No. 19-

IN THE

Supreme Court of the United States

XIA BI, *et al.*,

Petitioners,

v.

TERRY MCAULIFFE AND ANTHONY RODHAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Rule 9(b) of the Federal Rules of Civil Procedure imposes a particularity requirement for pleading the reliance element of common law fraud claims.

2. Whether foreign investors' exclusive reliance on misrepresentations contradicting English-language investment memoranda renders their reliance unjustifiable as a matter of law.

3. Whether company statements are attributable to the executives that are in charge of the company's daily affairs.

PARTIES TO THE PROCEEDING

Petitioners Xia Bi, Nian Chen, Ying Cheng, Chunsheng Li, Lin Lin, Lan Liu, Meiming Shen, Yunping Tan, Bixiang Tang, Yahong Wang, Yue Wang, Jian Wu, Junping Yao, Xuemei Zhang, and Yan Zhao ("Petitioners") were appellants in the United States Court of Appeals for the Fourth Circuit, Case No. 18-2194. Terry McAuliffe and Anthony Rodham were the only respondents in that case.

RELATED CASES STATEMENT

Xia Bi, et al. v. Terry McAuliffe, et al., No. 1:17-cv-01459, U. S. District Court for the Eastern District of Virginia. Order of dismissal entered on Sept. 5, 2018.

Xia Bi, et al. v. Terry McAuliffe, et al., No. 18-2194, U. S. Court of Appeals for the Fourth Circuit. Judgment entered July 17, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit under review (App. 1a-22a) is reported at 927 F.3d 177. The opinion of the United States District Court for the Eastern District of Virginia dismissing the amended complaint (App. 23a-29a) is unreported but is available at 2018 WL 4224850. The opinion of the United States District Court for the Eastern District of Virginia dismissing the original complaint (App. 30a-34a) is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the

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[1] All internal alterations, quotation marks, footnotes and citations herein are omitted and all emphasis is added unless otherwise noted. All "CA JA" references are to the Joint Appendix filed by the parties as Dkt. No. 22-1 in *Xia Bi v. McAuliffe*, Case No. 18-2194 (4th Cir.).

Fourth Circuit issued its judgment on June 12, 2019 and thereafter amended it on July 9, 2019. Petitioners' timely petition for rehearing *en banc* was denied on July 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT REGULATORY LANGUAGE

Federal Rule of Civil Procedure 9 – Pleading Special Matters:

> (a) Capacity or Authority to Sue; Legal Existence.
>
> > (1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:
> >
> > > (A) a party's capacity to sue or be sued;
> > >
> > > (B) a party's authority to sue or be sued in a representative capacity; or
> > >
> > > (C) the legal existence of an organized association of persons that is made a party.
> >
> > (2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) How Designated. If a claim for relief is within the admiralty or maritime

> jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.
>
> (2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

STATEMENT OF THE CASE

"America has always relied on entrepreneurship and investment to propel her economy forward," writes the Fourth Circuit in its opinion under review (App. 21a), yet the net effect of its conclusions threatens to forestall a great deal of foreign investment in our economy, raising insurmountable barriers to the legislative vehicle specifically designed to attract foreign capital for future job growth.

This Petition asks whether a plaintiff who is not literate in the English language states

a claim for fraud through allegations that the defendants misled the plaintiff in her native language, then attempted to disclaim away liability in agreements written in English, which the plaintiff could not and did not read. The Fourth Circuit affirmed a trial court's holding that the Petitioners, Chinese nationals seeking to immigrate to our country through the federal EB-5 program, could not state a claim through such allegations, as their failure to read or translate the English-language boilerplate disclaimers precluded them from satisfying the justifiable reliance element of their fraud claims.

In doing so, the Fourth Circuit chose to side with those courts that require particularity of pleading on the reliance element of a fraud claim. A straightforward reading of the relevant procedural rules, however, does not support application of the higher pleading standard to the facts concerning a plaintiff's state of mind. Furthermore, the Fourth Circuit erred by misapplying Virginia law, which controls on the merits of the Petitioners' common law fraud claims. Specifically, the Fourth Circuit's decision conflicts with the Virginia Supreme Court, which held that a fraud plaintiff is excused from pleading justifiable reliance "if the seller does or says anything to divert the buyer 'from making the inquiries and examination which a prudent man ought to make,'" *Horner v. Ahern*, 207 Va. 860, 864

(1967), and that the *Horner* "diversion" can be caused by the alleged false statements themselves, *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 828 n.4 (4th Cir. 1999) (applying Virginia law). These cases establish that courts considering fraud cases under Virginia law "have effectively ***eliminated*** the requirement that reliance be reasonable in some cases." *Id.* Though the facts of this case are tailor made for Virginia's reliance exception, the Fourth Circuit declined to apply it.

Finally, the Fourth Circuit failed to reach all the fraudulent statements alleged by the Petitioners, yet it affirmed the lower court's dismissal of the fraud claims anyway. The misrepresentations that the Fourth Circuit failed to reach, however, raise another split of authority because they are "group published" company statements that should be attributed to the Respondents, since the latter are the executives in charge of the company's daily affairs, yet courts are divided as to whether such attribution is proper. It is important to provide clarity on the issue and eradicate this loophole for corporate insiders to escape liability for the statements they control. In this case, "group publishing" attribution would save Petitioners' fraud claims, since the reliance analysis would change, as these company statements were communicated directly to the Petitioners,

erasing any doubts that they were exposed thereto.

This case is exceptionally important, because it squarely impacts the incentives of foreign investors seeking to migrate to our country in compliance with the federal EB-5 program, which allows foreign investors who invest in new enterprises to obtain permanent residency in the United States. The Fourth Circuit recognized the importance of the EB-5 program, and the need to strike the proper balance between risk and reward for investors in that program, in its opinion's closing paragraph. App. 21a-22a. The importance of the Fourth Circuit's reliance holding is heightened because Respondents here marketed their high stature within the American government, yet the Fourth Circuit faulted them for actually *undermining* the public trust. App. 14a. Indeed, the Fourth Circuit rejected the lower court's conclusion that Respondents' statements were mere opinion or "puffery"—they were far from it:

> [D]efendants' statements ran in front of the facts on the ground. There are no laurels in this case, no accolades to be bestowed. These are just the sort of misstatements targeted by statutory and common law fraud causes of action.… Far from building investor confidence, misstatements like those alleged in this case

> undermine public trust. We decline to whitewash the alleged misstatements here.

Id. Given these findings, Petitioners respectfully suggest that the question of whether they had a right to rely on these misstatements, in the context of this case—in which the Petitioners were English-illiterate, and Respondents knew they were—warrants this Court's review.

A. Background facts

Petitioners are Chinese immigrants who invested $500,000 apiece in GreenTech Automotive, Inc. ("GreenTech"), a would-be electric car company, in exchange for a false promise of the American dream. App. 2a-3a. GreenTech was a Mississippi corporation run through a web of related companies by Respondents Terry McAuliffe and Anthony Rodham. Both Respondents were endowed with high visibility of political connections, acting as prominent figures within the ranks of the Democratic Party. It was these connections that Respondents marketed to attract investors in exchange for a Green Card. Indeed, they dangled permanent residency in the U.S. through the federal EB-5 program in front of these investors and then reneged on every promise they made. This case is about fraud and greed and praying on vulnerable foreign investors who may not appreciate the full extent of English-language disclosures—especially where, as here, they

were bombarded with conflicting information in their native language that commanded their trust and respect due to Respondents' much-touted positions and affiliations within various levels of the U.S. government structures.

McAuliffe was the co-founder and former Chairman of GreenTech. App. 4a. Rodham was the CEO of sibling companies set up to fund and serve GreenTech. App. 4a-5a. Rodham also served as President and CEO of Gulf Coast, the management company that received the Petitioners' administrative fees. *Id.* A third named defendant, Charles Wang (who is not part of the case on appeal), co-owned GreenTech with Mr. McAuliffe and owned the Gulf Coast and GreenTech automotive Partnership A-3, LP (the "A-3 partnership"), an investment vehicle used to accept Petitioners' funds for a loan-out to GreenTech. CA JA 142.

GreenTech planned to mass produce hybrid vehicles. App. 2a-3a. To fund this plan, its principles raised funds from investors under the Employment-Based Immigration Fifth Preference, or EB-5, Program (8 U.S.C. § 1153(b)(5)). App. 3a. This program offers a path to permanent residency for foreign investors whose investments in American projects create or preserve at least ten American jobs. *Id.*

As Petitioners alleged in their complaint, Respondents made a slew of

misrepresentations to raise these funds, both individually and through the various companies they ran. Thus, Mr. McAuliffe himself misrepresented the number of cars GreenTech had sold, the number of employees it had hired (a key metric for immigration purposes) and GreenTech's customer base. App. 5a-6a. In turn, Mr. Rodham himself misrepresented the percentage of non-EB-5 investment in GreenTech and the nature of the relationship between the sibling companies at issue. App. 5a. The complaint further showed the misrepresentations issued by the companies Respondents controlled, including representations that the investments were both "guaranteed" and EB-5-compliant. CA JA 141, 148, 152, 156, 175 & 182 at ¶¶ 10, 53, 66, 81, 172 & 204.

Respondents made post-investment misrepresentations to the Petitioners as well, which were designed to forestall the Petitioners from terminating the investment and turn to other projects instead. Those misrepresentations included the number of cars GreenTech had sold, or that customers had otherwise ordered; the number of jobs created or that GreenTech reasonably expected to create; and GreenTech's customer relationships. C JA 167 & 177 at ¶¶ 140, 141, 143, & 177-180.

One artifice of Respondents' concealment practices was the use of the Chinese language when inducing reliance, and English when trying to shift the risk of that reliance onto the

Petitioners. CA JA 155 at ¶¶ 77-79. The Petitioners were presented with detailed communications in Chinese that misrepresented the nature of the investment, the performance of the company, funding GreenTech had received, and the guarantee that investors would obtain visas through this investment. *See id.* at ¶ 79. On the other hand, the private placement memorandum describing the investment and the limited partnership agreement binding the Petitioners to the Respondents and their companies "were distributed to plaintiffs in English only, not Chinese." App. 3a. The English communications contain the boilerplate disclaimers the Fourth Circuit found dispositive of the reliance question, including warnings concerning the speculative nature of the investment and the company's "development stage" status. *See, e.g.*, App. 18a-19a. The Petitioners stated that they signed the subscription documents "without reviewing any version" and do not claim to have translated the documents into their native language. App. 3a.

