Cambridge Retirement System v Amneal Pharmaceuticals, Inc., et al

Docket No. SOM-L-1701-19

Defendants' Motion to Dismiss Plaintiff's Amended Complaint

OPPOSED

Returnable: July 14, 2020

I. PARTIES AND RELIEF SOUGHT

Defendants, AMNEAL PHARMACEUTICALS INC., CHINTU PATEL, CHIRAG PATEL, BRYAN M. REASONS, PAUL M. BISARO, ROBERT L. BURR, ROBERT A. STEWART, KEVIN BUCHI, PETER R. TERRERI, JANET VERGIS, GAUTAM PATEL, TED NARK, EMILY PETERSON ALVA, JEAN SELDEN GREENE, DHARMENDRA J. RAMA, and AMNEAL PHARMACEUTICALS HOLDINGS, LLC ("Defendants"), by and through their counsel, Kevin M. McDonough, Esq., Peter A. Wald, Esq. and Christopher S. Turner, Esq. of LATHAM & WATKINS LLP, move to dismiss Plaintiff's Amended Complaint. Defendants have filed a reply brief dated June 12, 2020 which has been considered by the Court.

Plaintiff, CAMBRIDGE RETIREMENT SYSTEM ("Plaintiff"), by and through its counsel, James E. Cecchi, Esq., Donald A. Ecklund, Esq. and Christopher J. Buggy, Esq. of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., opposes the Defendants' Motion.

II. NATURE OF THE UNDERLYING ACTION

This is a securities class action alleging violations of the Securities Act of 1933 (the "Securities Act"). On March 11, 2020, Plaintiff Cambridge Retirement System ("Plaintiff") filed the Amended Class Action Complaint for Violations of §§ 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Complaint"). On March 31, 2020, Defendants[1] filed a Motion to Dismiss Plaintiffs' Amended Complaint (the "Motion" or "MTD"). Plaintiff opposes the Motion.[2]

[1] Defendants are Amneal Pharmaceuticals, Inc. ("Amneal" or the "Company"); Chintu Patel, Chirag Patel, Bryan M. Reasons, Paul M. Bisaro, Robert L. Burr, Robert A. Stewart, Kevin Buchi, Peter R. Terreri, Janet Vergis, Gautam Patel, Ted Nark, Emily Peterson Alva, Jean Selden Greene, Dharmendra J. Rama (collectively, the "Individual Defendants"); and Amneal Pharmaceuticals Holdings, LLC.

[2] Capitalized terms not otherwise defined here have the meaning ascribed to them in the Complaint. Citations to ¶___ refer to the Complaint. Emphasis is added unless otherwise noted.

III. SUMMARY OF MOVANT DEFENDANTS' POSITION IN THIS MOTION[3]

A. DEFENDANTS' VERSIO OF THE FACTUAL BACKGROUND

1. Amneal, Impax, And The Individual Defendants

Legacy Amneal was a pharmaceutical company specializing in developing, manufacturing, and distributing generic pharmaceutical products across a broad array of dosage forms and therapeutic areas. AC ¶ 39. Impax was a publicly-traded specialty pharmaceutical company that marketed generic products. *Id.* ¶ 40. Since the two companies merged, they have operated under the name Amneal Pharmaceuticals, Inc. *Id.* ¶ 5. The Individual Defendants are current and former directors and officers of Legacy Amneal and Impax. *Id.* ¶¶ 23-36.

2. Generic Pharmaceutical Industry Antitrust Investigations Commence In 2014

Antitrust investigations into the generics industry began at least by 2014, when Impax disclosed to investors "that one of its sales representatives received a grand jury subpoena from the Antitrust Division of the United States Justice Department," and that it had received a subpoena from Connecticut's Attorney General concerning an investigation into whether anyone engaged in "fixing, controlling or maintaining prices." *See* Ex. 1 at 154.[4]

The attorneys general of Connecticut and several other states eventually filed civil antitrust suits against a number of generic pharmaceutical companies. The original such complaint was filed on December 14, 2016. *See Connecticut v. Aurobindo Pharma USA, Inc.*, No. 3:16-cv-02056,

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[3] The Defendants' version.

[4] The Defendants' Motion is accompanied by the Certification of Kevin M. McDonough and corresponding Request for Judicial Notice. The Court agrees that it is permitted to consider all parts of the Registration Statement, which Plaintiff's Amended Complaint selectively cites and thereby incorporates by reference. *Greenberg v. Pro Shares Tr.*, No. A-0759-10T3, 2011 WL 2636990, at *6 (N.J. Super. Ct. App. Div. July 7, 2011) ("[A]t the motion to dismiss stage, the consideration of documents referred to in a complaint 'is proper and does not convert defendants' [Rule] 4:6–2(e) motion[] into [a] motion[] for summary judgment.'") (citation omitted). Under New Jersey Rule of Evidence 201, the Court is also permitted to take judicial notice of facts that are outside the pleadings but are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," such as court records. *Duffy v. Armstrong*, No. A-1285-07T1, 2010 WL 1433481, at *7 (N.J. Super. Ct. App. Div. Apr. 8, 2010); *Morris v. DeMarco*, No. A-1380-17T1, 2019 WL 2635662, at *4 (N.J. Super. Ct. App. Div. June 27, 2019). Courts have distinguished between noticing a complaint for the proposition that a party's allegations must have been truthful (not allowed), and noticing a complaint for the fact of its filing and the scope of its allegations (allowed). *See Krugman v. Mazie Slater Katz & Freeman, LLC*, No. A-2611-13T3, 2015 WL 1880073, at *4 (N.J. Super. Ct. App. Div. Apr. 27, 2015) (New Jersey courts may "rel[y] upon [judicial] records solely for the purpose of establishing the issues raised and the courts' resolution of those issues," not "for the truth of the facts set forth therein") (citing *State v. Silva*, 394 N.J. Super. 270, 278 (2000)).

Complaint (ECF No. 1), ¶7 (D. Conn. Dec. 14, 2016). This complaint was amended twice, on March 1, 2017, and June 18, 2018, after being consolidated in a multi-district litigation.

The June 18, 2018 iteration of the State AG Complaint totaled 247 pages, including 90 pages of factual allegations. It alleged that 20 generics manufacturers "entered into numerous contracts, combinations and conspiracies that had the effect of unreasonably restraining trade, artificially inflating and maintaining prices and reducing competition in the generic pharmaceutical industry throughout the United States[.]" *See* Ex. 2 (*Connecticut v. Aurobindo Pharma USA, Inc.*, Civ. A. No. 17-3768 (E.D. Pa. June 18, 2018) (ECF No. 15)). Although neither Impax nor Amneal was named in the first three State AG Complaints, the Registration Statement disclosed that "the Justice Department and U.S. Attorneys Offices and State Attorneys General have initiated investigations, reviews, and litigation into industry-wide pharmaceutical pricing and promotional practices, and whistleblowers have filed qui tam suits." Ex. 1 at 144.

In addition, at least 25 civil lawsuits "alleging a conspiracy to fix, maintain and/or stabilize prices of [] generic products" were filed against Impax and other generic pharmaceutical companies in 2016 and 2017. *Id.* at 155-56. Later in 2017, the Judicial Panel on Multidistrict litigation consolidated all such civil actions in the Eastern District of Pennsylvania, *see In re Generic Pharmaceuticals Pricing Antitrust Litigation*, Case No. 2:16-MD-02724-CMR (E.D. Pa. April 7, 2017) (ECF No. 194). *Id.* at 157. Neither Amneal nor Impax has been indicted or otherwise criminally prosecuted, and the AC does not allege otherwise.

3. Amneal Acquires Impax In May 2018

On October 17, 2017, Legacy Amneal and Impax "announced that they have entered into a definitive business combination in an all-stock transaction. As a result of the transaction, Amneal Holdings members will own approximately 75% and Impax shareholders will own approximately 25% of the new company's pro forma shares on an as converted basis." AC ¶ 42. Pursuant to the final Registration Statement, Impax shareholders exchanged their publicly traded shares in Impax for publicly traded shares in the combined company. Shares of Impax ceased trading on May 4, 2018 (NASDAQ stock exchange), and shares of the combined company began trading on May 7, 2018 (New York Stock Exchange). *Id.* ¶ 10.

In addition to disclosing the extensive price-fixing investigations and litigation already in progress, the Registration Statement provided numerous other warnings. Amneal expressly warned that it could be subject to "investigations or claims" due to "increasing U.S. federal and state

legislative and enforcement interest with respect to drug pricing," and that its "business, results of operations and financial condition could [] be adversely affected" as a result of those investigations or claims, or concomitant "legislative or regulatory proposals that limit [Amneal's] ability to increase the prices of [its] products." *Id.* ¶ 63.

4. The Third Amended State Attorney General Complaint Names Amneal In May 2019

A year after the merger—and five years into the antitrust investigation described above—a fourth iteration of the State AG Complaint was filed. This time, Amneal was named as one of 20 corporate defendants—though the Defendants point out that only *seven* of the complaint's more than 1,600 paragraphs contain factual allegations specific to Amneal, and those allegations address only one drug and one competitor. AC ¶¶ 13-14 (citing Compl., *State of Connecticut v. Teva Pharms., et al.*, No. 3:19-cv-00710-MPS (Dkt. No. 1) (D. Conn. May 10, 2019) (transferred to E.D. Pa.), at ¶¶ 502-04 (alleging that Teva Pharmaceuticals ("Teva") "refused to significantly reduce its price to [a] customer," "providing only a nominal reduction" for one drug after speaking with Amneal in 2014); ¶¶ 953-56 (alleging that two Teva employees had "strong relationships" with two Amneal employees)).

5. Plaintiff's Amended Complaint In This Action

The AC contains three categories of alleged misrepresentations involving nine challenged statements by Defendants: (i) statements allegedly rendered false or misleading by Defendants' failure to report that Amneal was engaged in price-fixing; (ii) statements about the status of competition in the generic pharmaceutical industry; and (iii) statements concerning Amneal's historical revenues. A chart of the nine challenged statements, and the asserted bases for dismissal of each, is appended to this brief. *See* Defendants' App'x A.

B. SUMMARY OF DEFENDANTS' ARGUMENTS AND RELIEF REQUESTED

Plaintiff Cambridge Retirement System ("Plaintiff") has filed a complaint, since amended ("AC"), accusing Amneal Pharmaceuticals, Inc. ("Amneal") and its officers and directors of illegal price-fixing, and of violating the securities laws by concealing that conduct from investors. Yet Defendants allege that "having spent months investigating and developing its claims, Plaintiff has still been unable to allege facts establishing that Amneal was engaged in price-fixing and violated the securities laws by concealing such activity." According to the Defendant, Plaintiff does not

come close to meeting the rigorous requirements for pleading such claims, and should be dismissed.

In 2018, two pharmaceutical companies—Impax Laboratories, Inc. ("Impax") and Amneal Pharmaceuticals, LLC ("Legacy Amneal")—merged. To effectuate the merger, Legacy Amneal issued a registration statement and prospectus effective as of May 7, 2018 (the "Registration Statement"). Prior to the merger (and the Registration Statement's effective date), Impax disclosed that it was one of several companies being investigated for price-fixing. Impax was sued in private civil antitrust actions and, when its stock price declined after a news article inaccurately predicted that Impax would be indicted, Impax was sued for securities fraud.[5]

Meanwhile, the attorneys general of numerous states filed three successive civil antitrust complaints against a raft of generic pharmaceutical companies in December 2016, March 2017, and June 2018. Each of these complaints implicated additional defendants, and added more substantive allegations of price-fixing—but *none* named Impax or Amneal. Apparently, more than a year after the Registration Statement became effective, Amneal was named as one of twenty (20) corporate defendants in the fourth iteration of the state attorneys general complaint filed May 10, 2019 (the "State AG Complaint"). Following this news, Amneal's stock price fell.

Plaintiff claims that Amneal and fourteen individuals[6] violated the federal securities laws because the Registration Statement did not disclose that they were part of a price-fixing conspiracy, misrepresented the state of competition in the generic pharmaceutical industry, and misstated Amneal's historical revenues. Plaintiff alleges that the truth about these alleged misstatements was not revealed until Amneal was named in the State AG Complaint.

Defendants argue that the Plaintiff's claims must be dismissed for the following reasons:

(1) Plaintiff has failed to plead statutory standing.

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[5] That securities lawsuit was dismissed. *N.Y. Hotel Trades Council & Hotel Ass'n of N.Y. City, Inc. Pension Fund v. Impax Labs., Inc.*, 2019 WL 3779262 (N.D. Cal. Aug. 12, 2019). Defendants explicitly disclosed the existence of this complaint against Impax. Ex. 1 (Registration Statement) at 158.

