraud under Rule 10b-5(a) and (c).

In sum, CRB's invocation of case law rejecting aiding and abetting liability in the context of misrepresentations claims under Rule 10b-5(b) is of no relevance here. CRB's challenge should be rejected.

II. Neither the Bankruptcy Plan Injunction nor the Sunlight Class Action Settlement Bars Plaintiff's Claims

A. The Sunlight Bankruptcy Plan Injunction Does Not Bar Plaintiff's Claims

CRB next argues that the Sunlight bankruptcy plan injunction bars Plaintiff's claims. Specifically, according to CRB, the indemnification provisions found in the plan set forth in the Loan Program Agreement at § 10.1 and the Loan & Security Agreement at § 11.3 provide that CRB is entitled to indemnity from Sunlight for any liability arising out of this action. CRB Br. at 24. But the Court need not look any further than the express terms of those indemnification provisions to see that they do not apply to the claims asserted in this action.

First, the indemnification provision in the Loan Program Agreement at § 10.1 does not apply to CRB "to the extent of any Losses which arise from the direct acts or omissions ***of [Defendant]***"—which Plaintiff alleges here. *See* CRB Ex. 5 at p. 32.

Second, the indemnification provision set forth in § 11.3 of the Loan and Security Agreement does not apply to Defendant:

> to the extent that . . . losses, claims, damages, liabilities or related expenses are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross

negligence, will misconduct or bad faith of [Defendant]. *See* CRB Ex. 6 at p. 37. Thus, these provisions are inapplicable to the instant facts.

Even if the indemnification agreements did apply here—and they clearly do not—CRB is not obligated to enforce them. If CRB were to voluntarily seek indemnification against Sunlight in violation of a court order, that would be CRB's, not Plaintiff's, violation by seeking to enforce that provision against Sunlight in violation of the plan. Any *potential* availability of indemnification for CRB does not automatically render Plaintiff's claims violative of the plan. Defendant's argument on this point does not support dismissal.[13]

B. The Release in the Sunlight Class Action Settlement Has No Impact on Plaintiff's Claims Against CRB

In a last-ditch attack on the Complaint, CRB asserts that the terms of the release in a securities class action against Sunlight in the Southern District of New York bars the instant claims against CRB. CRB Br. at 25. This is simply wrong.

The Stipulation of Settlement in *Fung v. Sunlight Financial Holdings, Inc., et al.*, Case No. 1:22-cv-10658-AKH (S.D.N.Y.) (the "*Sunlight* Action"), did not release Plaintiff's claims here against CRB. Indeed, at the fairness hearing for the

[13] *In re Essar Steel Minnesota, LLC*, 652 B.R. 709, 720 (Bank. D. Del. 2023), does not help CRB. It simply stands for the proposition that a bankruptcy plan provision that bars the assertion of a claim against a specific non-debtor is enforceable even though the person seeking to assert the barred claim was not solicited to approve or reject the plan. *Id.*

Sunlight Action settlement, in response to Plaintiff's objection that the release should not be deemed to include Plaintiff or its claims in the instant action, Judge Hellerstein ***narrowed*** the terms of the release and declined to rule that the *Sunlight* Action release included the instant claims against CRB. *See Sunlight* Action, Dec. 10, 2024 Fairness Hearing Transcript, attached hereto as Ex. A at 13-19.[14]

Nor is it of any help to CRB that CRB was a "shareholder" or "partner" of Sunlight such that it would be covered by the release in the *Sunlight* Action, as CRB proposes. CRB Br. at 25. The shareholder at issue here (CRB) only became a

[14] Judge Hellerstein struck overbroad proposed release language from the definition of "Settlement Class Claims," as highlighted here:

> "Settlement Class Claims" means any and all claims, rights, demands, suits, liabilities, or causes of action, in law or in equity, accrued or unaccrued, fixed or contingent, direct, individual or representative, of every nature and description whatsoever, under federal, state, local, foreign law, or any other law, rule, or regulation, both known and Unknown Claims, alleged or which could have been alleged by any Released Plaintiff Party against Defendants or against any other of the Released Defendant Parties in any court of competent jurisdiction or any other adjudicatory tribunal that arise out of, are based upon, are ***<u>in any way</u>*** related to, ***or are in consequence of*** any of the facts, allegations, transactions, matters, events, disclosures, nondisclosures, occurrences, representations, statements, acts, claims, omissions, or failures to act that were: (i) involved, set forth, or referred to in any of the complaints filed in the Action, ***that could have been filed in the Action***, or that otherwise would have been barred by res judicata had the Action been fully litigated to a final judgment; and (ii) relate to the purchase or sale of unlight or Spartan common stock during the Class Period.

Id. at 18. (emphasis added).

shareholder of Sunlight by virtue of Sunlight's bankruptcy reorganization, which occurred ***more than a year after*** the end of the class period in the *Sunlight* Action.

Ultimately, a class action release may release claims not presented or claims that could not have been presented only when "the released conduct arises out of the ***identical factual predicate*** as the settled conduct." *Melito v. Experian Mktg. Sols., Inc.,* 923 F.3d 85, 95 (2d Cir. 2019) (internal quotations omitted) (emphasis added). *See* 6 Newberg and Rubenstein on Class Actions § 18:20 (6th ed.) ("The basic rule is that courts will approve settlements—or give preclusive effect to judgments approving settlements—so long as the released claims arise out of the 'identical factual predicate' as the settlement.").

The claims alleged here in no way share an "identical factual predicate" with the claims alleged in the *Sunlight* Action. As CRB acknowledges, the Class Period in the case at bar is more than a year longer than the Class Period alleged in the *Sunlight* Action. CRB Br. at 25. According to the notice of the settlement in the *Sunlight* Action, the allegations in that case were that:

> Defendants made false and misleading statements concerning Sunlight's due diligence process for its contractor partners…. Specifically, Plaintiffs alleged that Sunlight gave substantial amounts of cash advances to its contractor partners without conducting the type of due diligence that it claimed to conduct. Plaintiffs alleged that as a result, there was a heightened risk that one or more of Sunlight's contractor partners could default on Sunlight's cash advances, and alleged that this risk eventually transpired when one of Sunlight's largest contractor partners defaulted and went into bankruptcy.

Notice of Pendency and Proposed Settlement of Class Action, attached hereto as Ex. B at 3.

By contrast, the instant action is not premised on misrepresentations as to the due diligence process relating to Sunlight's contractors. Rather, this case concerns the relationship between Sunlight and its capital providers—specifically, its indirect channel capital provider. *See e.g.*, ¶¶ 5-6, 8, 13, 17, 33-43. The instant case relates to a scheme undertaken by CRB to enable Sunlight to repeatedly and improperly exceed its lending limits and increase its exposure to non-performing loans, which Sunlight thereafter concealed from its investors. *See e.g.*, ¶¶ 3, 7, 12, 72. Also, as CRB acknowledges, the information that corrected the false impression on the market is alleged to have occurred at different times. CRB Br. at 25.

In sum, CRB's attempt to get a free ride on a release from a settlement of a prior action involving different facts and different claims should be rejected.

CONCLUSION

For the foregoing reasons, CRB's motion to dismiss should be denied.

Dated: June 11, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2025, I served a true and correct copy of the foregoing document on counsel for Defendant via email, pursuant to the Court's May 23, 2025 Text Order, ECF 38, as follows:

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