In the end, GreenTech "failed to manufacture and sell vehicles," "defaulted on the loan from the A-3 partnership," and "filed for bankruptcy." App. 7a.

B. Proceedings Below

The Petitioners filed their initial complaint in Virginia state court. App. 7a. Respondents removed the suit to the Eastern

District of Virginia based on federal question jurisdiction as well as supplemental jurisdiction for state law claims under 28 U.S.C. § 1367(a). CA JA 146. Respondents moved to dismiss the complaint for failure to state a claim under Federal rule of Civil Procedure 12(b)(6), and the district court granted their motions on March 30, 2018, with leave to amend. App. 7a. On April 11, 2018, Petitioners filed the operative complaint at issue here, their First Amended Complaint ("FAC"). CA JA 137-198. Defendants renewed their motions to dismiss, and Petitioners opposed, in relevant part, by arguing that the Fourth Circuit's companion holdings in *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614 (4th Cir. 1999), and *Bank of Montreal v. Signet Bank*, 193 F.3d 818 (4th Cir. 1999), excuse any requirement to allege justifiable reliance with particularity. Petitioners argued further that Respondents are responsible for statements made by their corporate fronts, invoking *Dunn v. Borta*, 369 F.3d 421 (4th Cir. 2004). The trial court did not address either argument and dismissed the FAC with prejudice. App. 8a. It stated that reliance on the oral misstatements that preceded written disclosures was unreasonable because the Petitioners did not read or review the offering documents. Moreover, in failing to address any company misstatements, the district court failed to analyze all the misstatements alleged in the complaint, as required for any particularity

analysis under Rule 9(b). This is especially so given that the circumstances surrounding Petitioners' reliance on the *company* misstatements were different from those pertaining to the Respondents' *individual* misstatements.

On June 12, 2019, the Fourth Circuit affirmed, though not before rejecting the trial court's finding that the individual misrepresentations considered were "non-actionable puffery or forward-looking statements." App. 13a-14a. ("These are just the sort of misstatements targeted by statutory and common law fraud causes of action."). But the court also rejected its own "diversion" exception announced in *Hitachi*. According to the Fourth Circuit, the exception does not apply here because the Petitioners were "provided [with] the relevant offering documents" containing the boilerplate disclaimers, and nothing suggests that the "defendants prevented them from taking the modest step of reviewing the operative offering documents that they signed." App. 20a. The court reasoned that "defendants had no generalized duty to translate the subscription documents for the benefit of foreign investors," and feared the imposition of a "new duty of translation on parties seeking to raise funds from foreign investors." *Id.* The court did not consider whether, under its own *Hitachi* exception, the oral misrepresentations made to the Petitioners in

their native language could have plausibly diverted them from further inquiry.

Finally, in affirming the lower court, the Fourth Circuit also did not consider any misrepresentations set forth in the FAC unless the statement was alleged to have been spoken directly by either Mr. McAuliffe or Mr. Rodham. That is, like the lower court, the court failed to consider any of the misrepresentations that are imputed to the Respondents as a matter of law based on their directing of the daily affairs of the relevant companies that made the misrepresentations directly to the Respondents via company publications, brochures and other direct communications after the investments took place, thus invoking a different reliance scenario than the one that the court actually addressed.

On June 26, 2019, Petitioners timely moved for rehearing *en banc*. On July 9, 2019, the petition for rehearing was denied. App. 35a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHETHER FEDERAL RULES REQUIRE PLEADING WITH PARTICULARITY THE FACTS SUPPORTING THE RELIANCE ELEMENT OF COMMON LAW FRAUD

A. The Split of Authority on the Issue of Particularity of Pleading Reliance Requires This Court's Intervention

Citing *Miller v. Asensio & Co.*, 364 F.3d 223, 227 (4th Cir. 2004), in support of its holding that federal law requires that an investor "justifiably relied" on misstatement, App. 26a, the Fourth Circuit appears to have walked into the same trap that Judge Posner writing for the Seventh Circuit avoided altogether in *Midwest Commerce Banking Co. v. Elkhart City Ctr.*, 4 F.3d 521, 524 (7th Cir. 1993), by holding that a plaintiff is "not required to allege the facts necessary to show that the alleged fraud was actionable." Indeed, *Miller* is an after-trial opinion that involves matters of proof rather than pleadings. When it comes to pleadings, however, the Seventh Circuit opined that neither "allegations demonstrating … [plaintiff]'s reliance on the defendant's

misrepresentations or omissions" nor "the reasonableness of that reliance" were required. *Midwest Commerce*, 4 F.3d at 524.

The Fourth Circuit, in turn, relied on its own contrary opinion in *Learning Works, Inc. v. The Learning Annex, Inc.*, 830 F.2d 541, 546 & n.1 (4th Cir. 1987), where it found allegations of reliance lacking in particularity due to plaintiff's failure to present any "factual allegations that would support … [the] claim that … reliance was reasonable," considering that plaintiff there ceased its operations in reliance on the impending sale despite the fact that the terms of the sale required it to stay open. In other words, the complaint there was plainly implausible without any resort to Rule 9's particularity standard—indeed, it would have failed under the current pleading regime enunciated by this Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (explaining the plausibility of pleading standard under Rule 8); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (further elaborating on the plausibility of pleading standard). Thus, while *Learning Works* was couched in terms of particularity, it was simply implausible on its face, rendering it inapplicable to the facts at hand.

Other circuits siding with Judge Posner include the Fifth Circuit, which recently tested reliance allegations in support of

common law fraud claims by applying this Court's plausibility test under Rule 8. *See IAS Servs. Grp., L.L.C. v. Jim Buckley & Assocs., Inc.*, 900 F.3d 640, 648 (5th Cir. 2018) (finding that allegations were "susceptible to the reasonable inference" that plaintiff relied on the misrepresentations and finding them sufficient under *Iqbal*'s plausibility test). They also include the First Circuit, which held that "[t]he specificity requirement [of Rule 9] extends only to the particulars of the allegedly misleading statement itself. The other elements of fraud, such as intent and knowledge, may be averred in general terms." *Rodi v. S. New England Sch. Of Law*, 389 F.3d 5, 15 (1st Cir. 2004).[2]

Indeed, this position finds support in Rule 9 itself. While the Fourth Circuit opined that there was "no textual basis" for the contrary

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[2] *But see, e.g.*, *Great Pac. Sec. v. Barclays Capital, Inc.*, 743 F. App'x 780, 782 (9th Cir. 2018) (affirming dismissal of fraud complaint for lack of pleading particularity on the reliance element pursuant to Rule 9(b)); *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 778-79 (3d Cir. 2018) (holding that the "complaint comes up short … because it does not plead the element of 'justifiable reliance' on [defendant]'s misrepresentation with the particularly required for Rule 9(b)"); *Evans v. Pearson Enterprises, Inc.*, 434 F.3d 839, 852-53 (6th Cir. 2006) (same).

view, App. 6a, yet the second sentence of Rule 9(b) allows conclusory allegations of "conditions of a person's mind," which some courts find to include one's reliance on fraudulent misrepresentations. *See, e.g., In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings,* 159 F. Supp. 3d 898, 921 n.5 (N.D. Ill. 2016) (relying on the second sentence of the rule and concluding that "Rule 9(b) does not require plaintiff to plead … plaintiff's reliance with particularity"): *In re NJOY, Inc. Consumer Class Action Litig.*, No. CV1400428MMMRZX, 2014 WL 12586074, at *7 (C.D. Cal. Oct. 20, 2014) (collecting cases and concluding that "the better view is that reliance need not be pled with particularity under Rule 9(b) because it is a condition of the mind"); *Hawkins v. Medtronic, Inc.*, 62 F. Supp. 3d 1144, 1156 (E.D. Cal. 2014) (same, collecting cases); *Indiana Bell Tel. Co. v. Ward*, No. IP 02-170-C H/K, 2002 WL 32067296, at *3 (S.D. Ind. Dec. 6, 2002) ("Rule 9(b) applies to the specifics of alleged misrepresentations, but the notice pleading requirements of Rule 8 apply to other aspects of the plaintiff's complaint, such as damages, reliance, or a defendant's state of mind.").

B. The Reliance Allegations in Petitioners' Complaint Should Be Sufficient to Withstand a Motion to Dismiss

Here, as to the alleged misrepresentations made directly by each of the Respondents (CA JA 154-155 at ¶¶ 71-76), the complaint specifically alleges that all Petitioners relied on every alleged representation; moreover, it specifies where and how Petitioners were exposed to them. Further, the complaint states that "[e]ach of the Plaintiffs" relied on "statements … made by Mr. McAuliffe … [and] Mr. Rodham" and "each of them reviewed and relied on … statements made by … Mr. Rodham, or [Mr.] McAuliffe…." CA JA 162 at ¶¶ 103-105. Finally, the complaint also details actions that Petitioners took to their detriment in reliance on Respondents' representations. Thus, Petitioners alleged that in reliance on the misrepresentations, they invested in GreenTech, moved to United States and incurred substantial relocation expenses, forwent other investment opportunities that would have delivered better immigration results, and kept their investments in GreenTech without seeking alternative investment vehicles. CA JA 167 at ¶ 144, 182 at ¶¶ 201-203, 184 at ¶¶ 213-216 & 186 at ¶¶ 226-228. Since Petitioners' allegations must be taken as true at this point, nothing more should be required.

Nevertheless, the Fourth Circuit found reliance allegations insufficiently particular because some of the statements at issue "were made to American media, sometimes of the local variety," thus making it unclear "how and whether" Petitioners "learned of these statements." App. 17a-18a. *First*, this finding is inapplicable to those statements that were made during roadshows in China. CA JA 154 at ¶¶ 71-72 & 75. As to those statements, it is unclear what other particulars could possibly be required.