[6] These fourteen individuals (the "Individual Defendants") are current and former officers and directors of Amneal or Impax: Chintu Patel, Chirag Patel, Bryan M. Reasons, Paul M. Bisaro, Robert L. Burr, Robert A. Stewart, Kevin Buchi, Peter R. Terreri, Janet Vergis, Gautam Patel, Ted Nark, Emily Peterson Alva, Jean Selden Greene, and Dharmendra J. Rama. The AC does not make any specific factual allegations regarding any of these Individual Defendants, other than to state their titles and allege that they either signed the Registration Statement or were identified therein as "incoming controlling officers." AC ¶¶ 23-37.

(2) Plaintiff has failed to plead material falsity for any of the challenged statements. According to the Defendants, the Plaintiff has failed to adequately to plead that Amneal was engaged in price-fixing—the necessary predicate for all of Plaintiff's claims. Defendants also aver that in addition, the challenged statements regarding "industry competitiveness" are non-actionable; they either constitute immaterial "puffery," or opinion statements for which adequate "falsity" allegations have not been made. Finally, the Defendants indicate that their statements regarding Amneal's historical revenues were unquestionably true, and as a matter of law were not rendered false by Amneal's "failure to disclose" that they were "ill-gotten."

(3) Plaintiff has failed to plead that any of the Individual Defendants is liable as a control person.

IV. SUMMARY OF THE BACKGROUND AND POSITIONS OF THE PLAINTIFF[7]

This is a securities class action alleging strict liability and negligence claims on behalf of investors in Amneal, who have lost millions of dollars as a result of the misstatements and omissions made by Defendants in a May 7, 2018 Registration Statement and prospectus, as amended ("Registration Statement") issued in connection with the Business Combination of Amneal Pharmaceuticals LLC ("Legacy Amneal" or "Amneal LLC") and Impax Laboratories, Inc. ("Impax").

On October 17, 2017, Legacy Amneal and Impax announced a deal to combine the privately-held Legacy Amneal and the public Impax in an all-stock transaction valued at approximately $1.45 billion. ¶5. Under the Registration Statement, Amneal, a new publicly traded holding company, was formed. ¶10. Before the Business Combination, Legacy Amneal was a fast-growing generic pharmaceutical manufacturer headquartered in Bridgewater, New Jersey, and Impax was a publicly-traded pharmaceutical company with a focus on specialty generic drugs. ¶¶7-8. In connection with the Business Combination, the Defendants—Amneal and certain of its current and former officers and directors—filed the Registration Statement and Amneal began trading on May 7, 2018 on the New York Stock Exchange under the ticker "AMRX" by issuing 224,996,163 shares of Class A common stock, which opened at $17 per share. ¶10.

But, Plaintiff contends that the Registration Statement made materially false and misleading statements and failed to disclose that (i) Legacy Amneal had colluded with several of its pharmaceutical industry peers to fix generic drug prices; (ii) secret collusion improperly

[7] Plaintiff's version.

bolstered Amneal's operations and financial results reported in the Registration Statement; (iii) the collusive conduct violated federal antitrust laws; (iv) as a result of that collusion, Amneal was the subject of governmental investigations into the Company's illegal conduct; and (v) as a result of the foregoing, Amneal's statements in the Registration Statement concerning its operations, financial results and exposure to Amneal LLC's illegal conduct were materially false and misleading. ¶¶59-67.

According to Plaintiff, the failure to disclose these facts violated the Securities Act, which Act was put in place in the wake of the great stock market crash of 1929 to prevent and provide remedies for misleading statements and omissions to investors. Plaintiff basis its charge on, among other things, that the Securities Act imposes an unflagging, strict liability duty of honesty and disclosure upon those who registered securities for distribution to investors in U.S. capital markets, as Defendants did here.

A. ALLEGATIONS OF PLAINTIFF

Plaintiff alleges that the "truth" emerged on May 10, 2019, when the Attorneys General of 44 states, including New Jersey, filed a lawsuit naming Amneal and over one dozen co-conspirators as defendants (the "AG Complaint"). The AG Complaint alleged that Legacy Amneal and other co-conspirators had engaged in a massive conspiracy to allocate the market for, and fix the prices of, numerous generic drugs. ¶69. Specifically, the AG Complaint detailed compelling evidence, collected by the state Attorneys General through an extensive investigation involving internal documents, call records, text messages, and cooperating witnesses, that Legacy Amneal, through senior executives at Legacy Amneal, had conspired with competitor Teva and others to allocate the markets and fix the prices for numerous generic drugs prior to the Business Combination. ¶¶71-76.

According to the Plaintiff, the AG Complaint provides specific and direct evidence of Legacy Amneal's role in the antitrust conspiracy. Plaintiff cites, for example, the AG Complaint, references to internal documents, comprehensive industry-wide phone logs and cooperating witnesses, detailed communications on September 9, 2014 between high-level executives at Amneal, Teva and Glenmark—the three competitors for a generic drug called Norethindrome—that allegedly formed an agreement to fix prices and allocate market share for the drug, ¶¶73-74. Plaintiff also avers that the AG Complaint also detailed other communications between Teva and

Legacy Amneal showing their role in this massive antitrust conspiracy. ¶76. The AG Complaint makes clear that these specific examples are only exemplars of the massive antitrust conspiracy. ¶75. On May 12, 2019, New Jersey Attorney General Gurbir S. Grewal issued a press release and explained how the AG Complaint shows how "high drug prices have been driven in part by an illegal conspiracy among generic drug companies to inflate their prices." ¶70. Plaintiff notes that Attorney General Gurbir warned that "no New Jersey company will get a free pass when it violates the law and harms our residents, just because it is located here." *Id.* Apparently, fact discovery in the AG Complaint action is ongoing and the substantial completion of document production is imminent. ¶81.

Upon the news of the AG Complaint, which revealed the risks and truth concealed by the Registration Statement, Amneal's common stock price plummeted. ¶¶77-78. On August 5, 2019, just a few months after the AG Complaint was filed, Amneal allegedly "surprised investors" when it reported major changes to its Board and management team. Specifically, the Company announced the resignations of Executive Chairman of Amneal's Board of Directors, Individual Defendant Paul Bisaro, and Amneal's CEO, Individual Defendant Robert Stewart. Amneal also announced that Individual Defendants Robert L. Burr, Dharmendra "DJ" Rama and Janet S. Vergis had resigned as directors on Amneal's Board. In addition, the Company announced that the co-founders of Legacy Amneal, Chirag Patel and Chintu Patel, had each resigned as Co-Chairman of Amneal's Board of Directors and would assume the roles of Co-Chief Executive Officers of the Company. ¶79. On the date Plaintiff filed its initial complaint in this Action, December 18, 2019, Amneal common stock closed at just $4.93 per share, down dramatically from the opening price of $17 per share on May 7, 2018, and its high closing price of $24.19 per share on September 20, 2018. ¶10.

In its opposition, Plaintiff asserts that these facts (described above) far exceed the notice pleading standard for stating a Securities Act claim under New Jersey procedure. Plaintiff argues that Defendants implicitly conceded this point by failing to argue for dismissal on any ground under the appropriate standard applied by New Jersey procedure. Instead, Plaintiff posits that the Defendants only advance the claim that violations of Sections 11, 12(a)(2) and 15 are not strict liability and are subject to a heightened pleading standard under both New Jersey law and federal law.[8] Plaintiff also counters that, in its view, the Defendants' arguments are directly contrary to

[8] Even though Plaintiff claims that federal procedure is inapplicable here.

prevailing New Jersey and federal Third Circuit law. Plaintiff also argues that in any event, under any standard, Plaintiff's allegations are sufficient.

Moreover, Plaintiff submits that the three additional arguments Defendants raise in support of dismissal all "fail." First, with respect to standing, Plaintiff states that it purchased Amneal common stock issued pursuant to and traceable to the Registration Statement. ¶21, 82. Plaintiff asserts that is sufficient to allege standing. Plaintiff notes that Defendants' entire standing argument follows what it describes as a fallacy that Plaintiff has not established standing because it could have purchased shares in a second offering pursuant to another registration statement. MTD at pp. 10-11. But, Plaintiff states that Amneal issued ***no*** additional shares and filed only a "shelf" registration statement that ***may*** be (but has not been) used in a future offering. Defendants' attack on standing therefore fails, as it ignores the Complaint's clear allegations and depends on the "baseless hypothesis" that Amneal issued additional shares of common stock (which it did not).

Second, Plaintiff claims that it adequately alleges the existence of a price-fixing conspiracy based on the detailed and documented allegations set forth in the AG Complaint. Plaintiff offers that each of the ***eight*** other courts (three of which are in the Third Circuit) to rule on securities violations by other participants in the conspiracy have "easily concluded", under a heightened pleading standard not applicable here, the existence of such a conspiracy, in large part (if not entirely) through the direct evidence provided in the AG Complaint. Plaintiff avers that the Defendants refusal to cite, or even acknowledge, these "on-point decisions is telling."

Finally, Plaintiff argues that it has properly plead material misrepresentations and omissions about the competitiveness of the generic drug market in which Legacy Amneal acted, the risk of legal liability to Amneal because of Legacy Amneal's participation in an antitrust conspiracy, and how the conspiracy affected Legacy Amneal's revenue. Plaintiff states that it has plead that Amneal's omissions of then-existing facts rendered these statements false and misleading. Defendants' primary attack that these statements are either "immaterial puffery" or "inactionable opinions," or that Defendants had no duty to disclose the truth, all fail, as described below. Plaintiff counters that the Defendants have refused to acknowledge that every other court presented with these nearly identical arguments have rejected them outright, after applying the much higher pleading standard applicable to federal securities fraud claims, is telling, and fatal to Defendants' arguments to the contrary.

V. COURT'S ANALYSIS AND DECISION

A. Applicable Standards of Review

1. Elements Of Sections 11 And 12(a)(2) Claims

To state a claim under Sections 11 and 12(a)(2) of the Securities Act of 1933 ("Securities Act"), Plaintiff must allege facts establishing an untrue statement of material fact, or the omission of a material fact necessary to make an affirmative statement not misleading. *See* 15 U.S.C. §§77k(a), 77l(a)(2). Plaintiff must show that each challenged statement was "materially false or misleading" when made. *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 273 (3d Cir. 2004). For an omission to be actionable, Plaintiff must allege "a substantial likelihood that the disclosures of the [omitted material] would have been viewed by the reasonable investor as having significantly altered the total mix of information [already] made available." *In re ProShares Tr. Sec. Litig.*, 728 F.3d 96, 102 (2d Cir. 2013). A plaintiff's claim fails if "at the time of [acquiring the security] he knew of such untruth or omission." 15 U.S.C. § 77k(a).

"Sections 11 and 12(a)(2) [of the Securities Act] impose strict liability on defendants for material omissions from securities registration statements and prospectuses." *Weiss v. Blech*, 1997 WL 458678, at *3 (S.D.N.Y. Aug. 11, 1997). Under either provision, "a plaintiff need not plead fraud, reliance or scienter on the part of the defendants to succeed." *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 924 (D.N.J. 1998). However, a plaintiff must, at a minimum, "show a material misstatement or omission [in the registration statement or prospectus] to establish his *prima facie* case." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). Indeed, as the Supreme Court has explained, "***Liability against the issuer of a security is virtually absolute, even for innocent misstatements***." *Id.*

Both federal and state courts concur that "[s]o long as plaintiffs plausibly allege that [the defendant issuer] omitted material information that it was required to disclose or made material misstatements in its offering documents, they meet ***the relatively minimal burden of stating a claim pursuant to Sections 11 and 12(a)(2***)." *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 718 (2d Cir. 2011) (emphasis added); *see also Int'l Union of Operating Eng'rs Benefit Funds of E. Pa. and De. v. Camping World Holdings, Inc.*, 2020 WL 1939666, at *3 (N.Y. Sup. Apr. 22, 2020) ("Because security issuers have virtually absolute liability under section 11 and negligence otherwise applies to section 11 and violations of section 12, the 1933 Act gives rise to liability

much more readily than the Securities Exchange Act of 1934, which governs securities fraud and is subject to exclusive federal jurisdiction.").

2. Applicable New Jersey Pleading Standards

When assessing a motion under Rule 4:6-2(e), "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Carbot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005). Where, as here, the complaint is premised on "allegations of misrepresentation . . . [the] particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." Rule 4:5-8. As a general rule, "this heightened standard applies not just to allegations of 'fraud,' but also to allegations of 'breach of trust' or any other similar 'allegations of misrepresentation.' Rule 4:5-8(a). For that reason, courts routinely apply this heightened-pleading standard to a wide array of actions based on alleged misrepresentations or similar misconduct." *PJSC Armada v. Kuzovkin*, No. BER-L-197-19, 2019 WL 5459804, at *3 (N.J. Super. L. June 28, 2019) (applying heightened standard to allegations of misrepresentation and granting motion to dismiss); *see also Res v. Bank of America, N.A.*, No. BER-L-3346-17, 2017 WL 3461165, at *3 (N.J. Super. L. Aug. 8, 2017); *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 114 (App. Div. 2009). Plaintiff's Amended Complaint is premised on allegations of misrepresentation. *See* AC ¶¶ 11, 16, 59, 62, 67, 90, 91, 92, 101 (alleging, *e.g.*, that Defendants "made false and misleading statements and/or misrepresented or failed to disclose material facts").

Certainly one of the initial issues for the Court to address is whether the "heightened pleading" standard applies in this case. The Defendant, of course, alleges that the heightened standard applies and that Plaintiff's Complaint has not met the standard. Plaintiff counters the Defendants' claim by asserting that contrary to Defendant's assertions, "the New Jersey 'notice pleadings' standard is applicable to" claims under Sections 11 and 12 of the Securities Act. *See Okla. Firefighters Pension & Ret. Sys. v Newell Brands Inc.*, 2019 WL 3764093, at *2 (N.J. Super. L. Aug. 1, 2019) (denying defendants' motion to dismiss claims brought under Sections 11, 12(a)(2) and 15 of the Securities Act and finding that "the New Jersey 'notice pleadings' standard is applicable to this case"), *reconsideration denied*, (N.J. Super. L. Nov. 1, 2019). As such, Plaintiff argues that the Defendants argue incorrectly that the Complaint is subject to the "heightened pleading standards" of Rule 4:5-8(a) and must therefore state "[the] particulars of the wrong, with dates and items if necessary . . . insofar as practicable." MTD at pp. 7-9. But Plaintiff submits that

the Defendants ignore *Newell*, a recent case that squarely addresses the correct notice pleading standard, and do not cite a single New Jersey case contradicting its holding. See *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 272–73 (3d Cir. 2006) ("[O]rdinary negligence is alleged in the Section 11 and Section 12(a)(2) claims, and those claims are pled separately from the Section 10(b) fraud claims against the same defendants. That is enough to avoid triggering Rule 9(b)."); *see also, e.g.*, *In re: Enzymotec Sec. Litig.*, 2015 WL 8784065, at *21 (D.N.J. Dec. 15, 2015) ("Section 11 and 12(a)(2) claims are generally not subject to the heightened pleading standards required under the PSLRA and Federal Rule of Civil Procedure 9(b)").[9]

As *Suprema* itself explains, the cases that Defendants cite involved complaints that, unlike the Complaint here, plead ***both*** fraud claims under the Exchange Act and non-fraud Securities Act claims, but made no effort to distinguish the fraud from the non-fraud allegations. *Suprema*, 438 F.3d at 272-73. Indeed, *Suprema* distinguished those cases on the grounds that the complaints asserted "Section 11 or 12(a)(2) claims premised *exclusively* on allegations of fraud" and Rule 9(b) was applied "because the complaint was 'completely devoid of any allegations that Defendants acted negligently.'" *Suprema*, 438 F.3d at 272 (quoting *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 161 (3d Cir. 2004) (emphasis in original), and distinguishing *Chubb* and *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004)).[10] Here, by contrast, the Complaint pleads ***only*** strict liability Securities Act claims. In fact, the Complaint is entirely devoid of ***any*** claims or allegations

[9] Other Circuits agree. *See, e.g.*, *Silverstrand Invs. v. AMAG Pharm., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013) ("[U]nlike § 10(b) of the Securities and Exchange Act, § 11 does not have a scienter or reliance requirement, and neither the heightened pleading standard of Fed.R.Civ.P. 9(b) nor of the Private Securities Litigation Reform Act applies unless a § 11 claim sounds in fraud."); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 506 (S.D.N.Y. 2013) ("Section 11 and 12(a)(2) claims that do not sound in fraud need not satisfy the heightened particularity requirements of Federal Rules of Civil Procedure 9(b)."); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 369 (5th Cir. 2001) (Securities Act "claims do not 'sound in fraud' and cannot be dismissed for failure to satisfy Rule 9(b)."); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314 (8th Cir. 1997) ("[T]he particularity requirement of Rule 9(b) does not apply to claims under § 11 of the Securities Act, because proof of fraud or mistake is not a prerequisite to establishing liability under § 11.")

[10] As a result, Defendants' assertion that these cases held Securities Act claims to "heightened" pleading standards because they recognized they should be subject to some sort of extra-statutory "rigorous scrutiny" (MTD at p. 8), is simply false. Those cases applied Rule 9(b) because the complaints at issue alleged predominantly fraud claims and failed to adequately distinguish fraud from non-fraud allegations. Their holdings are completely inapposite here.

of fraud, and, indeed, as in *Suprema*, plaintiffs have "expressly" disclaimed any such allegations in connection with their Section 11 and 12(a)(2) claims. *Suprema*, 438 F.3d at 272-73.[11]

As such, the Court finds that, for the purpose of the Court's holding in this Motion, the heightened pleading standard does not apply to the claims made by the Plaintiff in this case. Regardless, the Court will evaluate the Plaintiff's claims under both standards. As such, the Court will review the issues involved in this motion with the heightened standard which the Court has applied in the alternative in this opinion.

To state a claim under this heightened pleading standard, Plaintiff must "plead specific facts that would allow a fact-finder to draw th[e] specific conclusion" that a violation of the law occurred. *Hoffman*, 405 N.J. Super. at 114. "The allegations cannot be based upon unsupported assumptions," but rather "must be based on competent evidence and, where required, the opinion of an expert." *Id.* at 115. "A complaint containing conclusory allegations which parrot the language of the cause of action, consisting of 'mere generalizations devoid of specified factual support,' is insufficient under Rule 4:5-8(a)." *PJSC Armada*, 2019 WL 5459804 at *3 (quoting *Miller v. Bank of Am. Home Loan Servicing, LP*, 439 N.J. Super. 540, 552 (App. Div. 2015)).

There certainly are cases where the Court applied the heightened pleading standard in certain securities class actions alleging violations of Sections 11 and 12 and granted dismissal motions. *See, e.g., In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 273-75 (3d Cir. 2005) (affirming dismissal of Section 11 claim); *CalPERS v. Chubb Corp*., 394 F.3d 126, 162 (3d Cir. 2004) (same); *Rombach v. Chang*, 355 F.3d 164, 172 (2d Cir. 2004) (same); *In re Vonage Initial Pub. Offering (IPO) Sec. Litig*., No. CIV A 07-177 (FLW), 2009 WL 936872, at *7 (D.N.J. Apr. 6, 2009), on reconsideration in part, No. CIV. A. 07-177 (FLW), 2009 WL 1586945 (D.N.J. June 3, 2009) (dismissing Section 11 claims in securities class action where plaintiffs failed to satisfy the heightened pleading requirements under Federal Rule 9(b)). In fact, there are circumstances where state courts have recently dismissed Section 11 claims when it applied the heightened standard. *See, e.g., Matlick et al. v. Amtrust Fin. Servs., Inc.*, No. INDEXNO6513492019, 2020 WL 1294669, at *4 (N.Y. Sup. Ct. Mar. 16, 2020); *Matter of Netshoes Sec. Litig.*, 105 N.Y.S.3d 846, 853-60 (N.Y. Sup. Ct. 2019); *City of Livonia Ret. Health & Disability Benefits Plan v. Pitney*

[11] Citing *Chubb*, Defendants claim that the Complaint's "blithe" disclaimer of any allegations of fraud is insufficient to avoid triggering heightened scrutiny (MTD at p. 9), but it is Defendants who "blithely" ignore not only *Suprema*'s holding, but the fact that there is nothing to "disclaim" because, again, the Complaint makes ***no*** allegations of fraud.

Bowes, Inc., No. X08 CV 18 6038160 S, 2019 WL 6188612, at *1, 10 (Conn. Super. Oct. 24, 2019); *In re Dentsply Sirona, Inc. Sec. Litig.*, No. 155393/2018, 2019 WL 4695724, at *6 (N.Y. Sup. Ct. Sep. 26, 2019).[12]

In any event, the Court will analyze the Defendants' Motion using both standards.

B. Has Plaintiff Failed to Plead Statutory Standing?

To establish statutory standing under Section 11, Plaintiff must allege facts establishing that it acquired "shares in the offering for the registration statement," or if it purchased shares in the aftermarket, that it "can trace [those] shares back to the relevant offering." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013); *see also In re FleetBoston Fin. Corp. Sec. Litig.*, 253 F.R.D. 315, 347 (D.N.J. 2008) ("[Section 11's] standing provisions limit putative plaintiffs to the 'narrow class of persons' consisting of those who purchase securities that are the direct subject of the prospectus and registration statement." (citation omitted)). Standing is an element of Plaintiff's claim, and this "high-burden standing requirement" is "inherent in the statute's definition of a cause of action." *De Vito*, 2018 WL 6891832 at *15.

It can be fairly said that the "traceability" requirement can be difficult in certain circumstances, if not impossible, to meet "[w]hen a company has issued shares in multiple offerings under more than one registration statement." *Century Aluminum*, 729 F.3d at 1107. In that setting, aftermarket plaintiffs can only prove the source of their shares by "trac[ing] the chain of title for their shares back to the [challenged] offering, starting with their own purchases and ending with someone who bought directly in the [challenged] offering." *Id.* at 1106-07. That undertaking is apparently "easier said than done," even at the pleading stage, because "many brokerage houses do not identify specific shares with particular accounts but instead treat the account as having an undivided interest in the house's position." *Id.* (quoting *Barnes v. Osofsky*, 373 F.2d 269, 271-72 (2d Cir. 1967)); *see Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495, 498 (5th Cir. 2005) ("market realities" and "fungibility of stock" can "render Section 11 ineffective as a practical matter in some aftermarket scenarios"). As a result, courts nationwide routinely dismiss Section 11 claims brought by aftermarket plaintiffs when the traceability requirement is not. *See,*

[12] According to the Defendants, Plaintiffs have only recently begun filing Section 11 cases in state court, perhaps thinking they will receive friendlier treatment than in federal court. In *Cyan, Inc. v. Beaver County Employees Pension Fund*, 138 S. Ct. 1061 (2018), the Supreme Court held that state courts retain concurrent jurisdiction over lawsuits asserting claims under the Securities Act, and that such lawsuits are not removable to federal court.

e.g., *Century Aluminum*, 729 F.3d at 1106, 1109 (affirming dismissal because plaintiffs did not plausibly trace shares to challenged offering); *Krim*, 402 F.3d at 491, 492 (same); *In re Ariad Pharm., Inc. Sec. Litig.*, 842 F.3d 744, 756 (1st Cir. 2016) (same); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 899-900 (4th Cir. 2014) (same).

In this case, Defendants submit that before the merger, Impax was publicly traded while Legacy Amneal was privately held. AC ¶¶ 7-8. Pursuant to the merger's terms, shares of Amneal began trading on May 7, 2018 (NYSE) under the ticker "AMRX," with the issuance of 224,996,163 shares of Class A common stock. Each share of Impax common stock was converted into the right to receive one share of Amneal Class A common stock. AC ¶ 10. Subsequent to the merger, on March 1, 2019, Amneal filed another registration statement for Class A Common Stock (among other securities). *See* Ex. 3 (Amneal S-3ASR dated March 1, 2019).

Defendants argue that the Amended Complaint's standing allegations are defective because Plaintiff has failed to provide any details concerning its share acquisition or ownership. Defendants complain that the Plaintiff offers only the conclusory allegation that it "acquired Amneal common stock pursuant to the Registration Statement and was damaged thereby." AC ¶ 21. In appropriate cases, the existence of a second registration statement underscores the importance of requiring Plaintiff to plead the timing of its share acquisition. Defendants offer that if Plaintiff acquired its shares after March 1, 2019, those shares could have been issued pursuant to the second (unchallenged) registration statement. *See* Ex. 3; *De Vito*, 2018 WL 6891832 at *15 (dismissing complaint due to plaintiffs' failure to plead facts showing "that the shares they bought are directly traceable to the challenged 2013 offering, as opposed to the blameless 2014 offering"). Thus, Defendants argue that the Plaintiff's pleading failure requires that all claims be dismissed unless and until Plaintiff can allege with precision the statutory basis for its standing.

Plaintiff counters the Defendants' arguments by pointing out that Amneal has issued common stock shares once since its creation—through the Registration Statement.[13] Therefore, Plaintiff submits that, in the circumstances here, all common stock shares purchased since are traceable to the Registration Statement. The Complaint alleges that "Plaintiff and other Class members acquired Amneal shares pursuant and/or traceable to the Registration Statement." ¶94.

[13] As discussed below, Defendants' assertion that Plaintiff could have purchased securities pursuant to another securities offering is, in itself, a false and misleading statement because there was no second offering.