Second, as to the statements made through American media, the Fourth Circuit specifically acknowledged that one can base "a meritorious fraud claim" on "statements to media sources, even local ones in distant lands," App. 18a, yet it still found the allegations lacking because the complaint did not pinpoint when and how each Petitioner heard or learned about each of the representations at issue. To be sure, there is nothing implausible about Petitioners' receiving foreign news feeds, such as CNBC and NBC, in China in their native language. Indeed, nowhere do Petitioners allege that the statements were still in English when they reached them. As such, any supposition that just because Petitioners could not speak English, they could not have been exposed to or relied on the misrepresentations broadcasted on CNBC, NBC and online, cannot carry the day on a motion to dismiss;

rather, any such doubts should be resolved through discovery. Similarly, when and where each Petitioner received the statements—be it at a local Starbucks or in person—would not advance Respondents' defenses and, as such, need not be specifically alleged at this point of litigation.

Finally, as discussed below, the Fourth Circuit failed to reach group publishing allegations, which, on their own, would have sufficed to support a reversal of the dismissal below. This is because the group publishing allegations entail different reliance considerations altogether, since they were communicated ***directly to the Petitioners*** via company brochures. Thus, for example, in its November 2015 newsletter, Gulf Coast, the company directed by Mr. Rodham, stated that GreenTech's production would reach 3,000 cars in January 2016, just two months later. CA JA 167 at ¶ 140. Because GreenTech has assembled less than 50 cars, and sold no cars, at the time this statement was made, this representation was baseless and misleading. *Id.* Since all of the Petitioners had invested in GreenTech (through an entity controlled by Gulf Coast) by November 2015, they received this communication directly. CA JA 162-165 at ¶¶ 106-07, 109, 113-18, 120-21, 123, 125, 130 & 132. Similarly, in its April 2016 newsletter, Gulf Coast stated that GreenTech had already established relationships with two dealers who were slated to purchase

GreenTech's cars. CA JA 167 at ¶ 143. This statement was misleading, as GreenTech has never sold cars through dealers, or otherwise. *Id.*; *see also id.* at ¶ 141 (in the same newsletter, stating that GreenTech was making great progress toward its initial public offering or IPO, even though GreenTech never had an IPO, and was never reasonably on target for one, as it never sold cars and was never on track to sell cars on a wide enough basis to justify a public offering). Since all the Petitioners invested in 2012-2013, they received these communications directly as well.

In the same vein, in a December 2012 and a January 2013 newsletter, Gulf Coast stated that GreenTech had been an approved supplier for the Department of Defense. This statement was false and misleading, as GreenTech was not an approved supplier and never supplied cars to the Department of Defense. CA JA 158 at ¶ 89. Moreover, since eight Petitioners had invested in GreenTech by that time, they received this communication directly. CA JA 163-164 at ¶¶ 113, 114, 116, 119, 121, 122, 123 & 125. Similarly, in a February 2013 "GTA Project Annual Review," Gulf Coast stated it had received orders for 12,000 electric vehicles from Europe. CA JA 159 at ¶ 90; *see also id.* at ¶¶ 93-94 (alleging additional misstatements through a March 2013 Gulf Coast newsletter). This statement was false

and misleading because GreenTech never had significant production and sold few or no cars in its history. *Id.* at ¶ 90. At least eight Petitioners had invested in GreenTech at that point in time and thus received this communication directly. CA JA 163-164 at ¶¶ 113, 114, 116, 119, 121, 122, 123 & 125.

These ***direct*** communications induced Petitioners that received them to forego withdrawing from the project and seek investments with better immigration chances. CA JA 167 at ¶ 144. As such, this is as complete and sufficiently detailed of a picture of the required reliance as one can possibly get.

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Courts "must take care not to permit the more demanding standard of Rule 9(b) to encroach unduly on the general approach to pleading that Congress has established in Rule 8." *Lachmund v. ADM Inv'r Servs., Inc.*, 191 F.3d 777, 783 (7th Cir. 1999). The Fourth Circuit erred by deepening the circuit split on the wrong side of the law. This Court should take this opportunity to correct it.

II. THE FOURTH CIRCUIT MISAPPLIED VIRGINIA LAW BY FINDING PETITIONERS' RELIANCE UNJUSTIFIABLE AS A MATTER OF LAW

Aside from requiring more particularity than the law demands, the courts below here misapplied the long-standing cannon of Virginia law, which excuses justifiable reliance whenever a buyer is diverted from making reasonable inquiries into the truth by the seller's misrepresentations. *See Horner*, 207 Va. at 864 (holding that a buyer may therefore recover for fraud if the seller does or says anything to divert the buyer "from making the inquiries and examination which a prudent man ought to make"); *accord Bank of Montreal*, 193 F.3d at 828 n.4 (concluding that "the Virginia courts have effectively eliminated the requirement that reliance be reasonable" in such diversion cases), citing *Van Deusen v. Snead*, 247 Va. 324, 329 (1994); *see also Hitachi*, 166 F.3d at 629-30 (applying Virginia's exception for diversion cases).

It started with the District Court, which concluded that Petitioners failed to allege reasonable reliance because they "did not read" the English-language boilerplate in the formal documents. App. 8a. Rather, it found, they "rel[ied] upon contradictory oral representations, informal newsletters, and statements contained on websites and social media" because the latter were all in their

native language, Mandarin Chinese. *Id.* The District Court concluded that such reliance is "unreasonable" as a matter of law because the Petitioners could not conduct a "reasonable investigation" if they did not translate the English boilerplate into Mandarin. *Id.* The court did not even consider whether the Petitioners were excused from pleading justifiable reliance under Virginia law.

The Fourth Circuit affirmed. Addressing the reliance exception for diversion cases, the Fourth Circuit said the Petitioners were not diverted from making a reasonable inquiry because they were "provided the relevant offering documents" containing cautionary language, and "[n]othing … prevented them from taking the modest step of reviewing the operative offering documents." App. 20a. But this finding is grounded on a factual error that is not supported by the complaint's allegations. The Petitioners were bombarded with false representations about GreenTech's finances, current sales, projections, regulatory prospects, and customer base ***before*** they invested and received any written materials containing the cautionary boilerplate that the Fourth Circuit found to be so significant. CA JA 150-161 at ¶¶ 60-99. Most of these representations were in Petitioners' native language. The question of whether a plaintiff fits within Virginia's reliance exception by alleging that false statements in Mandarin were disclaimed in English is one that demanded greater

scrutiny, since the purpose of the exception is to allow claims in which the investigatory duty is corrupted by the actions of the alleged fraudster.

Indeed, by the time Petitioners here received the written disclosures in English cautioning them, *inter alia*, that GreenTech is a risky investment, they had been already assured, repeatedly and in their native language, that GreenTech had started producing cars, had the requisite number of employees to satisfy the EB5 requirements, and pretty much "***guaranteed***" them permanent residency. CA JA 150-161 at ¶¶ 60-99 (original emphasis). Those assurances persisted after Petitioners' investment. CA JA 166-167 at ¶¶ 136-143. And these were not just some random "foreigners" that provided these assurances, as the Fourth Circuit put it. App. 20a. Rather, these were highly connected American politicians that served in the highest echelons of governmental power. They touted their stature as leverage and traded it in for Petitioners' trust. There was nothing per se unreasonable in believing them.

Yet the Fourth Circuit concluded that the "written offering documents must control," even though they were "in fact contradicted" by Respondents' "media statements." App. 18a. But under Virginia law, "one cannot, by fraud and deceit, induce another to enter into a contract to his disadvantage, then escape liability by saying that the party to whom the

misrepresentation was made was negligent in failing to learn the truth." *Nationwide Ins. Co. v. Patterson*, 229 Va. 627, 631 (1985). Thus, "[w]hen the one inducing the other to enter the contract throws the other off guard or diverts him from making the reasonable inquiries which usually would be made," the diverted buyer need not show reliance. *Bank of Montreal*, 193 F.3d at 828; *accord Horner*, 207 Va. at 864. Moreover, in *Bank of Montreal,* the Fourth Circuit itself applied Virginia law to find that "courts have allowed the false representation to act as the 'diversion,'" such that the "same acts of concealment [may] serve as basis for both element of fraud and 'diversion' exception." 193 F.3d at 828 n.4. In so doing, the Fourth Circuit found that "the Virginia courts have effectively ***eliminated*** the requirement that reliance be reasonable in … [such diversion] cases." *Id.*, citing *Van Deusen*, 247 Va. at 329.

The Fourth Circuit, however, declined to find that any of the alleged misrepresentations could have plausibly diverted Petitioners from conducting their due diligence "before investing" because it found, as a matter of law, that they had "information sufficient" to call the misrepresentations at issue into question. App. 18a-19a & 21a. *First*, this finding is contrary to the facts as alleged. By the time Petitioners came to invest and receive the written disclosures with boilerplate disclaimers, they had been already assured

that GreenTech was a sure thing that produced cars, had dealers in place to buy them, and provided the requisite number of jobs. *See Nationwide Ins.*, 229 Va. at 630-31 (in a diversion case, rejecting defendant's argument that plaintiff could not "recover because he had available the means of acquiring the correct information about the meaning of the policy"). It is unclear, under the Fourth Circuit's view, why it was the written disclosures that should have called into question the oral misrepresentations and not vice versa.

Second, the Fourth Circuit further erred by considering only the misrepresentations encountered by the Petitioners "before investing." But the complaint also sets forth extensive misrepresentations designed to keep Petitioners from dropping out. CA JA 166-167 at ¶¶ 136-143.[3] Even assuming that the written boilerplate provided "information sufficient" to trigger due diligence before investing, then the misrepresentations that came *after* the investment provided the

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[3] The Fourth Circuit's dicta to the effect that "the subscription documents did not provide plaintiffs with a right to withdraw their money from the partnership," App. 9a, citing CA JA 334, is factually incorrect. The documents specifically provide for such a right elsewhere. *See, e.g.*, CA JA 326-327; *see also* CA JA 251, 253, 264 & 275.