As such, the Court finds that under both New Jersey and Third Circuit law, this allegation adequately pleads Plaintiff's standing to bring Securities Act claims. *See, e.g.*, *Newell*, 2019 WL 3764093, at *5 (under New Jersey law, Securities Act plaintiff "need only allege that it acquired the security 'pursuant to a false or misleading registration statement'" to plead Securities Act standing, and collecting cases); *Suprema*, 438 F.3d at 274 n. 7 ("At the pleading stage . . . we accept as true plaintiffs' allegations that they made their stock purchases in or traceable to the Suprema public offerings," and noting that "traceability" is a "factual [question], to be resolved through discovery"); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 286 (3d Cir. 1992) (plaintiffs adequately pled standing where they "allege[d] that they purchased UJB stock 'pursuant to' a DRISP registration statement"); *Enzymotec*, 2015 WL 8784065, at *21 (plaintiffs "adequately alleged [Securities Act] standing" where they "allege that they purchased Enzyrnotec securities issued in, or traceable to, the offering of Enzyrnotec securities that were conducted pursuant to either the IPO or SPO"); *Gargiulo v. Isolagen, Inc.*, 527 F. Supp. 2d 384, 392 (E.D. Pa. 2007) ("[T]he Court has determined that Lead Plaintiffs have adequately pled standing because in their Complaint, Plaintiffs stated that certain plaintiffs and members of the Class purchased Isolagen securities issued in, or traceable to, the offering . . . ."); *see also In re Glo. Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 208 (S.D.N.Y. 2003) ("[T]he pleading requirement [for Securities Act standing] is not elaborate. It is reasonable, if not even self-evident, that the Plaintiffs have not been required to explain how their shares can be traced; general allegations that plaintiff purchased 'pursuant to' or traceable to false registration statement have been held sufficient to state a claim," and citing, *inter alia*, *Shapiro*, 964 F.2d at 286).

Notably, in the holding *In Re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013) held that even under the more demanding (*Iqbal/Twombly)* federal pleading standard, "alleging that the plaintiff's shares are 'directly traceable' to the offering in question might well suffice . . . when all of the company's shares were issued in a single offering under a single registration statement" because "because by definition all of the company's shares will be directly traceable to the offering in question." *Id*. That is precisely the situation here: the ***only*** public offering of Amneal shares during the Class Period occurred through the merger and, thus, pursuant to the Registration Statement the Complaint alleges contained false and misleading statements. To be clear, there can be no question that Plaintiff's shares are traceable to the Registration Statement

because ***all*** the shares that were publicly traded during the Class Period were issued pursuant to the Registration Statement.

The Defendants' strawman argument that Plaintiff's "shares could have been issued pursuant to" another "unchallenged" March 1, 2019 shelf registration statement is simply not applicable here. MTD at pp. 11-12. As Defendants are surely well-aware, the only offering was the one made pursuant to the Registration Statement and ***no*** Amneal shares of any kind were ever issued pursuant to that shelf registration statement. In fact, Defendants do not deny that there was only one offering here.

Yet, Defendants continue to argue that the Plaintiff has not specifically alleged or shown that it acquired shares in the offering for the registration statement. The Court rejects that position. Certainly form over substance needs to end somewhere. Since there was only one offering, Plaintiff need not plead facts relating to traceability with more specificity since it is self-evident that it could only have acquired the shares from the one and only offering.

Also, for the same reason, Defendants argue that the Plaintiff also fails to plead standing for its Section 12(a)(2) claim, which requires Plaintiff to allege that it acquired the securities in question "directly from the defendants" by means of a prospectus. *See Freidus v. Barclays Bank PLC*, 734 F.3d 132, 141 (2d Cir. 2013); *Yates*, 744 F.3d at 900. As such, Defendants submit that where, as here, Plaintiff has not established standing, its claims must be dismissed. *Century Aluminum*, 729 F.3d at 1106.

In the Court's view, the Plaintiff's pleadings satisfactorily and minimally pled this particular element. There would be no harm in allowing the matter to proceed so it can be addressed as needed during discovery.

C. Has Plaintiff Failed to Plead "Material Falsity"?

Defendants claim that the Plaintiff alleges three categories of misrepresentations by Defendants: (i) statements purportedly rendered false and misleading by their failure to report that Amneal was engaged in price-fixing, AC ¶¶ 62-65; (ii) alleged misstatements about the status of competition in the generic pharmaceutical industry, *id.* ¶¶ 60-61; and (iii) alleged misstatements about Amneal's historical revenues, *id.* ¶¶ 66-67. Yet, Defendants aver that none of these three categories establishes a federal securities violation because Plaintiff has failed to allege with particularity predicate facts showing that Amneal was in fact engaged in price-fixing. Defendants theorize that without this, all of Plaintiff's claims fail. In addition, Defendants assert that the second

category of alleged misrepresentations must be dismissed because the challenged statements were either immaterial (non-actionable) "puffery," or opinion statements for which "falsity" has not adequately been alleged under controlling Supreme Court precedent, and the third category of alleged misrepresentations must be dismissed because the challenged statements were unquestionably true, and as a matter of law were not rendered misleading by Defendants' failure to disclose Amneal's alleged "misconduct."

Plaintiff counters that the alleged widespread price-fixing scheme in which Legacy Amneal participated has prompted at least eight federal class actions alleging Amneal's peers and its alleged co-conspirators violated the federal securities law by disseminating false and misleading statements concealing that scheme. Plaintiff offers that in ***every single one of those cases***, courts across the country, relying on essentially the same allegations of anticompetitive conduct pled here, uniformly held that statements ***identical*** to those at issue in this case were materially misleading.[14] Significantly, the allegations in those cases passed muster under a pleading standard far more demanding than the controlling standard here: those federal cases all asserted claims for securities *fraud* under the Securities Exchange Act and, so, had to meet not only Rule 9(b)'s heightened particularity requirements, but the far more demanding pleading requirements of the Private Securities Litigation Reform Act ("PSLRA").

Plaintiff claims that the Defendants ask this Court to do the extraordinary: not only to be the first and only court in the country to hold that none of the statements at issue here are false and misleading ***as a matter of law***, but to do so under a far less demanding pleading standard than the one applied by all the courts across the country that have arrived at the exact opposite conclusion. Plaintiff states that the Defendants do not cite – let alone attempt to distinguish – any of this highly

[14] *Ontario Teachers' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 2019 WL 4674839, at *13-15 (D. Conn. Sept. 25, 2019); *In re Allergan Generic Drug Pricing Sec. Litig.*, 2019 WL 3562134, at *6-12 (D.N.J. Aug. 6, 2019); *Utesch v. Lannett Co., Inc.*, 385 F. Supp. 3d 408, 418-21 (E.D. Pa. 2019); *Evanston Police Pension Fund v. McKesson Corp.*, 411 F. Supp. 3d 580, 598-99 (N.D. Cal. 2019); *Roofer's Pension Fund v. Papa*, 2018 WL 3601229, at *10-12 (D.N.J. July 27, 2018); *In re Mylan N.V. Sec. Litig.*, 2018 WL 1595985, at *6-8, 10, 16 (S.D.N.Y. Mar. 28, 2018); *Fleming v. Impax Labs. Inc.*, 2018 WL 4616291, at *2-3 (N.D. Cal. Sept. 7, 2018) (holding complaint adequately alleged issuer's anticompetitive conduct and that its statements characterizing the generics market as "competitive" were actionable, but dismissing for failure to plead scienter and loss causation, which are irrelevant here); *Speakes v. Taro Pharm. Indus., Ltd.*, 2018 WL 4572987, at *4-6 (S.D.N.Y. Sept. 24, 2018). The plaintiffs in *Impax* amended their complaint and the Court dismissed the price-fixing claims on the grounds of loss causation, and otherwise left its prior opinion finding that plaintiffs adequately pled the falsity of plaintiff's price-fixing statements and omissions intact. *See N.Y. Hotel Trades Council & Hotel Ass'n of N.Y. City, Inc. Pension Fund v. Impax Labs. Inc.*, 2019 WL 3779262, at *2 (N.D. Cal. Aug. 12, 2019).

relevant and persuasive authority, including those cases decided within the Third Circuit (the *Allergan*, *Papa* and *Lannett* opinions), or defended by the very same team of attorneys that represent Amneal in this action (*Impax*). In any event, Plaintiff argues that there is no reason for this Court to come to a different conclusion here.

1. Has Plaintiff Failed To Assert A Securities Claim Based On Allegations That Amneal Fixed Prices?

a. Defendants' Arguments

Defendants argue that the Plaintiff has failed to plead material falsity as to ***any of the challenged statements*** because it has not alleged specific facts sufficient to establish that Amneal was engaged in price-fixing. "[W]hen a complaint claims that statements were rendered false or misleading through the nondisclosure of illegal activity, the facts of those underlying illegal acts must also be pleaded with particularity." *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 457 (2d Cir. 2019) (affirming dismissal of securities class action alleging nondisclosure of illegal antitrust conspiracy). Defendants postulate that where, as here, "each of plaintiff['s] nondisclosure claims are entirely dependent upon the predicate allegation that [Amneal] participated in an anticompetitive scheme . . . . the securities law claims premised on the *nondisclosure* of the alleged scheme are fatally flawed" if "the complaint fails to allege facts which would establish such an illegal scheme." *Axis Capital*, 456 F. Supp. 2d at 585, 597 (emphasis in original) (dismissing Section 11 and Section 12 claims because "plaintiffs have failed to allege with sufficient particularity either an underlying anticompetitive scheme . . . or the existence of material misstatements or omissions relating to such an alleged scheme").

As such, Defendants urge that the Plaintiff's allegations, even if taken as true, do not establish price-fixing. Defendants submit that the Plaintiff asserting claims based on illegal price-fixing face a daunting pleading burden: they must allege specific facts, direct or circumstantial, reasonably tending to prove that "[Amneal and its competitors] had a conscious commitment to a common scheme." *In re Baby Food Antitrust Litig*., 166 F.3d 112, 117 (3d Cir. 1999) (*citing Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 764 (1984)). Defendant posits that the Plaintiff must thus allege far "more than merely parallel behavior." *Pelletier v. Endo Int'l PLC*, No. 17-CV-5114, 2020 WL 759410, at *9 (E.D. Pa. Feb. 14, 2020) (citations omitted). Instead, Plaintiff must plead both (1) parallel conduct among the allegedly conspiring defendants (here, Teva and Amneal, *see supra* Section II.D.), and (2) "plus factors," from which the court plausibly

can infer that Amneal entered into a price-fixing *agreement* with Teva. *Id.* The Third Circuit has identified three relevant types of plus factors: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 193 (3d Cir. 2017).[15]

Defendants charge that the Plaintiff alleges only parallel price maintenance by Amneal and Teva in the face of customer pressure to lower the price of one generic drug. Defendants indicate that the Plaintiff offers nothing more than two phone calls and one Facebook Messenger exchange between Amneal and Teva employees. AC ¶¶ 73, 76.[16] Specifically, Defendants assert that the Plaintiff avers that on September 9, 2014, a customer asked Teva to lower the price of Norethindrone Acetate. AC ¶ 73. That same day, according to the State AG Complaint, a Teva employee received calls from two different Amneal employees, and one of the Amneal employees also spoke with a salesman at Glenmark—allegedly the other competitor in the market for Norethindrone Acetate. *Id.* However, Defendants argue that, in their view, importantly, Plaintiff does not plead the names of the employees allegedly involved in any of these calls, nor describe what they allegedly said to each other—but nonetheless summarily asserts that "[a]s a result of Amneal's direct collusion with Teva and Glenmark, Teva did not reduce its generic drugs price

[15] Where plaintiff alleges an oligopolistic market, allegations showing the first two factors, "motive" or "actions against self-interest," become unimportant because they merely reflect the fact that sellers in concentrated markets make decisions that take into account the anticipated reaction of their competitors. *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 191 (E.D. Pa. 2016).

[16] Defendant also asserts that the Plaintiff does not even attempt to plead its own allegations of price-fixing. Rather, it parrots allegations from the State AG Complaint as if they are facts, when in reality the State AG Complaint has not even advanced beyond the pleading stage and is still subject to multiple pending motions to dismiss. *Compare* AC ¶¶ 71-77, 81 *with Connecticut et al. v. Teva Pharmaceuticals USA, Inc.*, No. 2:19-cv-02407-CMR, ECF Nos. 108, 128, 130 (E.D. Pa.). According to the Defendant, these nonspecific and unproven allegations are not entitled to deference. *See, e.g., In re Universal Health Servs., Inc. Deriv. Litig.*, No. CV 17-2187, 2019 WL 3886838, at *36 (E.D. Pa. Aug. 19, 2019) ("Indeed, the allegations raised in the [separate] lawsuits cited here are just that—allegations . . . . Therefore, it is not appropriate for the court to give weight to the allegations in [the present case]."). Also, Defendant avers that when allegations lifted from someone else's complaint are also insufficient to plead the existence of facts necessary to sustain claims of misrepresentation and omission. *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009), *aff'd*, 387 F. App'x 72 (2d Cir. 2010); *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 317 (4th Cir. 2004) ("Although the filing of a[] . . . complaint against [a defendant] is indisputable, the facts alleged therein are not."). Defendant contends that this applies with equal force to complaints purportedly blessed by regulators. *Gaer*, 2011 WL 7277447, at *10 (giving no weight to allegations in a qui tam complaint or the fact of government intervention in that lawsuit).

for the customer." AC ¶ 74.[17] Defendants also claim that Plaintiff also claims that on May 29, 2015, an Amneal employee informed a Teva employee via Facebook message that "Amneal will 'let go' of one customer of a particular drug, as long as Amneal is able to retain another large customer for that drug," *Id.* ¶ 76. However, the Defendants complain that Plaintiff neither quotes *any* actual message nor describes *any* action actually taken in response to the alleged message—and certainly alleges no facts establishing any *agreement entered into* as a result of this supposed exchange.