Petitioners with new "information sufficient" to negate any written boilerplate. This new information included staged tours of GreenTech facilities where employees were instructed to pretend that they were busy manufacturing cars, as well as assurances that any government investigations of the company proved that it was "problem free and reliable." CA JA 166 at ¶¶ 137-138. Since this new information was sufficient in itself to assuage any preexisting boilerplate claiming that the investment would be risky, it should have been enough to allow Petitioners' fraud claims to proceed. *See, e.g.*, *Van Deusen*, 247 Va. at 329 (holding that "[t]he purchasers' allegation that the sellers took certain affirmative actions designed to conceal the defects described in the investigation report is sufficient" to support the reliance element of their fraud claims).

Third, Petitioners' inability to understand complicated written English documents should also be a factor in the reliance analysis. While the Fourth Circuit expressed concern about the need to create a special rule for cases involving foreign plaintiffs, App. 20a-21a, no such special rule is required if Virginia's diversion exception is to be applied correctly. Indeed, many other courts excuse reliance in cases involving foreign plaintiffs without special rules, by considering the plaintiffs' illiteracy in the mix of facts

submitted on this element.[4] In fact, at least one court specifically addressed foreign

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[4] *See, e.g.*, *Min Fu v. Hunan of Morris Food Inc.*, No. CIV. 12-05871 KM, 2013 WL 5970167, at *6 (D.N.J. Nov. 6, 2013) (where defendant "misrepresented the contents of the document" to a Chinese-speaking plaintiff and "fraudulently included Chinese text" in the document only after plaintiff signed it, the "balance between the potential fraud" and plaintiff's "potential negligence in signing the document" was a "question of fact" that was "premature to consider" on the pleadings); *Semenov v. Hill*, 982 P.2d 578, 581 (Utah 1999) (plaintiff's "language capability" was "material to his fraud claim" because "the illiteracy of a party has an important bearing on the question of the existence of fraud in procuring [a] signature"); *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 55 (N.C. Ct. App. 2011) (complaint "sufficiently alleged justifiable reliance" where plaintiff "[was] not fluent in English" and thus "could not discover a misrepresentation, as the only person … [plaintiff] could communicate with who had the information needed was also the party making the misrepresentation"); *Tekstrom, Inc. v. Savla*, No. CIV.A. 05A-12-006JTV, 2006 WL 2338050, at *11-12 (Del. Super. Ct. July 31, 2006), aff'd, 918 A.2d 1171 (Del. 2007) (where defendants challenged trial court's

investors' reliance on oral misrepresentations that varied the contents of English-language documents and found that, while plaintiff possessed documents contradicting those oral misrepresentations, the fact finder should consider "the entire context of the transaction, including plaintiff's sophistication and business experience." *Qun v. Karstetter*, No. 14-CV-1362-CAB (DHB), 2014 WL 12461260, at *7 (S.D. Cal. Sept. 24, 2014). Since plaintiff in *Qun*, like the Petitioners here, had "limited investing experience, no experience investing in United States corporations, and tenuous command of the English language," the court declined to dismiss his claims because it could not "conclude as a matter of law that reasonable minds could only conclude that plaintiff's reliance on defendants' oral misrepresentations was unreasonable." *Id.*

Reasonable reliance is ordinarily a "fact intensive inquiry." *Gunnells v. Healthplan*

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holding that reliance was reasonable, pointing to plaintiff's "failure to take even the simplest of steps to protect himself" and pointed to plaintiff's "fluency in English and educational background," court concluded reliance was justified because "many of … [the] misrepresentations—and those most crucial to … [plaintiff] deciding to come to Delaware—could not have been clarified through a cursory examination").

Servs., 348 F.3d 417, 435 (4th Cir. 2003).[5] The Petitioners' illiteracy in English, though not a silver bullet, should not be ignored, either. The Fourth Circuit did not accord due

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[5] In this connection, courts are also divided as to whether the element of reliance can be appropriately resolved as a matter of law on a motion to dismiss. While the Fourth Circuit impliedly held that it can, other Circuits disagree. *See, e.g., IAS Servs. Grp., L.L.C. v. Jim Buckley & Assocs., Inc.*, 900 F.3d 640, 650 (5th Cir. 2018) (reversing dismissal below and observing that "[c]ourts have uniformly treated the issue of justifiable reliance as a question for the factfinder…. And for good reason. Justifiable reliance is a fact-intensive inquiry…."); *In re APA Assessment Fee Litig.*, 766 F.3d 39, 48 (D.C. Cir. 2014) ("Defendants seek to prevail at the motion-to-dismiss stage even though the 'reasonableness of ... reliance upon a misrepresentation is a question of fact, for which disposition by [pre-trial motion] is generally inappropriate.'"); *but see Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990) ("The issue of justifiability of reliance is not one that is inherently unsuitable for determination as a matter of law…."). This Court should take up this issue as well to clarify this important procedural point, which has far-ranging implications on the merits, since prematurely dismissing a case on a factual point essentially denies a plaintiff her right to a jury trial.

consideration to that aspect of the facts under Virginia law, justifying reexamination thereof.

III. "GROUP-PUBLISHED" MISREPRESENTATIONS THAT THE FOURTH CIRCUIT FAILED TO CONSIDER PROVIDE AN ALTERNATIVE GROUND TO GRANT THE PETITION

The Fourth Circuit limited itself to considering two misrepresentations the complaint attributed to Mr. Rodham and four attributed to Mr. McAuliffe. App. 5a-6a. Yet there were many additional alleged misrepresentations rightly attributable to each Respondent, which both the Fourth Circuit and the district court never considered—even though any of those additional misrepresentations would have allowed the case to proceed. Specifically, the complaint is replete with alleged misrepresentations by both Gulf Coast and GreenTech, Mr. Rodham's and Mr. McAuliffe's respective employers. As corporate insiders and executives in charge of day-to-day operations for each respective company, each Respondent is presumed to have been speaking whenever each of their respective companies (Gulf Coast for Mr. Rodham, and GreenTech for Mr. McAuliffe) put out company statements. As such, Respondents bear individual liability for those statements. The Fourth Circuit erred

by failing to reach this alternative ground of liability. *Cf. Ill. State Bd. of Inv. v. Authentidate Holding Corp.*, 369 F. App'x 260, 266 (2d Cir. 2010) ("Because the district court did not address the individual defendants' liability under any of the other theories presented in the [complaint], including liability for … those [misstatements] attributable to them under the group pleading doctrine, we vacate and remand to allow the district court to consider those claims in light of our conclusions in this order.").

A. This Court Should Take the Opportunity to Clarify Application of the Presumption and Address the Split of Authority on the Issue

This issue warrants the Court's attention because courts are split on applying the "group publishing" presumption, yet a holding suggesting that corporate insiders are immune from potential liability for statements released under their closely-held firms' names can be abused. The "group-published information" presumption, as applied in some Circuits, "serves as a presumption that may be invoked *in favor* of a plaintiff," allowing her to "rely on a presumption that statements in company generated documents represent the collective work of those individuals directly involved in the company's daily management." *Dunn v. Borta*, 369 F.3d 421, 434 (4th Cir. 2004) (original italics). Similarly, when company

documents are distributed in connection with an offer of securities, "no specific connection between fraudulent representations in the … [solicitation] and particular [insider] defendants is necessary." *Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir. 1986); *see also Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1254 (10th Cir. 1997) (holding that the Tenth Circuit does not require the identification of 'individual sources of statements ... when the fraud allegations arise from misstatements or omissions in group-published documents such as annual reports, which presumably involve collective actions of corporate directors or officers").[6] Indeed, this approach is consistent with the general tort notion that "[a] corporate officer is individually liable for the torts he

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6 *Accord In re GlenFed, Inc. Sec. Litig.*, 60 F.3d 591, 593 (9th Cir. 1995) (holding that for company statements, "it is reasonable to presume that these are the collective actions of the officers. Under such circumstances, a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations."); *In re Digi Int'l, Inc. Sec. Litig.*, 6 F. Supp. 2d 1089, 1101 (D. Minn. 1998), *aff'd sub nom. In re Digi Int'l, Inc., Sec. Litig.*, 14 F. App'x 714 (8th Cir. 2001) (applying "group publication" presumption).

personally commits and cannot shield himself behind a corporation when *he is the actual participant in the tort*." *Columbia Briargate Co. v. First Nat. Bank in Dallas*, 713 F.2d 1052, 1060 n.17 (4th Cir. 1983) (original italics).

Yet the passage of the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 ("PSLRA") created a split of authority on this issue. Some courts ceased applying the presumption because they conflate it with the group pleading doctrine. Thus, for example, the Fifth Circuit in *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.,* 365 F.3d 353, 363-64 (5th Cir. 2004), rejected the previously adopted group publishing doctrine by conflating it with pleading *collective scienter*, which is part of the group pleading doctrine that has nothing to do with attribution of company statements to those that are presumably responsible for them. As a result, the Fifth Circuit concluded that the group publishing could not survive the PSLRA, since the statute "requires … plaintiffs to distinguish among those they sue and enlighten each defendant as to his or her particular part in the alleged fraud." *Id.*; *accord Winer Family Tr. v. Queen*, 503 F.3d 319, 324 (3d Cir. 2007); *but see Berry v. Valence Tech., Inc.*, 175 F.3d 699, 706 (9th Cir. 1999) (reasserting application of the group publishing doctrine in the Ninth Circuit after

the passage of the PSLRA).[7] Since there is disagreement between courts as to whether group pleading survives PSLRA, the group publishing presumption got swept up in the resulting wreckage.[8] This Court declined to

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[7] Clearly, courts declining to apply the presumption elevate form over substance. If one element of the scheme involved group activity or statements, it makes little sense to preclude plaintiffs from pleading as much. Taken to its extreme, such a requirement could immunize fraudulent group conduct if: (i) plaintiffs are loath to attribute to an individual that which is more accurately attributable to a group; and (ii) plaintiffs are precluded from accusing the group.