As such, Defendants argue that the Plaintiff's allegations are not sufficient to establish either parallel conduct or the requisite "plus factors"— *both* of which are necessary to plead price-fixing. *First*, Defendants submit that the Plaintiff has not alleged *any* pricing action at all by Amneal—let alone, parallel action with a competitor. *In re Baby Food Antitrust Litig.*, 166 F.3d at 122 (parallel price-fixing requires that "two or more competitors in such a market act separately but in parallel fashion in their pricing decisions").

Second, Defendants state that it is black-letter law that an allegation of parallel pricing strategy by competitors—a form of "conscious parallelism"—"cannot by itself 'create a reasonable inference of conspiracy'" because "[p]arallel conduct is 'just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" *Valspar Corp. v. E.I. Du Pont De Nemours*, 152 F. Supp. 3d 234, 240 (D. Del. 2016), *aff'd*, 873 F.3d 185 (3d Cir. 2017); *see also Gamm*, 944 F.3d at 465 (dismissing securities class action for failure to plead price-fixing scheme without "indicia of mutuality or otherwise interdependent action"). In *Gamm*, the Second Circuit held that plaintiff failed to plead price-fixing despite allegations that the defendant "planned the antitrust conspiracy with its competitors during industry meetings and conferences" and "collud[ed] to . . . manipulate" an industry pricing index, which was subsequently exposed in newspaper articles. *Id.* at 459-61. In the Defendants' view, the allegations here are far weaker than those deemed insufficient in *Gamm*: the AC (in a cursory paraphrasing of the State AG Complaint) describes nothing more than one interaction between a customer and Teva, and two phone calls between Amneal and Teva employees—without providing any details concerning the phone calls, any parallel (much less illegal) conduct by Amneal and

[17] Confusingly, and at the same time, Plaintiff alleges that Teva offered its customer a "nominal reduction" in price. *Id.* ¶ 74.

Teva, or any factual basis establishing the necessary "plus factors," which might form the basis for an inference of collusive behavior. AC ¶¶ 73-74.

Defendants also note that a Pennsylvania federal court recently analyzed a securities claim based on what the Defendants describe as much stronger allegations of price-fixing against another generic pharmaceutical company—and concluded that they were insufficient to state a claim. In *Pelletier v. Endo International PLC*, the plaintiff alleged "that Defendant Endo was aware of the prices charged by its competitors, and priced its drugs exactly similar as other competitors, and thus a jury can make an inference from these facts that Endo was participating in a price fixing conspiracy." *Endo,* 2020 WL 759410 at *9. However, Defendants state that the court rejected these allegations as "merely [suggesting] . . . parallel pricing"—without "allegations to establish the 'plus factors' as required." *Id.* at *9-10.

The Defendants advocate that the same result should obtain here, because Plaintiff has failed to plead "traditional conspiracy evidence" such as "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan." *Id.* at *10. An email or phone call is not enough. *Valspar*, 873 F.3d at 200 (emails between competitors "may raise some suspicion insofar as they indicate that something anticompetitive is afoot. But . . . oligopolistic conscious parallelism is *by nature* anticompetitive *and also* legal" (emphasis in original)). Thus, Defendants conclude that as all of Plaintiff's claims rely on an inference that Amneal engaged in price-fixing, its failure to plead facts establishing the basis for such an inference is fatal to those claims.[18]

[18] In *Endo,* the court held that even if Plaintiff could plead facts establishing Amneal's participation in a price-fixing conspiracy, in its view, the AC still must be dismissed because the law does not affirmatively require Defendants to accuse themselves of "uncharged [and] unadjudicated wrongdoing." *Endo,* 2020 WL 759410, at *10 ("Plaintiffs do not articulate any legal theory, or cite any Supreme Court or precedential Third Circuit case that would warrant a failure to disclose participation in a price fixing conspiracy as part of a securities fraud."). Securities claims based on such theories are routinely dismissed. *See, e.g., Galati v. Commerce Bancorp, Inc.*, 220 F. App'x 97, 101-02 (3d Cir. 2007) (affirming dismissal of claims based on failure to disclose illegal bid-rigging and rejecting plaintiffs' argument that defendants "had a duty to tell the whole truth about the unsustainable and illegal manner in which" they achieved the growth described in SEC filings); *Axis Capital*, 456 F. Supp. 2d at 589.

Nor were Defendants "required to disclose Amneal LLC's role in the alleged antitrust conspiracy and ongoing investigations pursuant to Item 303" of SEC Regulation S-K. AC ¶ 65. Item 303 does not "create an independent cause of action for private plaintiffs," and "a violation of [Item 303] does not automatically give rise to a material omission." *Oran v. Stafford,* 226 F.3d 275, 288 (3d Cir. 2000); *see also Das v. Rio Tinto PLC,* 332 F. Supp. 3d 786, 803, 810-11 (S.D.N.Y. 2018)(dismissing Item 303 claim where "[d]efendants had no reason to believe that an unlawful act occurred or would be identified by a regulator, or that any regulatory penalty was reasonably likely to impact Rio Tinto's finances or operations," because

b) Plaintiff's Counter Position

Plaintiff counters that every court to consider this argument – evaluating allegations that mirror those here and are likewise drawn from the AG Complaint – has rejected it, even after applying the PSLRA's far more demanding pleading standards. *See, e.g.*, *Allergan.*, 2019 WL 3562134, at *6 (finding, under the heightened pleading standard of the PSLRA, that plaintiffs alleged direct, circumstantial and indirect indicia of a price fixing conspiracy); *Lannett*, 385 F. Supp. 3d at 419-20 (finding that "the Complaint adequately pleads anti-competitive pricing in the generic drug markets at issue here," which is sufficient to establish the existence of an illegal price-fixing conspiracy); *Mylan*, 2018 WL 1595985, at *16; *see also Papa*, 2018 WL 3601229, at *11 ("The Court finds there are sufficient allegations to demonstrate underlying [anti-competitive] misconduct, even when viewed through the PSLRA's heightened standard, and that dismissal is inappropriate at this juncture."). *A fortiori*, the Complaint easily alleges that Amneal engaged in anti-competitive conduct under New Jersey's permissive notice pleading standard.

c) Court's Finding

The Court finds that even under heightened pleading standards, the Complaint would be required to do no more than allege "plausible grounds to infer an [anticompetitive] agreement." *Mylan*, 2018 WL 1595985, at *16. This "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*. (internal quotations omitted).

Other Courts have had little difficulty concluding that allegations, like those here, detailing direct communications between company executives indicating an agreement to allocate the market for, or fix the price of, a particular drug (¶¶71-75) adequately plead "underlying misconduct," such that a failure to disclose that misconduct is misleading under the federal securities laws. *See, e.g.*, *Allergan*, 2019 WL 3562134, at *6; *Mylan*, 2018 WL 1595985, at *16. In *Allergan*, for instance, the court held that the complaint alleged "direct evidence" of underlying price-fixing for purposes of a securities fraud claim where, citing the AG Complaint, it detail[ed] specific communications between executives from Allergan and other drug companies . . . concerning their agreement to fix the prices of two additional generic drugs, as well as text messages and emails confirming these agreements." 2019 WL 3562134, at *6. These

"Item 303 requires the registrant only to disclose those trends, events, or uncertainties that it *actually knows* of when it files the relevant report with the SEC" (emphasis in original; citation omitted)).

communications included suspiciously-timed phone calls with co-conspirators, *e.g.*, contemporaneous with pricing increases, like those alleged here. *Id*. at *4.

Likewise, in *Mylan*, the court held that the complaint "plausibly ple[d] the existence of a market allocation arrangement" where, relying on a similar complaint filed by the state Attorneys General, it "cite[d] two internal Heritage communications and one email to Mylan which confirm Mylan's participation" in that arrangement. *Mylan*, 2018 WL 1595985, at *16. Just as here, these communications included, "a commitment by Mylan to walk away from at least one large national wholesaler and one large pharmacy chain to allow Heritage to obtain the business," and phone records demonstrating that "in November 2013, Heritage executives contacted Mylan directly to address" a dispute concerning the market allocation arrangement. *Id.*; *see also Lannett,* 385 F. Supp. 3d at 414 (complaint adequately alleged undisclosed price-fixing where it cited a related AG Complaint's allegations describing "external phone calls with competitors and internal communications discussing whether and how to collude"); *In re Sotheby's Holdings, Inc.*, 2000 WL 1234601, at *2 (S.D.N.Y. Aug. 31, 2000) ("The complaint describes further evidence of collusion in the form of shared preferred customer lists that identified clients that were spared from paying the new fees.").[19]

As in *Mylan*, *Allergan* (and the other cases cited above), the Complaint here includes specific allegations detailing communications between Legacy Amneal and its co-conspirators that provide, at a minimum, "plausible grounds to infer" market allocation and price fixing agreements. For example, the Complaint describes a May 29, 2015 Facebook message in which senior Legacy Amneal and Teva executives appears to ***explicitly*** agree to allocate customers, just as in *Mylan*.

[19] Notably, allegations providing ***direct*** evidence of an anti-competitive agreement by detailing communications between co-conspirators – like those here – are unusually strong. Courts routinely sustain federal securities claims arising from an undisclosed price-fixing agreement, even under "heightened" pleading standards, where the complaint alleges only ***indirect*** evidence of such an agreement. *See, e.g.*, *Teva*, 2019 WL 4674839, at *14 (underlying misconduct adequately alleged despite the fact that "plaintiffs do not allege direct evidence of a price-fixing conspiracy," where the "complaint alleged that various officials from the defendant company . . . attended trade association meetings and, shortly thereafter, the prices of their drugs increased, and the prices of their competitors' drugs similarly increased after that."); *Impax*, 2018 WL 4616291, at *3 (underlying misconduct adequately pled where complaint alleged that "the severity and abruptness of [price] increases [taken in lock-step with supposed competitors] render implausible any non-collusive explanation for the price hikes"); *Papa*, 2018 WL 3601229 (underlying misconduct adequately alleged based on indirect evidence of anticompetitive agreement, including motive, and nature and timing of price increases); *Taro, Ltd.*, 2018 WL 4572987, at *4 (price-fixing alleged based on "parallel price movements for the drugs at issue over a short period of time, combined with certain factors that tend to indicate price-fixing").

¶76. In that exchange, the Legacy Amneal executive agrees to "let go" of one customer for a particular drug in exchange for being permitted to retain another large customer.[20] Likewise, as in *Mylan*, *Allergan*, and *Lannett*, the Complaint cites internal Teva communications, including phone and email records, evidencing Legacy Amneal's participation in an agreement to fix the price of an important endometriosis drug. Among other things, the Complaint describes an internal email in which a senior Teva executive stated that in late 2014, Teva "bid high" at a customer for the endometriosis drug (an obviously irrational move in a competitive market) because it understood that the customer "would be an increase candidate for Amneal" and, in coordination with Teva's high bid, Amneal "increased shortly thereafter." ¶74.[21]

Defendants fail to adequately address and account for authority holding that the ***same*** allegations from the ***same or similar*** complaints filed by the state Attorneys General concerning the ***same*** price fixing conspiracy adequately allege an underlying anticompetitive agreement for purposes of pleading securities claims, even under the PSLRA's heightened pleading standards, which all parties agree do not apply here. Instead, Defendants rely on essentially a single case, *Pelletier v. Endo International PLC*, 2020 WL 759410 --- F. Supp. 3d --- (E.D. Pa. Feb. 14, 2020). In fact, *Endo* adds to the lists of courts that support a finding that this Court should sustain the Complaint. Even applying the PSLRA's heightened pleading standard, the *Endo* court ***sustained*** securities ***fraud*** claims under Section 10(b) of the Exchange Act against the drug company, holding that the complaint adequately alleged that statements virtually identical to those challenged here were actionable. *Id*. at 11.

To plead an anticompetitive agreement, a plaintiff may allege "***either*** direct evidence of an agreement" – *i.e.*, direct communications between coconspirators, as the Complaint here does – "***or*** circumstantial evidence," which consists of "parallel price increases" coupled with so-called "plus-factors," such as motive and opportunity to collude. *Allergan*, 2019 WL 3562134, at *6;

[20] In an effort to downplay this obviously damning communication, Defendants assert that the Complaint "alleges no facts establishing any *agreement entered into* as a result of this supposed exchange." But the Complaint need not allege every detail of the final agreement reached between the parties to state a claim. Indeed, even under heightened pleading standards, it need only allege "plausible grounds to infer" an anticompetitive agreement, *Mylan*, 2018 WL 1595985, at *16, which it plainly does.

[21] Defendants also attempt to downplay these allegations as "nothing more than one interaction between a customer and Teva, and two phone calls between Amneal and Teva employees." But they ignore the Complaint's allegations describing this internal email, in which the senior Teva executive admissions makes clear the two companies agreed to keep the price of the endometriosis high, enabling Teva's bid and Amneal's subsequent price increase. ¶¶71-74.

Papa, 2018 WL 3601229, at *11. In *Endo*, unlike the claims in this case, the plaintiffs could not allege direct evidence of an anticompetitive agreement and instead, had to rely on circumstantial evidence. 2020 WL 759410, at *9-10. That circumstantial evidence was particularly thin since, ***unlike*** Amneal, Endo was not named in the AG Complaint as a participant in the scheme alleged in this case. *Id*. Citing *Lannett*, the *Endo* court held that the complaint adequately alleged the existence of a price fixing conspiracy among generic drug markers, even if the circumstantial evidence cited in the complaint was insufficient under heightened pleading standards to allege that Endo had participated in it. *Id*. at *11. Accordingly, the court concluded, "Plaintiffs may pursue Defendants' knowledge of price fixing in the generic industry, among Endo's competitors, as part of its overall securities fraud claim, but not as part of a separate claim premised on a failure to disclose its own alleged price-fixing." *Id*. The court then held that statements in which Endo "purported to inform investors about the competitive environment" in which it sold its drugs, like those challenged here, were actionable. *Id*.; *see also McKesson*, 411 F. Supp. 3d at 598-99 (existence of anticompetitive scheme rendered issuer's statements that market for generic drugs was "highly competitive" false, even though it did not participate in scheme).

Defendants also argue that allegations of "parallel pricing" are inadequate to allege an anticompetitive agreement without allegations showing some "plus factors" are met. MTD at pp. 13-14. However, the Complaint here alleges the existence of an anticompetitive agreement through ***direct*** evidence; it does not rely on, and need to allege, circumstantial evidence consisting of parallel pricing coupled with the so-called "plus factors." *See, e.g.*, *Allergan*, 2019 WL 3562134, at *6 ("'[A] plaintiff must plead ***either*** direct evidence of an agreement ***or*** circumstantial evidence." (quoting *Burtch v. Milberg Factors, Inc.*, 62 F.3d 212, 225 (3d Cir. 2011)). Again, even the cases on which Defendants rely make clear that alleging direct evidence of an anticompetitive agreement obviates the need to do so indirectly through parallel pricing. *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 465 (2d Cir. 2019) ("An agreement can be alleged through direct evidence; however, in most antitrust cases this type of 'smoking gun' can be hard to come by, especially at the pleading stage. ***As an alternative***, a complaint may present circumstantial facts,"

including "conscious parallelism."). In the cases cited by the Defendants, the plaintiffs did not allege direct evidence of an anticompetitive agreement.[22]

Finally, Defendants assert that the AG Complaint's allegations in the Complaint here "are not entitled to deference" because that case has not been decided on the merits. MTD at p. 14 n. 7. This argument has been rejected by courts in the Third Circuit and elsewhere, who have pointed out that it is supported by "[n]either . . . precedent nor logic," since, among other things, Plaintiff could plainly rely on those same allegations for pleading purposes if they appeared in a "news clipping or public testimony." *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 768 n. 24 (S.D.N.Y. 2012) (refusing to discount "allegations put forth in other litigants' complaints").[23] As discussed above, *Allergan*, *Mylan*, *Lannett*, *Impax,* and others all specifically credited allegations based on the AG Complaint and related AG complaints for purposes of a motion to dismiss. *Supra*, at 15, 17-18; *see also Chamberlain v. Reddy Ice Holdings, Inc.*, 757 F. Supp. 2d 683, 703 (E.D. Mich. 2010) (crediting allegations of anticompetitive conduct

[22] Accordingly, Defendants assertion "[t]he allegations here are far weaker than those deemed insufficient in *Gamm*" is not facially true. MTD at p. 16. The Complaint here cites direct evidence of communications the *Gamm* court characterized as a "smoking gun," while the plaintiffs in that case (which, again, was subject to the PSLRA's heightened pleading standards), were forced to rely on circumstantial evidence, alleged conclusorily that the issuer had "opportunities to conspire." If anything, *Gamm* simply underscores the strength of the Complaint's allegations here.

[23] *See also, e.g., Lord Abbett Affiliated Fund, Inc. v. Navient Corp.*, 363 F. Supp. 3d 476, 493–94 (D. Del. 2019) (refusing to "discount" the "government allegations incorporated into the Complaint"); *In re OSG Sec. Litig.*, 12 F. Supp. 3d 619, 622 (S.D.N.Y. 2014) (allowing plaintiff to amend pleadings with allegations from another lawsuit); *Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, GmBH*, 2010 WL 5239238, at *11 (D.N.J. Dec. 16, 2010) (denying motion to strike allegations based on prior antitrust complaint against same defendants); *Gray v. Bayer Corp.*, 2010 WL 1375329, at *3 (D.N.J. Mar. 31, 2010) (denying motion to strike allegations based on FTC complaint); *see also Estate of Roman v. City of Newark*, 914 F.3d 789, 796 (3d Cir 2019.) (considering consent decree at motion to dismiss stage and favorably citing *OSG*).

citing whistleblower complaint for purposes of motion to dismiss securities fraud complaint).[24]

For the reasons set forth above, the Court finds that Plaintiff has adequately alleged a "securities claim" based upon allegations that Amneal fixed prices. The Court's holding applies even if the Court analyzes the Plaintiff's pleadings on the heightened pleading standard.

2. Has Plaintiff Failed To Assert A Securities Claim Based On Amneal's Statements Regarding Industry Competition?

Defendants also argue that the Plaintiff's failure to plead facts showing price fixing by Amneal is fatal to *all* of its claims. *See supra* Section IV.B.1. In addition, Plaintiff's challenges to certain statements made by Plaintiff regarding "competition" in the generic drug industry, *see, e.g.*, AC ¶¶ 60, 61, fail because the statements were non-actionable (immaterial as a matter of law) puffery, or opinion statements not adequately alleged to have been false when made.

First, the Defendants contend that more than half of the challenged statements are nonactionable puffery. "Vague and general statements of optimism . . . are not actionable . . . because they constitute no more than 'puffery' and are understood by reasonable investors as such." *In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1427-28, n.14 (3d Cir. 1997) (citation omitted). According to the Defendants, Courts routinely find such statements non-actionable because they are "too general to cause a reasonable investor to rely upon them." *Bldg. Trades United Pension Tr. Fund v. Kenexa Corp*., No. CIV.A. 09-2642, 2010 WL 3749459, at *11 (E.D. Pa. Sept. 27, 2010); *see also Burlington Coat Factory*, 114 F.3d at 1427. Defendants allege that at least five of the challenged statements are immaterial puffery—and therefore non-actionable—as a matter of law:

[24] Defendants' reliance on *Gaer v. Education Management Corp.* 2011 WL 7277447, at *10 n. 12 (W.D. Pa. Aug. 30, 2011), is misplaced. In *Gaer*, the court simply refused to take judicial notice of complaints whose allegations were *never included* in the plaintiff's complaint. *Id.* Defendants also rely on *RSM Production Corp. v. Fridman*, 643 F. Supp. 2d 382, 403-04 (S.D.N.Y 2009). But that case struck allegations based on *dismissed or discontinued* complaints, and, more significantly, *numerous* cases have pointed out, that it misread Second Circuit law. *See, e.g.*, *Navient*, 363 F. Supp. 3d at 493–94; *Bear Stearns*, 851 F. Supp. 2d at 768 n. 24.

It is also worth noting that Defendants' claim that the AG Complaint action "has not even advanced beyond the pleading stage" (MTD at p. 14 n.7) is false. That case is in the middle of active fact discovery, and neither Amneal nor the majority of the other alleged co-conspirators have filed a motion to dismiss the AG Complaint (or indicated that they would file such a motion) nearly one year after the filing of the AG Complaint.

- Amneal "face[s] intense competition in the pharmaceutical industry from both brand and generic drug product companies." App'x A, Statement 1; *see Axis Capital*, 456 F. Supp. 2d at 589 (statement of "competitive strengths" is puffery).
- The pharmaceutical industry is "highly competitive." App'x A, Statement 2; *see Axis Capital*, 456 F. Supp. 2d at 589 (statement regarding a "highly competitive" industry is puffery).
- Two competitive factors in the generic pharmaceutical market are the "introduction of other generic drug manufacturers' products in direct competition with [Amneal's] generic drug products" and "pricing pressures by competitors and customers." App'x A, Statements 3 and 4. These are benign statements that describe obvious competitive factors in any industry. *See Burlington Coat Factory*, 114 F.3d at 1427, 1428 n.15 (recognizing situations where statements are so unenthusiastic and general that no reasonable investor would attach relevance to them); *Axis Capital*, 456 F. Supp. 2d at 589.
- One competitive factor in the generic pharmaceutical market is "a company's reputation as a manufacturer and distributor of quality products." App'x A, Statement 5; *see Burlington Coat Factory*, 114 F.3d at 1427-28, n.15; *Howard v. Arconic Inc.*, 395 F. Supp. 3d 516, 548 (W.D. Pa. 2019) ("The quintessential examples of such inactionable 'puffery' are 'general statements about reputation, integrity, and compliance with ethical norms.").

Second, at least one of the challenged statements is a non-actionable opinion statement:

> We believe our principal competitors in the U.S. generic pharmaceutical market, where we primarily compete, are Teva Pharmaceutical Industries Limited ("Teva"), Sandoz (a division of Novartis AG) ("Sandoz"), Endo International plc (Par) ("Endo"), Mylan Inc. ("Mylan") and Fresenius Medical Care AG & Co. KGAA /Akorn, Inc. These companies, among others, collectively compete with the majority of our products. We also faces [sic] price competition generally as other generic manufacturers enter the market.

App'x A, Statement 6. Defendants argue that under Supreme Court precedent, where an affirmative opinion statement is challenged, the plaintiff must plead and prove both objective and subjective falsity—*i.e.*, that the statement lacks a reasonable basis, *and* that the speaker did not honestly hold the stated opinion. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 186 (2015); *see also City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 170 (3d Cir. 2014) ("Opinions are only actionable under the securities laws if they are not honestly believed and lack a reasonable basis.").

Defendants state that the statements in issue are not objectively false. Defendants posit that the Plaintiff's cursory allegations of "parallel pricing conduct" as to one drug and one competitor are not "remotely sufficient" to render false Defendants' challenged statement, which relates to all of its products and all market participants. Furthermore, the AC contains no factual allegations supporting a claim of subjective falsity, *i.e.*, that the opinion was not sincerely held at the time it

was given.[25] *See City of Edinburgh*, 754 F.3d at 170 (rejecting challenge to defendants' positive interpretation of clinical trials' outcome); *see also Hoey v. Insmed Inc.*, No. CV 16-4323 (FLW), 2018 WL 902266, at *25 (D.N.J. Feb. 15, 2018) (statement that "we believe [defendant] may provide improved efficacy" is non-actionable opinion where plaintiff failed to allege facts supporting a finding of subjective falsity).

Thus, for these reasons as well, Defendants submit that the Plaintiff AC falls far short of satisfying *Omnicare's* stringent standard. This challenged statement is a non-actionable opinion statement, and Plaintiff's claim based on it must be dismissed.

Plaintiff counters that the Registration Statement stated that the generic drug market in which Legacy Amneal participated was "***highly competitive***"; that Legacy Amneal "face[d] ***intense competition*** from both brand and generic drug products"; and that "***pricing pressures by competitors and customers***" were among the "principal competitive factors" driving Legacy Amneal's financial performance. ¶¶60-63. The Registration Statement even specifically stated that Teva, Legacy Amneal's alleged co-conspirator, among other generic drug companies, "***collectively compete[d]*** with the majority of our products." ¶61. These statements were materially misleading. Contrary to the Registration Statement, the Complaint alleges that neither the generic drug market nor Legacy Amneal's participation in it was characterized by legitimate competition. Plaintiff postulates that in truth, and unknown to investors, Legacy Amneal had engaged in a host of anticompetitive conduct, including entering into market allocation and price fixing agreements with its purported "competitors," thereby exposing the Company to significant adverse legal, regulatory, and reputational fallout.