[8] Lower courts exhibit confusion on the issue to this day. *Compare In re TransCare Corp.*, 592 B.R. 272, 287-88 (Bankr. S.D.N.Y. 2018) (recognizing the group publishing presumption as a valid doctrine), *with In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 640-41 (S.D.N.Y. 2017) (stating that the doctrine is invalid after PSLRA yet approving attribution of company statements to the executives that bore the ultimate authority for the statements); *see also Aviva Life & Annuity Co. v. Davis,* 20 F. Supp. 3d 694, 707 (S.D. Iowa 2014) (concluding that group publishing doctrine is alive and well despite the PSLRA and this Court's decision in *Janus Capital Grp., Inc. v. First Derivative*

address the PSLRA wrinkle by limiting itself to stating that "there is disagreement among

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Traders, 564 U.S. 135, 142 (2011), which was limited to issues of primary and secondary liability); *In re Baan Co. Sec. Litig.,* 103 F. Supp. 2d 1, 17 (D.D.C. 2000) (reasoning that group publication doctrine applies to attribute misrepresentations but PSLRA requires scienter to be pleaded as to each defendant); *In re Raytheon Sec. Litig.*, 157 F. Supp. 2d 131, 152 (D. Mass. 2001) (observing that "a majority of courts facing the issue have determined that the group … [publishing] doctrine does in fact survive the passage of the PSLRA"); *but see Local 295/Local 851 IBT Employer Grp. Pension Tr. & Welfare Fund v. Fifth Third Bancorp.,* 731 F. Supp. 2d 689, 719 (S.D. Ohio 2010) (analyzing the presumption as group pleading and holding that it did not survive the passage of PSLRA), and *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 503 F. Supp. 2d 25, 40 (D.D.C. 2007) (declining to attribute company statements to company insiders because "it seems to this Court that the requirement in the plain language of the PSLRA of a showing of scienter on the part of each defendant trumps any reliance on the 'group pleading doctrine,' and, thus, requires plaintiffs to allege specific facts demonstrating that each of the defendants acted with the requisite state of mind").

the Circuits as to whether the group pleading doctrine survived the PSLRA…." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326 n.7 (2007) (also noting that "the Shareholders do not contest the Seventh Circuit's determination [on application of group pleading], and we do not disturb it"). Yet the statement necessarily implies that ***but for*** the PSLRA and the complications it may or may not create for scienter allegations supporting federal securities fraud claims, the doctrine is otherwise valid—and, at the very least, should allow Petitioners' two common law fraud-based claims to rely on company statements at issue here.

Most importantly, however, the group pleading split should not even affect application of the "group publishing" presumption at issue here. This is because PSLRA deals with scienter, and "the [group publishing] doctrine has nothing to do with scienter. Rather, it is a reasonable presumption that the contents of company-published documents and press releases are attributable to officers and directors with inside knowledge of and involvement in the day-to-day affairs of the company." *In re BankAmerica Corp. Sec. Litig.*, 78 F. Supp. 2d 976, 988 (E.D. Mo. 1999). This is exactly why even those courts that rely on PSLRA to reject group pleading for scienter allegations still find the "group publishing" presumption "permissible and useful when pleading conduct and omissions," which is what

Petitioners did here. *In re Thornburg Mortg., Inc. Sec. Litig.*, 695 F. Supp. 2d 1165, 1200 (D.N.M. 2010), *aff'd sub nom. Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190 (10th Cir. 2013); *accord Durgin v. Mon*, 659 F. Supp. 2d 1240, 1253 (S.D. Fla. 2009), *aff'd*, 415 F. App'x 161 (11th Cir. 2011).

Allowing corporate insiders to hide behind company statements with impunity sets a dangerous precedent. As the Virginia Supreme Court specifically forewarned long ago, limiting liability to the company itself "would in many instances afford immunity to the chief offenders, the officers of the corporation, without whose assistance it would be impossible for the corporation to engage in the prohibited business." *Crall v. Com.*, 103 Va. 855, 49 S.E. 638, 640 (1905). This Court should take this opportunity to affirm the "group publishing" presumption that prevents such a result. It should also clarify the law to distinguish company statements from group pleading for purposes of scienter, as there is wide-spread confusion among the courts below on this important issue.

B. Petitioners Alleged Sufficient Facts to Hold Both Respondents Responsible for Their Respective Company Statements

Here, the complaint presents extensive allegations that Mr. Rodham and Mr.

McAuliffe controlled and directed the affairs of Gulf Coast and GreenTech, respectively. Thus, Petitioners alleged, *inter alia*, that Rodham operated and controlled Gulf Coast and the companies that controlled GreenTech (specifically, A-3 partnership and its general partner, A-3 GP, LLC ("A-3 GP")) as the President and CEO of each company. CA JA 142 at ¶ 16, 168 at ¶ 148 & 179 at ¶ 189. The allegations specify that he "managed each company's day to day operations, had full and complete knowledge of all of … [their] conduct, and actively participated in the affairs" of these companies; moreover, Rodham "was aware of, and directed, all of the statements and conduct of those companies…." CA JA 168 at ¶ 148 & 179 at ¶ 189. In addition, the allegations further provide that Rodham recruited Chinese investors and took primary responsibility for structuring the investments. CA JA 148 ¶ 56.

Similarly, Petitioners alleged that McAuliffe co-founded GreenTech and served as its Chairman; moreover, he was GreenTech's largest shareholder at all relevant times. CA JA 142 at ¶ 15, 161 at ¶ 99 & 180 at ¶ 193. The allegations specify that he "was aware of, and ultimately responsible for, GreenTech's major initiatives, including the raising of EB-5 investment from investors … and the marketing thereof, and actively participated in GreenTech's affairs." CA JA 180 at ¶ 193. Likewise, he served as the face of the

GreenTech operation and marketed his name and image to attract investors such as Petitioners here. CA JA 153 at ¶ 70 & 161 at ¶ 99.

Accordingly, Rodham should have been deemed to be the speaker whenever Gulf Coast or GreenTech put out their public statements, and these statements should have considered when measuring particularity of the individual fraud claims asserted against Rodham. For the same reasons, Petitioners' allegations of misrepresentations by GreenTech should have been part of the analysis when measuring particularity of the individual fraud claims asserted against McAuliffe. These allegations include Gulf Coast's "**guarantee[] [of] permanent residency**" to EB-5 investors via a June 2010 brochure, its representation that EB-5 investment made up only 7.8% of GreenTech's financing in the same brochure, its statement that the capital invested in GreenTech was guaranteed against loss in the same brochure, and its representation that investors would be the "first to harvest benefits and the last to bear risks" should the company file for bankruptcy. CA JA 151-152 at ¶¶ 63-67 (original emphasis); *see also* CA JA 156-157 at ¶¶ 80-83, 158-159 at ¶¶ 89-91 & 159 at ¶ 93 (setting forth additional allegations of various Gulf Coast's misrepresentations and the facts showing their falsity, including representations concerning the number of

jobs created and cars sold). All of these statements were false: *first*, there was no basis to guarantee permanent residency in June 2010, and many GreenTech investors have not obtained permanent residency; *second*, EB-5 investment made up the majority of GreenTech's financing; and *third*, EB-5 guidelines actually require the investment to be at risk, and there is no guarantee that investors would better off than regular creditors come bankruptcy time. CA JA 151-152 at ¶¶ 63-67.

Similarly, Petitioners alleged various misrepresentations by GreenTech, such as, for example, certain concealing misrepresentations designed to cover up the alleged fraud, including statements in 2013 that certain government investigations confirmed GreenTech to be problem free and reliable (which was false because the investigations actually concluded the opposite). CA JA 166 at ¶ 138. All of these alleged misstatements provide additional sufficient basis for Petitioners' fraud claims against both Respondents.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 3, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 17, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2194

XIA BI; NIAN CHEN; YING CHENG; CHUNGSHENG LI; LIN LIN; LAN LIU; MEIMING SHEN; YUNPING TAN; BIXIANG TANG; YAHONG WANG; YUE WANG; JIAN WU; JUNPING YAO; XUEMEI ZHANG; YAN ZHAO,

Plaintiffs-Appellants,

and

YUANYUAN CHEN; JUN HUANG; KUI LE; ZHONGHUI LI; CHUN WANG; RUI WANG; LEI YAN; JIN YOU; ZHEN YU; HOUQIAN YU; NIANQING ZHANG; HUIBIN ZHAO,

Plaintiffs,

v.

TERRY MCAULIFFE; ANTHONY RODHAM,

Defendants-Appellees

and

XIAOLIN "CHARLES" WANG; DOES 1-100,

Defendants.

Appendix A

May 7, 2019, Argued;
June 12, 2019, Decided

Designation of Appellants
Amended: July 17, 2019

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:17-cv-01459-CMH-IDD). Claude M. Hilton, Senior District Judge.

Before WILKINSON and NIEMEYER, Circuit Judges, and DUNCAN, Senior Circuit Judge.

WILKINSON, Circuit Judge:

Twenty-seven Chinese investors appeal from the dismissal of their claims against Terry McAuliffe and Anthony Rodham stemming from failed investments in an electric vehicle startup. For the reasons that follow, we affirm.

I.

A.

We accept as true the following facts, which come from plaintiffs' amended complaint. Plaintiffs-Appellants are a group of twenty-seven Chinese citizens who invested $500,000 each in a partnership that loaned their money to GreenTech Automotive. GreenTech, founded in 2008, was a Mississippi corporation that wanted to enter the

hybrid and electric vehicle markets. Initially, GreenTech planned to produce the "MyCar," a vehicle that would travel at low speeds and thus be subject to lower levels of regulatory scrutiny.

This ambitious plan required a great deal of capital. GreenTech sought to raise some funds from foreign investors who might qualify under the Employment-Based Immigration Fifth Preference, or EB-5, Program. See 8 U.S.C. § 1153(b)(5). This program offered a path to permanent residency for foreign investors whose investments in American projects created or preserved at least ten jobs for American workers. While the program ordinarily required a $1 million investment, investments of $500,000 in certain rural areas or areas with high unemployment may also qualify under the EB-5 program.