Again, Plaintiffs argue that ***every*** court to decide the issue has held that ***identical*** statements characterizing the generic drug market as "competitive," made by Amneal's co-conspirators in the ***same*** widespread price fixing scheme, were materially misleading. *See, e.g.*, *Allergan*, 2019 WL 3562134, at *8-10 (holding generic drug maker's statements that "[t]he pharmaceutical industry is highly competitive" and that "we face competition from brand name companies in the generic market," among others, fell "outside the bounds of mere puffery and are actionable"); *Teva,* 2019 WL 4674839, at *3, 15 ("[T]he plaintiffs allege generally that the defendants consistently

[25] Indeed, Plaintiff expressly disclaims any allegations of fraud, *see* discussion *supra* Section III.B, and is therefore estopped from making such a claim. *See Omnicare,* 575 U.S. at 186 ("[T]he Funds do not contest that Omnicare's opinion was honestly held. . . . [because] their complaint explicitly 'exclude[s] and disclaim[s]' any allegation sounding in fraud or deception[.]")

misrepresented that the generics market was highly competitive when, in fact, the defendants and its competitors were engaged in a collusive agreement to raise prices . . . . Courts in this Circuit have determined that similar allegations were sufficient to survive a motion to dismiss, even under the heightened Rule 9(b) and PSLRA standards."); *McKesson*, 411 F. Supp. 3d 580, 599 ("Claiming the generic drug market is competitive would be misleading if there was in fact widespread price fixing."); *Papa*, 2018 WL 3601229, at *12 (holding that generic drug maker's "statements regarding competitiveness in the generic market and pricing pressures are likewise actionable," and rejecting argument that they were inactionable "puffery"); *Taro*, 2018 WL 4572987, at *6 ("To the extent that Taro engaged in a price-fixing conspiracy with their competitors, statements that the industry was, for example, 'intensely competitive,' are misleading in the absence of a disclosure of that anticompetitive conduct." (internal quotations omitted)). Indeed, in *Lannett*, the court held the complaint adequately alleged "statements that 'the generic pharmaceutical industry is highly competitive" and that 'we face strong competition in our generic product business'" were "plausibly false" because "the Complaint pleads that the opposite of these statements were true: that the generic pharmaceutical industry was riddled with anticompetitive conduct and that Lannett did not face strong competition because prices for the drugs that it sold were illegally inflated by industry competitors' collusive behavior." 385 F. Supp. 3d at 418–20.

Likewise, in *Mylan*, the court held that the generic drug manufacturer's statements that "[t]he U.S. pharmaceutical industry is very competitive," purporting to list the "primary means of competition," and that its "[p]rimary competitors include the major manufacturers of brand name and generic pharmaceuticals" among others, were misleading because they fail to disclose Mylan's participation in the same anticompetitive scheme alleged in the Complaint here. 2018 WL 1595985, at *2, 7. The *Mylan* court reasoned, "If, as Plaintiffs allege, Mylan was engaged in a variety of anticompetitive practices – often in collusion with Mylan's competitors – then these statements are misleading in the absence of a disclosure of that anticompetitive conduct." *Id.* At *7; *see also Reddy Ice*, 757 F. Supp. 2d at 693, 703 (statements identifying "highly competitive market as one of the main business challenges faced by" issuer were misleading where they failed to disclose anticompetitive scheme); *Sotheby's*, 2000 WL 1234601, at *4 (statements that company faced "intense competition" with a "primary . . . competitor" and described the importance of price to consumers were misleading because a "price-fixing agreement between [the company and its competitor] had eliminated price competition").

1. Regarding Whether the Challenged Statements Are Material

With regards to the claim that the clanged statements are not material, again the Plaintiff asserts that the "unanimous authority" has found the ***exact*** statements challenged here misleading and urge this Court to be the first in the country to hold that they are "immaterial puffery" as a matter of law. MTD at pp. 17-18; Appendix A, Statements 1-5. Notably, the Defendants have not effectively distinguished *Allergan*, *Teva*, *Mylan*, *Papa*, *Lannett*, *Taro*, *Impax*, or any of the other cases cited above rejecting the same arguments concerning material falsity that Defendants make here. The Defendants have also not adequately addressed the proposition that "[c]ourts considering motions to dismiss have often observed that materiality is a fact-specific issue, better resolved by the fact finder." *De Vito*, 2018 WL 6891832, at *28. Instead, Defendants rely on a handful of cases that are either inapposite or that affirmatively undercut their argument.

Even in the *Endo* case cited by the Defendants, the court ***rejected*** arguments that the drug maker's statements "purport[ing] to inform investors about the competitive environment" in which it sold its drugs were immaterial puffery, and instead held they were actionable. 2020 WL 759410, at *11. Likewise, and contrary to Defendants' assertions, *In re Axis Capital Holdings Ltd. Securities Litigation*, 456 F. Supp. 2d 576, 585-586, 589 (S.D.N.Y. 2006) did ***not*** hold that statements describing an industry as "highly competitive" were puffery or immaterial as a matter of law (indeed, it explicitly acknowledged *Sotheby*'s contrary holding). The *Axis Capital* court held that the complaint failed to allege that the defendant company's "steering practices" violated antitrust law under the PSLRA's heightened pleading standard. *Id.*

Based upon the above, the Court finds that Plaintiff has adequately pled that the challenged statements are material.

2. Regarding Whether the Challenged Statements Are Inactionable Opinions

Defendants also argue that one of the representations in the Registration Statement is an inactionable statement of opinion. *First*, the statement that "[t]hese [enumerated] companies, among others, collectively compete with the majority of our products" and that "[w]e also faces [sic] price competition generally as other generic manufacturers enter the market" (¶61) can be fairly construed as ***not*** an opinion statement. In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the Supreme Court held that an opinion references the speaker's subjective mental state and expresses uncertainty using qualifying language such as "I

believe" or "I think." 575 U.S. 175,182-83 (2015). The challenged statements, on the other hand, appear to be, and can be construed to be factual assertions that do not reference the speaker's subjective attitude and admit of no uncertainty. While the Registration Statement does use qualifying language in the separate statement that "[w]e believe our principal competitors in the U.S. generic pharmaceutical market, where we primarily compete, are Teva Pharmaceutical Industries Limited ("Teva") . . . .", it can be fairly said that this statement is ***not*** expressing an opinion about ***whether*** Amneal competes with these companies (the assertion the Complaint alleges is false) – such a reading would be inconsistent with the very next sentence – but whether the enumerated list identifies all of Amneal's "principal" competitors.

Second, the Court finds that even if that single statement was an opinion, it is actionable under *Omnicare*. Defendants misstate *Omnicare*'s holding. *Omnicare* did ***not*** hold – and in fact ***explicitly rejected*** the proposition – that a plaintiff must allege a speaker subjectively disbelieved an opinion statement to allege falsity. 575 U.S. at 188-89, 192-93. Instead, the Court held that an opinion statement is actionable, ***even if honestly held***, when, as alleged here, it does not "fairly align[] with the information in [the defendant's] possession" or when the defendant "lacked the basis for making those statements that a reasonable investor would expect." 575 U.S. at 188-89, 195-96. Here, there can be no question that the Registration Statement's representation that Teva and other generic drug companies were among Amneal's "principal competitors" may not "fairly align[ed]" with the information in Amneal's possession, including emails, texts, and other communications in which Amneal and these companies had explicitly agreed ***not*** to compete with each other.

3. Are the Registration Statement's Misleadingly Incomplete Descriptions of Amneal's Antitrust Risk Actionable?

Amneal's Registration Statement also included SEC-mandated "risk disclosures" purporting to disclose the Company's antitrust risks. Plaintiff alleges that these incomplete risk disclosures misleadingly stated that DOJ had subpoenaed ***other*** generic drug companies, "including Impax," in connection with their pricing practices, but failed to disclose that Legacy Amneal had actively participated in the alleged antitrust conspiracy that was currently under investigation. ¶63. Thus, Plaintiff posits that the Registration Statement provided investors with a misleadingly incomplete, and unduly sanguine, picture of Amneal's antitrust liability due to Legacy Amneal's direct role in that conspiracy. In response, Defendants broadly argue, without

legal support, that these statements, an the purportedly omitted information, were not materially false because the Company "is not obligated to accuse itself of participating in a price-fixing conspiracy." MTD at p. 17, n.9, Appendix A, Statements 7-8.

As a general proposition, "Once a company has chosen to speak on an issue – even an issue it had no independent obligation to address – it cannot omit material facts related to that issue so as to make its disclosure misleading." *De Vito*, 2018 WL 6891832, at *29. Having chosen to make statements purporting to describe the Company's antitrust risk, it is plausibly alleged that Amneal could not omit Legacy Amneal's own significant exposure, including the pendency of an ongoing investigation.

Courts routinely hold that such misleadingly incomplete risk disclosures – including statements understating the issuer's legal, regulatory, or reputational exposure – are actionable. *See, e.g., Mylan*, 2018 WL 1595985, at *10 (risk disclosures stating only that government "could" view its conduct as anticompetitive and "could" open an investigation gave a misleadingly incomplete picture of issuer's antitrust liability where investigation was already ongoing); *Dodona I, LLC v. Goldman, Sachs & Co.,* 847 F. Supp. 2d 624, 647-48 (S.D.N.Y. 2012) (general warnings of the risks associated with investing in mortgage-backed securities, including the possibility of market downturns, were misleading where they failed to disclose "singularly prohibitive risks associated with the" specific investment at issue, and noting that "an incomplete or misleading disclosure may be just as damaging as total concealment"); *Panther Partners, Inc. v. Ikanos Commc'ns, Inc.,* 538 F. Supp. 2d 662, 669 (S.D.N.Y.2008) ("[R]isk disclosures must accurately characterize the scope and specificity of the risk, as understood at the time the statements are made."); *In re Van der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 400 (S.D.N.Y. 2005).

In *Van der Moolen*, for instance, the court held that a stock specialist company's risk warnings that the company *could* face adverse regulatory action *if* its traders violated the law were misleading where the company failed to disclose that its traders were, in fact, actually violating NYSE rules by "front-running" trades. 405 F. Supp. 2d at 400. Quoting the Third Circuit's holding in *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 710 (3d Cir. 1996), the *Van der Moolen* court explained, "'to warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.'" 405 F. Supp. 2d at 400

In fact, Plaintiff points out that in securities cases arising out of the same generic drug antitrust scheme alleged in the AG Complaint, courts have specifically held that statements understating or downplaying the issuer's antitrust liability were actionable. *See Lannett*, 385 F. Supp. 3d at 416 (holding actionable generic drug company CEO's statement "[i]n response to a question from an analyst about the effect ongoing investigations into price-fixing would have on Lannett's products… 'None whatsoever. Matter of fact, I think price increases are opportunistic things. You don't know when you're going to have the opportunity and when you do, you take advantage of it'"); *Allergan*, 2019 WL 3562134, at *11 (generic drug company CEO's statements that that "the DOJ investigation really is a red herring" and, in the context of Allergan, was "not that significant" were actionable).

Defendants broadly suggest that the Registration Statement's disclosure of Impax's known antitrust woes absolves them of liability for omitting Legacy Amneal's unknown anticompetitive conduct and the fallout from it. MTD at p. 17 n.9, Appendix A, Statements 7-8. But, as even the cases on which they rely do not support such overly broad proposition. Having chosen to issue statements on the combined company's antitrust exposure, the Registration Statement was required to speak completely and accurately on the subject as to both Impax and Legacy Amneal. *See, e.g.*, *De Vito*, 2018 WL 6891832, at *28-29. In *De Vito*, the court held that the issuer's registration statement was misleading where it failed to disclose a related-party transaction that, in effect, gave a pre-IPO investor a discount on shares acquired in the IPO. *Id*. at *28. The court rejected the defendants' argument that omitting this transaction was immaterial because the registration statement "already disclosed *twenty-one* separate related-party transactions" that were similar. *Id*. (emphasis in original). The court reasoned, "That Liquid disclosed *other* related-party transactions and stock transfers does not absolve it from liability. To the contrary, by speaking on the subject, Liquid took on a duty to ensure that its disclosures were not misleading . . . . it could not misleadingly imply that its disclosures of other related-party transactions were comprehensive and complete." *Id*. at *28-29.[26]

Here, the Court holds that as in *De Vito*, by "speaking on the subject" of Legacy Amneal's (and as a result, Amneal's) antitrust liability, it has been adequately pled that the Registration

[26] Notably, the *De Vito* court also declined the defendants' invitation to hold that the omitted agreement did not materially changed the "total mix" of information already available to investors, holding that "weighing the significance of these omissions is the exact type of fact finding that is inappropriate at the motion to dismiss stage." 2018 WL 6891832, at *28-29

Statement was required to present a complete picture of the Company's exposure, rather than leave investors with the potentially misleading impression that only Impax's already-known legal liability and reputation were implicated in the price fixing scheme. In fact, that Amneal's stock declined significantly on news that its predecessor entity Legacy Amneal was *also* involved in that scheme demonstrates that the Registration Statement provided investors with a materially incomplete picture of the Company's exposure.[27]

4. Has Plaintiff Failed To Assert A Securities Claim Based On Amneal's Statements Regarding Its Historical Revenues?

Defendants also state that the Plaintiff asserts that Amneal's reported revenues for 2013-2017 were "materially false and misleading" because they "were in part the result of anti-competitive conduct." AC ¶¶ 66-67. Yet Defendants complain, however, that the Plaintiff does *not* allege that the actual amount of revenue was misstated. *Id.* Defendants argue that the Plaintiff cannot transform accurate statements into misleading ones by claiming that the Company's revenues were artificially inflated through illegal conduct. *Galati*, 220 F. App'x at 102 ("Factual recitations of past earnings, so long as they are accurate, do not create liability under Section 10(b)."); *In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 401 n.3 (6th Cir. 1997) ("It is clear that a violation of federal securities laws cannot be premised upon a company's disclosure of accurate historical data.").