GreenTech thus planned to build a new manufacturing facility in Tunica, Mississippi to take advantage of the lower investment threshold. The company collected funds from potential EB-5 immigrants through several different investment platforms. Some Chinese investors, for example, purchased preferred shares directly from GreenTech. The plaintiffs in this lawsuit, however, invested their money in GreenTech Automotive Partnership A-3, LP (the "A-3 partnership"), which was created to collect capital and then loan it to GreenTech. Plaintiffs' investments were governed by a series of documents, including "the private placement memorandum, the subscription agreement, the limited partnership agreement, a construction loan agreement, [and] a power of attorney agreement." J.A. 155. These documents were distributed to plaintiffs in English only, not Chinese.

Plaintiffs allege that they signed the subscription documents "without reviewing any version" and do not claim to have translated the documents into their native language. *Id.* at 181, 186. Pursuant to those written agreements, each of the twenty-seven plaintiffs paid $500,000 for a partnership share in A-3 sometime between July 2012 and December 2013. They each also remitted an "Administrative Fee" of $60,000 or $61,000 to Gulf Coast Funds Management, LLC, a GreenTech affiliate that managed the A-3 partnership.

In total, the A-3 partnership collected $500,000 from each of eighty-six investors, and then loaned the total of about $43 million to GreenTech. The loan terms were "not the result of arm's length negotiations." *Id.* at 169. The Private Placement Memorandum reveals that the loan, which was non-recourse, "specifically exclude[d] customary provisions designed to protect the interests of lenders." *Id.* at 278. GreenTech would make interest-only payments to the A-3 partnership at a 4% interest rate; of that amount, 1.5% would be used to pay Gulf Coast yearly management fees. *Id.* at 257.

Defendants-appellees are Terry McAuliffe and Anthony Rodham.[1] McAuliffe was the co-founder and former Chairman of GreenTech. Rodham was the CEO of both the A-3 partnership and another entity that was formed to serve as A-3's general partner, GreenTech

1. We note that defendant Anthony Rodham passed away on June 7, 2019. Inasmuch as plaintiffs have failed to prevail against any appellee in this action, his passing has no bearing on the resolution of this appeal.

Automotive Capital A-3 GP, LLC. Rodham also served as President and CEO of Gulf Coast, the management company that received plaintiffs' administrative fees.

Plaintiffs claim that Rodham and McAuliffe made a series of false statements relating to the A-3 partnership's fundraising efforts. The complaint alleges that Rodham made the following misstatements:

(1) On April 25, 2011, Rodham claimed that EB-5 funds accounted for only 7.8% of GreenTech's capital during an event in Beijing, China.

(2) At this same event, Rodham expressed that Gulf Coast "chose" GreenTech as a suitable investment.

The complaint alleges that these statements were false because (1) far more than 7.8% of GreenTech's funds came from EB-5 investors; and (2) Gulf Coast could not *choose* GreenTech since they were under joint ownership and management.

The plaintiffs also allege that McAuliffe made four misstatements:

(1) On November 11, 2011, McAuliffe told a CNBC interviewer that GreenTech "ha[d] only sold 11,000 cars, but it's still a new business for us." J.A. 154.

(2) On January 14, 2012, McAuliffe informed Jan Paynter during an interview that GreenTech's first-year's production of electric vehicles would be sold to the country of Denmark.

(3) On July 23, 2012, McAuliffe said in an interview with three Chinese reporters that GreenTech was the first corporation to mass produce low-speed electric cars.

(4) On December 5, 2012, McAuliffe stated in an interview with a local NBC station that GreenTech "had a thousand employees." J.A. 155.

The complaint alleges that each of those statements was false when made because GreenTech (1) had not sold 11,000 cars; (2) did not have a contract with Denmark; (3) had not mass-produced any electric vehicles; and (4) had fewer than one hundred employees.

Plaintiffs allege that they each "relied on some or all of the statements in these newsletters, statements on GreenTech's websites and social media, and statements made by Mr. McAuliffe [and] Mr. Rodham . . . during roadshows, in interviews, and in written materials they authorized before signing the subscription agreement . . . ." J.A. 162. But there are no specific allegations that any individual plaintiff encountered any of those alleged misstatements in promotional materials or on Greentech's website. Twenty-two plaintiffs, moreover, allege that they

moved to the United States on provisional visas in reliance on defendants' misrepresentations.

GreenTech, along with a web of related corporate entities, eventually failed to manufacture and sell vehicles according to its business plan. GreenTech defaulted on the loan from the A-3 partnership, and the plaintiffs have not recovered their $500,000 investments. As of the filing of the amended complaint, GreenTech and several of the related entities had filed for bankruptcy. Plaintiffs now seek, *inter alia*, to recover the losses from their failed investments in the A-3 partnership.

B.

Plaintiffs filed their original complaint in Virginia state court. After removing the suits to the Eastern District of Virginia, McAuliffe and Rodham filed motions to dismiss. The district court granted the motions under Federal Rule of Civil Procedure 12(b)(6). With respect to the fraud claims so central to the complaint, it held that the plaintiffs had failed "to identify the facts needed to adequately plead claims . . . with particularity," J.A. 134, including allegations over "the manner in which [any false statements] misled the plaintiff[s], and the manner in which plaintiff[s] relied on the statements." *Id.* at 133-34. Plaintiffs were allowed twenty days to file an amended complaint.

The amended complaint honed plaintiffs' allegations by reducing the number of claims and dropping from the case several corporate defendants, which by that point had

filed for bankruptcy and thus stayed any actions against them. The amended complaint raised claims against both McAuliffe and Rodham for fraud in the inducement (Count I); fraud (Count II); federal securities fraud (Count III); and conspiracy to commit fraud and breach fiduciary duties (Count VII). Plaintiffs also brought claims against Rodham for breach of fiduciary duty (Count IV); accounting (Count V); aiding and abetting a breach of fiduciary duty (Count VI); unjust enrichment (Count VIII); and negligence (Count IX).

McAuliffe and Rodham again moved to dismiss the claims against them for failure to state a claim under Rule 12(b)(6). And the district court again granted the motion, this time with prejudice. As to the fraud claims, the court noted that "[p]laintiffs do not state which of the named [p]laintiffs claims to have relied on each statement, or where or how any specific [p]laintiff heard or learned of the alleged statements." J.A. 478-79. For that reason, plaintiffs still had failed to plead reliance with the particularity required under the Rules of Civil Procedure. See Fed. R. Civ. P. 9(b). The court also noted that any reliance on the alleged misstatements was unreasonable because plaintiffs by their own admission did not read or review the offering documents.

The court also dismissed the claims for breach of fiduciary duty, unjust enrichment, and negligence because plaintiffs were not the appropriate party to bring these claims, which properly should have been brought by the partnership itself or as derivative claims. The subscription documents included a Delaware choice-of-law provision.

See J.A. 351. Whether a claim is direct or derivative under Delaware law turns on whether the partnership suffered the alleged injury and whether it would receive the benefit of any recovery. *El Paso Pipeline GP Company, L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1256-65 (Del. 2016).

As the district court put it, "[p]laintiffs still lack standing to assert such a claim . . . because any alleged injury that was suffered was suffered by the Limited Partnership and not by the [p]laintiffs directly" and because "[a]ny recovery to be had would be to the Limited Partnership and not to the individual [p]laintiffs." J.A. 481-82, 483-84. This was true, in part, because the subscription documents did not provide plaintiffs with a right to withdraw their money from the partnership. See J.A. 334. The aiding and abetting a breach of fiduciary duty claim failed for the same reason. The district court dismissed the conspiracy claim along with the underlying breach of fiduciary duty and fraud claims. Finally, it dismissed the accounting claim because plaintiffs asserted no right to an accounting under the partnership agreement. Plaintiffs now appeal the district court's order dismissing their claims.[2]

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2. The appeal chiefly concerns fraud claims based on alleged misstatements by Rodham and McAuliffe. We have reviewed the record and affirm the dismissal of plaintiffs' other claims for the reasons stated by the district court. With respect to plaintiffs' federal securities fraud claim, while we do not endorse the district court's statement that "the PSLRA[] prohibits the amendment of complaints," J.A. 480-81, the district court did in fact allow the complaint to be amended and any additional amendments would have been futile for the reasons set forth herein.

II.

Review of the district court's dismissal involves the special pleading standards applicable to claims of fraud. All complaints in federal court must, at a minimum, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Federal Rule of Civil Procedure 9(b) heightens pleading standards for claims of fraud, so that "a party must state with particularity the circumstances constituting fraud," except that "conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Plaintiffs' federal securities fraud claim must also comply with the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. The PSLRA leaves in place the general requirements of Rule 9(b), but requires pleadings to demonstrate, *inter alia*, "the reason or reasons why [each alleged] statement is misleading" and to provide facts "giving rise to a strong inference" of scienter. 15 U.S.C. § 78u-4(b); see *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 172 (4th Cir. 2007).

A.

Plaintiffs bring both common law fraud claims under Virginia law and statutory fraud claims under federal law, here Rule 10b-5. See 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5 (Rule 10b-5). There are, no doubt, important legal differences between federal and state fraud claims. The state claims, for example, need not involve the

"purchase or sale of a security" as required under Rule 10-5. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008). Rule 10b-5 claims, moreover, sometimes rely on legal theories that may not be available as a matter of Virginia common law. Compare *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011) (applying the fraud-on-the-market theory), with *Fentress Families Tr. v. Va. Elec. & Power Co.*, 81 Va. Cir. 67 (2010) (rejecting application of that theory).

This case, however, bottoms out on shared features of the state and federal fraud claims. Both federal and state law require that each defendant made a material misstatement. See *Stoneridge*, 552 U.S. at 157; *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 764 S.E.2d 256, 260 (Va. 2014). To support recovery on any theory, moreover, plaintiffs must have justifiably relied on those same misstatements. See *Miller v. Asensio & Co., Inc.*, 364 F.3d 223, 227 (4th Cir. 2004) (federal securities law); *Jared & Donna Murayama 1997 Tr. v. NISC Holdings, LLC*, 284 Va. 234, 727 S.E.2d 80, 86 (Va. 2012) (Virginia common law). It is to these common elements that we now turn.

B.

First, we consider whether the complaint alleges material misstatements. Defendants argue that some of their alleged statements cannot be material misstatements as a matter of law. They note that "an action based upon fraud must aver the misrepresentation of present pre-

existing facts, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 699 S.E.2d 483, 490 (Va. 2010) (internal quotation marks omitted); see *Raab v. General Physics Corp.*, 4 F.3d 286, 289-90 (4th Cir. 1993) (forward-looking statements are often immaterial under federal securities law). Similarly, courts have long accepted that immaterial boasting and exaggerations, often called puffery, do not normally constitute actionable fraud. See *Longman v. Food Lion, Inc.*, 197 F.3d 675, 685 (4th Cir. 1999) (federal securities law); *Tate v. Colony House Builders, Inc.*, 257 Va. 78, 508 S.E.2d 597, 600 (Va. 1999) (Virginia common law).

The above rules serve important purposes. Forward-looking statements provide valuable information for investors in the securities marketplace, and they allow contracting parties to make better-informed judgments. But as Yogi Berra observed, "It's tough to make predictions, especially about the future." Even the most careful projections will sometimes prove wrong. Pinning liability on forward-looking statements would risk an influx of lawsuits concerning every major event, and would shut valuable projections entirely out of the market. See 15 U.S.C. § 78u-5(c) (federal safe harbor for forward-looking statements by certain issuers and their affiliates).

Puffery, too, serves an important role in the formation of contracts large and small. There is little doubt that expressions of enthusiasm and use of superlatives are common tools for skilled salespersons. See J.A. 155 (McAuliffe describing GreenTech as a "great American

success story"). These sorts of statements can help inspire confidence and trust when those qualities are in short supply, and ultimately serve to encourage the free flow of capital in the marketplace. There is, in the end, little reason to purge the market of all optimism. Projections and puffery will thus rarely qualify as material misstatements under federal and state law. See *Longman*, 197 F.3d at 685; *Tate*, 508 S.E.2d at 600.

The problem for defendants, however, is that their alleged misstatements go beyond mere projections or puffery. Rodham, for example, said that EB-5 funds accounted for only 7.8% of GreenTech's capital. This statement was not an expression of optimism or speculation as to who might invest in the future; it was an assertion about what funds had been raised in the past. McAuliffe's alleged misstatements were even more aggressive. GreenTech either had "sold 11,000 cars," or it had not; it had "a thousand employees," or not; and it had mass-produced electric cars, or not. Those statements were plainly not forward-looking. See *Malone v. Microdyne Corp.*, 26 F.3d 471, 472-80 (4th Cir. 1994) (discussing forward-looking statements).

Even McAuliffe's alleged statement that the first year of vehicle production would be sold to the country of Denmark, which at first blush describes a future event, fails closer inspection. Read in the light most favorable to the plaintiffs, this is no simple statement of opinion or future intent; it claims that a named buyer had agreed to purchase specific vehicles at a particular time. Plaintiffs' allegation thus counts as an assertion of fact under the

case law in this circuit. See *Raab*, 4 F.3d at 289-90.

In toto, defendants' statements ran in front of the facts on the ground. There are no laurels in this case, no accolades to be bestowed. These are just the sort of misstatements targeted by statutory and common law fraud causes of action. False information is not useful to the market, and may lead investors to commit their resources in ways that will prove harmful. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) (Stevens, J., concurring in judgment). Far from building investor confidence, misstatements like those alleged in this case undermine public trust. We decline to whitewash the alleged misstatements here.

C.

Defendants also argue that plaintiffs have failed to adequately plead justifiable reliance on the alleged misstatements. We agree with the district court that plaintiffs' complaint falls far short of plausibly pleading justifiable reliance.

1.

Under Virginia common law, plaintiffs must allege "reasonable or justifiable reliance" on a defendant's misrepresentations. *Murayama 1997 Tr.*, 727 S.E.2d at 86 (internal quotation marks omitted). "[T]he touchstone of reasonableness" under Virginia law "is prudent investigation." *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 629 (4th Cir. 1999). Federal law similarly

requires that an investor "justifiably relied" on particular misstatements in an action under Rule 10b-5. *Miller*, 364 F.3d at 227 (internal quotation marks omitted). As with Virginia common law, federal securities law "requires plaintiffs to invest carefully" and conduct at least "minimal diligence." *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1028 (4th Cir. 1997) (internal quotation marks and alterations omitted). Plaintiffs cannot recover, in other words, if they "possess[] information sufficient to call a misrepresentation into question but nevertheless close [their] eyes to a known risk." *Id.* (internal quotations marks and alterations omitted).

Plaintiffs invite the court to assess the element of justifiable reliance without turning to Rule 9(b)'s heightened pleading standards. See Fed. R. Civ. P. 9(b). But our circuit has previously held that "[r]easonable, detrimental reliance upon a misrepresentation is an essential element of a cause of action for fraud . . . and such reliance must be pleaded with particularity." *Learning Works, Inc. v. The Learning Annex, Inc.*, 830 F.2d 541, 546 (4th Cir. 1987) (citing Rule 9(b)). Indeed, Rule 9(b) itself provides that "a party must state with particularity the circumstances constituting fraud . . . ." Fed. R. Civ. P. 9(b). How and whether a party relied on a misstatement is every bit as much a "circumstance[] constituting fraud" as any other element. *Id.* And when Congress or the Federal Rules intend for an element of fraud to be pleaded under a different standard, they tell us so explicitly. Rule 9(b), for example, specifically instructs that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* Plaintiffs can point to no

similar language placing the element of reliance beyond the reach of Rule 9(b). With equal clarity, the PSLRA requires pleadings to include facts "giving rise to a strong inference" of scienter, 15 U.S.C. § 78u-4(b), while leaving Rule 9(b)'s background pleading standards in place for the other elements of fraud. See *Hunter*, 477 F.3d at 172. There is, in sum, no textual basis to give plaintiffs extra wiggle room in pleading the reliance elements of their state and federal fraud claims.

The plaintiffs' argument also fails as a matter of common sense. Rule 9(b) seeks "to provide defendants with fair notice of claims against them and the factual ground upon which they are based . . . ." *McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 559 (4th Cir. 2013). This rationale applies with special force to allegations of reliance, which inherently rest on information within a plaintiff's possession. See *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 852-53 (6th Cir. 2006). Whereas defendants are likely to know facts that will allow them to contest the falsity of their own statements or their own state of mind, they have little reason to know how a plaintiff learned of any misstatements or what role they played in a plaintiff's investment decisions. Particular allegations of reliance thus lie at the core of Rule 9(b)'s mandate.

2.

Plaintiffs' complaint fails to adequately plead justifiable reliance, instead relying only on general and conclusory allegations. Paragraph 103 of the amended complaint provides a prime example:

> Each of the Plaintiffs relied on some or all of the statements in these newsletters, statements on GreenTech's websites and social media, and statements made by Mr. McAuliffe [and] Mr. Rodham . . . during roadshows, in interviews, and in written materials they authorized before signing the subscription agreement and transferring their $500,000 investment and $60,000 or $61,000 Administrative Fee.

As the district court noted, "[p]laintiffs do not state which of the named [p]laintiffs claims to have relied on each statement, or where or how any specific [p]laintiff heard or learned of the alleged statements." J.A. 478-79. The only information provided that is specific to any given plaintiff is the individual's name, citizenship, current residence, and the dates of his subscription agreement and money transfer. A list of names and investment dates may be important, but it does nothing to show how any plaintiff learned of a given misstatement, or whether any plaintiff even relied on a given misstatement at all. The district court was correct to dismiss the complaint because these general allegations do not satisfy us that the plaintiffs have "substantial prediscovery evidence of those facts." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

The facts of this case make those omissions particularly glaring. Most of the alleged misstatements, for example, were made in English—a language that many of the plaintiffs allege they do not understand. What is more, many of those alleged misstatements were made to

American media, sometimes of the local variety. It is far from clear how or whether plaintiffs learned of these statements. This is not to say that statements to media sources, even local ones in distant lands, cannot form the basis of a meritorious fraud claim. Far from it. We live in a day and age where news travels fast and vast amounts of information are easily accessible online. But the realities of the Internet do not alter the fundamental need for plaintiffs to plead reliance with particularity, and the amended complaint falls short of that bedrock requirement.

Even if plaintiffs had properly described who relied on each misstatement and how that person heard of it, they fail to plead justifiable reliance. Investments often boil down to a series of written contracts. In this case, those contracts included "the private placement memorandum, the subscription agreement, the limited partnership agreement, a construction loan agreement, [and] a power of attorney agreement." J.A. 155. The written offering documents must control, and here they in fact contradicted the sorts of stray media statements attributed to Rodham and McAuliffe.

The Private Placement Memorandum, for example, made clear that GreenTech was "a development stage company," J.A. 243, that was raising money to "design, build, and *commence* production" of vehicles at a new production facility, J.A. 274 (emphasis added). It also warned that the underlying loans from the partnership to GreenTech did "not contain market terms and specifically exclude[d] customary provisions designed to protect the

interests of lenders." *Id.* at 278. It said, in all capital letters, that "AN INVESTMENT IN THE PARTNERSHIP IS SPECULATIVE AND INVOLVES A SIGNIFICANT DEGREE OF RISK." J.A. 237. It also described how GreenTech had already raised capital from investors under the EB-5 program, *id.* at 275, and that "[n]o assurance can be given that an investor will receive a conditional or permanent lawful resident status in the U.S. or that an investment in the Partnership will comply with the EB-5 [p]rogram," J.A. 259 (internal emphasis omitted). In short, the plaintiffs plainly "possesse[d] information sufficient to call [the alleged] misrepresentation[s] into question." *Banca Cremi*, 132 F.3d at 1028 (internal quotations marks and alterations omitted).

But plaintiffs make clear in their complaint that they signed the subscription documents "without reviewing any version." J.A. 181, 186. Indeed, they allege that they only recently discovered "the nature of the documents they signed." *Id.* at 155. There is no allegation in the complaint that they made any effort to translate the documents into their native language, or even asked any English-speaking attorney or investment advisor to review the documents for them.