Defendants argue that such a proposition is true even when the corporation's results were supposedly inflated by its own allegedly wrongful conduct. In *Cognizant*, plaintiffs alleged that statements concerning the defendant corporation's revenue growth were false and misleading because such growth was driven by its participation in an alleged bribery scheme. *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, No. 2:16-CV-06509-WHW-CLW, 2018 WL 3772675, at *3 (D.N.J. Aug. 8, 2018). The court held that none of the challenged statements triggered a duty to disclose

[27] For this reason, Defendants' assertion that they are not required to "accuse themselves of 'uncharged [and] unadjudicated wrongdoing'" MTD at p. 17 n. 9, fundamentally misunderstands the law. Again, once an issuer speaks on a subject, it must speak truthfully and completely. Amneal could not affirmatively claim, for instance, that the market for its product was "highly competitive," while actively engaging in anticompetitive conduct. Nor, contrary to Defendants' claims, did *Galati v. Commerce Bancorp, Inc.*, hold that an issuer is never required to disclose illicit conduct. To the contrary, it held that while statements at issue in that case – statements concerning the Company's "strong performance," and "unique business model"-- were immaterial, more concrete statements "affirmatively characteriz[ing] management practices as 'adequate,' 'conservative,' 'cautious,' and the like" ***can, and have,*** triggered an obligation on the issuer's part to disclose illegal conduct. 220 F. App'x 97, 102 (3d Cir. 2007)

the alleged bribery scheme because they were not related to that scheme; there were no references to licenses, tax benefits, or permits in connection with the revenue disclosures. *Cognizant*, 2018 WL 3772675, at *18, 21 (rejecting notion of a "duty to disclose any improper or illegal businesses that contribute to a company's success" as "inconsistent with Third Circuit precedent" because "factual recitations of past earnings, so long as they are accurate, do not create liability" under the securities laws); *Emples. Ret. Sys. of City of Providence v. Embraer S.A.*, No. 16-cv-6277 (RMB), 2018 WL 1725574, at *7 (S.D.N.Y. Mar. 30, 2018) (rejecting claim that defendant was obligated to disclose that "some unstated portion of its sales or income was derived from contracts related to the FCPA violations" because its "financial statements were (literally) accurate," and thus nonactionable); *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 404 (S.D.N.Y. 2016) ("accurate historical data" not rendered misleading for omitting to disclose that sales growth "was boosted by an illegal marketing and kickback scheme").

However, in *Allergan*, 2019 WL 3562134, at *11 the court rejected defendants' argument that "the complaint falls short of adequately pleading material falsehood or misleading statements in its statements of income" because "Plaintiffs have effectively pleaded anti-competitive conduct with factual assertions about dramatic price increases and a wide range of investigatory efforts and events that plausibly belie Allergan's justifications" and allegations that Allergan's financial results were misleadingly inflated was a "natural corollar[y] to the alleged conduct"); *City of Roseville Emps'. Ret. Sys. v. Horizon Lines, Inc.*, 686 F. Supp. 2d 404, 415-16 (D. Del. 2009) ("'Accurately depicting successful financial performance, but attributing the performance to the wrong source, is misleading under the securities laws.'") (quoting *In re ATI Techs., Inc. Sec. Litig.*, 216 F. Supp. 2d 418, 436 (E.D. Pa. 2002)); *In re Providian Fin. Corp. Sec. Litig.*, 152 F. Supp. 2d 814, 823 (E.D. Pa. 2001) ("[B]ecause of the illegal or fraudulent sales practices, the statements misstated or inflated Providian's financial results."); *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 588-89 (D.N.J. 2001) (financial results misleading when inflated by illegal conduct).

Defendants argue that these statements are not actionable because are all accurate reports of Legacy Amneal's historical revenues. MTD at pp. 20-21. But Plaintiff alleges and posits that Legacy Amneal's "historical financial information was false and misleading because it omitted information concerning the price-fixing conspiracy." *In re Infineon Techs. AG*, 2006 WL 1329887, at *6 (N.D. Cal. May 16, 2006); *Merck*, 2011 WL 3444199, at *9 ("'Some statements, although literally accurate, can become through their context and manner of presentation, devices which

mislead investors.'" (quoting *McMahon*, 900 F.2d at 579). Defendants cite *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, but that case found statements reporting historical financial results misleading. 2018 WL 3772675, at *24 (D.N.J. Aug. 8, 2018). While the court dismissed statements attributing those results to benign factors, it did so because the complaint did not allege "a close connection" between the financial results discussed and "the underlying misconduct," there, a foreign bribery scheme. *Id*. at *22. Here, by contrast, it is alleged that the "close connection" between Amneal's reported revenue and an anticompetitive scheme to inflate the Company's drug prices is more manifest.

At this stage of the proceeding, the Court finds that the Plaintiff has adequately pled a cause of action in the manner that it has alleged a securities claim based upon allegedly false statements on Amneal's statements regarding historical revenues. In the Court's view, the Plaintiff's Complaint should be able to proceed onto discovery on the issue.

5. Does Plaintiff's Complaint adequately allege the Registration Statement included materially misleading omissions?

Plaintiff also alleges that the Registration Statement's failure to disclose Amneal's anticompetitive conduct and the pendency of an ongoing investigation into that conduct also violated Items 303 and 503 of SEC Regulation S-K. ¶¶52-58; 65. Item 303 requires an issuer to include in any registration statement and prospectus "material forward-looking information regarding known material trends and uncertainties" and an "analysis of their effects" on the issuer. The SEC has stated that Item 303 is "intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company . . . with particular emphasis on the registrant's prospects for the future." ¶55 (quoting Management's Discussion and Analysis of Financial Condition and Results of Operation, Securities Act Release No. 6835, 1989 WL 1092885, at *3 (May 18, 1989)). Item 303's disclosure obligations are triggered when there is a risk or uncertainty that is "both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012).

Courts, including the *Newell* court in New Jersey last year, have specifically held that an issuer's failure to disclose potential legal, regulatory, or reputational exposure as the result of known illegal or improper conduct may violate Item 303. *See Newell*, 2019 WL 3764093, at *4

(finding that plaintiff properly pled a Section 303 violation based on the claim that the issuer lacked the capacity to integrate the acquired company and was facing problems with sales at the time of the merger); *see also, e.g.*, *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 95 (2d Cir. 2016) (issuer's failure to disclose illegal kickback scheme violated Item 303 because issuer knew "that it could be implicated in the fraud and required to repay" revenue and that "[e]xposure of the fraud also jeopardized [issuer's] existing or future [business] relationships"); *In re CenturyLink Sales Practices & Sec. Litig.*, 403 F. Supp. 3d 712, 726 (D. Minn. 2019) ("The Complaint adequately alleges that Item 303(a) of Regulation S-K required CenturyLink to disclose that its illegal sales practices were a material driver of its reported revenue."); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 2016 WL 6652731, at *15 (S.D.N.Y. Nov. 10, 2016) ("MetLife omitted to state material facts about the pending state investigations [into improper accounting practices] prior to August 2011, which it had a duty to disclose under SEC Regulation S-K, Item 303, thereby rendering certain of its public statements misleading.").

Here Plaintiff alleges that Legacy Amneal's illicit participation in a widespread generic drug price fixing scheme that led to AG and DOJ investigations into the Company's participation in "an organized, systematic effort to conspire and fix prices and avoid competition" (¶71) plainly created substantial "uncertainties" that were "reasonably likely to have material effects" on Amneal's financial condition. Moreover, in the Court's view, the Complaint adequately alleges that senior Amneal executives helped orchestrate the Company's anticompetitive conduct in communications with senior executives at other generic drug companies, including Teva and Glenmark. ¶¶71-76.

Citing *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000), Defendants claim (in a footnote only) that Item 303 does not "create an independent cause of action for private plaintiffs." MTD 17 n. 9. A closer reading indicates that *Oran* held that "a violation of SK–303's reporting requirements does not ***automatically*** give rise to a material omission ***under Rule 10b–5***," *i.e.*, securities fraud claims under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. 226 F.3d at 288. Plaintiff here brings claims under Sections 11 and 12 of the Securities Ac, ***not*** claims under Section 10(b) of the Exchange Act. There is a plethora of authority for the proposition that a failure to disclose information required by Item 303 gives rise to claims under Sections 11 and 12 of the Securities Act. *See, e.g.*, *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998) ("[A]ny omission of facts 'required to be stated' under Item 303 will produce

liability under Section 11."); *Panther Partners*, 681 F.3d at 120 ("One of the potential bases for liability under §§ 11 and 12(a)(2) is an omission in contravention of an affirmative legal disclosure obligation. In this case, Item 303 of SEC Regulation S–K provides the basis for Ikanos's alleged disclosure obligation."); *Silverstrand Invs. v. AMAG Pharm., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013) ("As Plaintiffs correctly point out, an actionable § 11 omission may arise when a registration statement fails to comply with Item 303 or 503 of SEC Regulation S–K."); *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013) ("Failure to comply with an SEC regulation in the documents accompanying a stock offering can also trigger liability under § 11 of the Securities Act."); *see also J & R Mktg., SEP v. Gen. Motors Corp.*, 549 F.3d 384, 390 (6th Cir. 2008) (under the Securities Act "an offeror is duty-bound to disclose all material information required to be disclosed by statute" and extending this principle to Item 303).[28]

In fact, *Oran* ***itself*** distinguished the Ninth Circuit's holding in *Steckman*, which sustained a private action for violations of Item 303, ***precisely because*** that action asserted claims under Sections 11 and 12 of the Securities Act. 226 F.3d at 288 at n. 9.[29] Accordingly, courts in New Jersey and the Third Circuit have sustained Securities Act claims arising from violations of Item 303. *See, e.g.*, *Newell*, 2019 WL 3764093, at *4; *Curran v. Freshpet, Inc.*, 2018 WL 394878, at *8 (D.N.J. Jan. 12, 2018).

Likewise, Item 503 of Regulation S-K, which mandates that the registration statement disclose "the most significant factors that make the offering speculative or risky," 17 C.F.R. §229.503(c), required Defendants to disclose Legacy Amneal's anticompetitive conduct and the pendency of an ongoing investigation into that conduct. Courts have held that "an actionable [Section] 11 omission may arise when a registration statement fails to comply with Item . . . 503," and the same conduct giving rise to an Item 303 violation can also support a violation of Item 503. *Silverstrand* 707 F.3d at 102; *In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429, at *27 (S.D.N.Y. July 25, 2016).

[28] The text of Section 11 itself makes clear that a claim lies where an issuer "omit[s]" from a registration statement "material fact[s] required to be stated therein." 15 U.S.C. § 77k.

[29] Nor, as the Second Circuit explained, did the Third Circuit hold that a violation of Item 303 can never give rise to a fraud claim under Section 10(b). Instead, "*Oran* simply determined that, '[b]ecause the materiality standards for Rule 10b–5 and [Item 303] differ significantly,' a violation of Item 303 'does not *automatically* give rise to a *material* omission under Rule 10b–5.'" *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 103 (2d Cir. 2015) (quoting *Oran*, 226 F.3d at 288).

The Court notes that the Defendants do not address the Complaint's allegations that the Registration Statement's omissions violated Item 503. *In re Worldcom, Inc. Sec. Litig.*, 2003 WL 22533398, at *10 (S.D.N.Y. Nov. 7, 2003).As such, since that claim is not addressed in the Defendants' briefing there is no need for the Court to address it.

D. Has Plaintiff Failed To Plead Control Person Liability For The Individual Defendants?

Section 15 imposes secondary or "derivative" liability on anyone who controls a violator of Sections 11 or 12. *See* 15 U.S.C. § 77o. Section 15 liability is thus contingent upon the viability of claims under Sections 11 and 12. *See In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 284-85 (3d Cir. 2006). Defendants argue in this Motion that because Plaintiff's claims in Counts I and II should be found by the Court to fail as a matter of law, its "controlling persons" claims necessarily fail as well.

However, the Court finds that the Plaintiff's Complaint also adequately alleges "control person" claims under Section 15 of the Securities Act against the Individual Defendants. ¶¶23-37; 106-07. Section 15 of the Securities Act provides joint and several liability for "[e]very person who, by or through stock ownership, agency, or otherwise . . . controls" a primary violator of Sections 11 or 12 "[N]aked allegations of control will typically suffice to plead an adequate § 15 claim to withstand a motion to dismiss under Rule 8." *In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 158, 187 (S.D.N.Y. 2003). Defendants do not dispute that the Complaint alleges the Individual Defendants are controlling persons, only that the Complaint adequately alleges a predicate Section 11 or 12(a)(2) violation. MTD at 21. However, since the Court has found that the Complaint adequately states Section 11 and 12(a)(2) claims, and, the Complaint adequately pleads control person claims under Section 15.

CONCLUSION

For the reasons expressed in the Court's opinion, the Defendants' Motion to Dismiss is DENIED WITHOUT PREJUDICE.