The question is whether plaintiffs could justifiably rely on the alleged misstatements when they did not read, translate, or ask advisors to review the subscription documents. Several factors may influence whether reliance was justifiable as a matter of law. See *Banca Cremi*, 132 F.3d at 1028; *Sweely Holdings, LLC v. Suntrust Bank*, 296 Va. 367, 820 S.E.2d 596 (Va. 2018) (finding reliance

unjustifiable as a matter of law). But this case is not close. The investments in a start-up company on the edge of new automotive technology obviously signaled a high degree of risk. Risk invites prudence; prudence involves inquiry. The plaintiffs here were putting more than half a million dollars in the hands of foreigners with whom they alleged no prior relationship. It was unjustifiable to make such an investment in reliance on stray media statements without so much as translating or even reviewing the subscription documents before signing them. While everyone occasionally skips over the fine print in their day-to-day endeavors, it is fair to expect some minimal level of due diligence before making this large an investment in a company whose prospects were chancy and where sizeable returns were anything but guaranteed.

Even so, plaintiffs ask this court to excuse any unjustifiable reliance on the basis that defendants "divert[ed them] 'from making the inquiries and examination which a prudent man ought to make.'" *Hitachi*, 166 F.3d at 629 (quoting *Horner v. Ahern*, 207 Va. 860, 153 S.E.2d 216, 219 (Va. 1967)). This argument also fails. Plaintiffs were clearly provided the relevant offering documents. Nothing in plaintiffs' amended complaint so much as suggests that defendants prevented them from taking the modest step of reviewing the operative offering documents that they signed. The defendants had no generalized duty to translate the subscription documents for the benefit of foreign investors, especially when translation would open a new avenue of dispute and the English version of those documents would have been controlling in any event. J.A. 353. Imposing some invariable new duty of translation

on parties seeking to raise funds from foreign investors would hike the costs of international financing for many nations, encourage new mistranslation lawsuits, and open the door to additional forms of mischief. There is no plausible allegation in the complaint that defendants diverted plaintiffs from conducting a prudent and objectively reasonable investigation before investing. See *Hitachi*, 166 F.3d at 629.

Our emphasis on reliance should come as little surprise: that element occupied the lion's share of the briefing in this court and was part of both the first and second orders to dismiss from the district court. See J.A. 133-34, 478-79. Yet when the panel asked plaintiffs' lead counsel where the complaint adequately alleged reliance, he repeatedly stated that his co-counsel would answer those questions on rebuttal. But the court was not obligated to hold its questions on reliance for rebuttal, at which point the opposing party would no longer have a fair opportunity to respond. Just as counsel may divide oral argument time, the court may expect lead advocates to be familiar with more than a tiny corner of the complaint and parties to advance arguments when opposing counsel has the chance to take issue with them. Our ultimate inquiry, of course, rests on the adequacy of the complaint itself—but basic fairness must not become a casualty of the appellate process at any stage.

III.

America has always relied on entrepreneurship and investment to propel her economy forward. The EB-5

program was intended to recognize that immigrants can play an integral role in that story, providing jobs for our society in exchange for the opportunity to be a part of it. But the truth of the matter is that investments are inherently risky, with the hope of reward weighed always against the fear of failure. Not every failed investment can lead to a meritorious fraud lawsuit. The element of justifiable reliance encourages a modicum of personal responsibility for investment decisions and helps to distinguish those who were wrongly misled from those making *post hoc* attempts to recoup market losses. Because the amended complaint failed to adequately allege justifiable reliance, the district court's decision to dismiss it is

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED SEPTEMBER 5, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:17-cv-01459

XIA BI, *et al.*,

Plaintiffs,

v.

TERRY MCAULIFFE, *et al.*,

Defendants.

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Terry McAuliffe and Defendant Anthony Rodhams' Motions to Dismiss Plaintiff's First Amended Complaint.

On December 22, 2017, Defendants removed this action from Fairfax County Circuit Court to this Court based on federal question and supplemental jurisdiction. Plaintiffs Original Complaint contained eleven counts against Defendants. On April 11, 2018 Plaintiffs filed an amended complaint with nine counts including eight of the original counts and one new count for negligence. The

claims include: Fraud in the Inducement (count 1); Fraud (count 2); Federal Securities Fraud (count 3); Breach of Fiduciary Duty (count 4); Accounting (count 5); Aiding and Abetting Breach of Fiduciary Duty (count 6); Conspiracy to Commit Fraud and Breach Fiduciary Duties (count 7); Unjust Enrichment (count 8); and Negligence (count 9). Only counts one, two, three, and seven (7) are alleged against Defendant McAuliffe. All counts are alleged against Defendant Rodham.

The Court finds that Plaintiffs fail to state a claim for which relief may be granted on all counts. For the claims of fraud and fraud in the inducement (counts 1-2), Plaintiffs fail to plead with particularity. Federal Rule of Civil Procedure 9(b) requires a heightened pleading standard of particularity for claims of fraud. To meet the FRCP 9(b) particularity standard, the complaint must (1) identify the fraudulent statements which were made and the documents or oral representations containing them, (2) the time and place of each statement and the person responsible for making (or not making - in the case of omissions) the same, and (3) the content of such statements, the manner in which they misled the plaintiff, and the manner in which plaintiff relied on the statements. *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008).

Here, Plaintiffs in their Amended Complaint still fail to identify the facts needed to adequately plead claims of fraud and fraud in the inducement with particularity. Plaintiffs do not state which of the named Plaintiffs claims to have relied on each statement, or where or

how any specific Plaintiff heard or learned of the alleged statements.

The only specific allegation against Mr. Rodham is that he allegedly stated, in April 2011, to investors at a public forum in Beijing that Greentech was attractive to Gulf Coast because foreign investment constituted just 7.8% of the total investment, when in fact EB-5 investment was allegedly the majority of the funds raised. Plaintiffs do not allege with particularity why this statement by Mr. Rodham was known by him at the time to be false. Plaintiffs also do not allege how such a statement was material to the Plaintiffs' investment decision, considering that the Plaintiffs contend they invested based on their belief that their investment was "guaranteed" and would result in the granting of their EB-5 petitions.

Similarly, for Mr. McAuliffe Plaintiffs fail to allege any specific facts demonstrating their reliance on his alleged statements. At least two of the alleged misrepresentations by Mr. McAuliffe are either non-actionable puffery or forward-looking statements that fail to misrepresent "present pre-existing facts." *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 362, 699 S.E.2d 483 (Va. 2010). These alleged statements are unfulfilled promises or statements as to future events that do not amount to fraud.

"It is not enough for a plaintiff in a fraud action to show that it acted to its detriment in response to the defendant's false representation or concealment of a material fact." *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 629 (4th Cir. 1999). Rather, to state a claim for fraud, "a plaintiff

must demonstrate that its reliance upon the representation was reasonable and justified." *Id.* Reasonable reliance, in turn, requires a reasonable investigation. The Plaintiffs claim that they invested in the Limited Partnership interests in reliance upon certain statements made to them by Defendants in oral presentations and in written statements contained in newsletters, websites, and social media, but they did not read the English-language private placement memorandum, subscription agreement, partnership agreement, power of attorney, or related formal documents presented to them before they invested.

It was unreasonable for Plaintiffs not to have translated or read the key documents that set forth the terms of their investments, and instead to rely upon contradictory oral representations, informal newsletters, and statements contained on websites and social media.

Plaintiffs' federal securities fraud claim (count 3) fails because they are legally foreclosed by the PSLRA from raising a Rule 10b-5 claim in their Amended Complaint. Specifically, the PSLRA, prohibits the amendment of complaints. *Smith v. Circuit City Stores, Inc.*, 286 F. Supp. 2d 707, 722-23 (E.D.Va. 2003) (stating that the PSLRA does not "contemplate amending complaints, it sets a high standard of pleading which if not met results in mandatory dismissal"). The plain language of the Reform Act does not contemplate amending complaints. *In re Champion Enters., Inc., Sec. Litig.*, 145 F. Supp. 2d 871, 873 (E.D. Mich. 2001), aff'd on other grounds sub nom. *Miller v. Champion Enters. Inc.*, 346 F.3d 660 (6th Cir. 2003). This is because "the [PSLRA] could not achieve this purpose

. . . to 'provide a filter at the earliest stage (the pleading stage) to screen out lawsuits that have no factual basis' if plaintiffs 'were allowed to amend and amend until they got it right." *Id.* Count three thereby fails.

Plaintiffs next allege breach of fiduciary duty (count 4), and aiding and abetting breach of fiduciary duty (count 6) against Defendant Rodham. As mentioned in the Court's first motion to dismiss order, Virginia law does not recognize a separate tort for aiding and abetting breach of fiduciary duty. As for the breach of fiduciary duty claim, Plaintiffs still lack standing to assert such a claim. Plaintiffs are partners in the Limited Partnership, not in the defendant companies. The Limited Partnership merely loaned proceeds to Greentech. The Complaint does not state allegations that Plaintiffs have an interest in the defendant companies to create a fiduciary relationship. Plaintiffs' attempt to cure this deficiency in the First Amended Complaint is futile because any alleged injury that was suffered was suffered by the Limited Partnership and not by the Plaintiffs directly.

Count 8, conspiracy to commit fraud and breach fiduciary duties still fails because Plaintiffs do not state cognizable claims for the underlying actions of the conspiracy. Civil conspiracy is not an independent cause of action, but requires an underlying wrong which would be actionable absent the conspiracy. *See Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 694 (Del. Sup. 1986). Because Plaintiffs' claims for fraud and breach of fiduciary duty fails, so too must the claim for conspiracy.

For the accounting claim (count 6), the First Amended Complaint still fails to allege any cognizable right to such an accounting under the Limited Partnership Agreement. Plaintiffs are simply members of a partnership who loaned money to the defendant companies, and the partnership agreement does not expressly provide a right to accounting.

Plaintiffs next allege a claim for unjust enrichment (count 8). Nothing in the First Amended Complaint has cured the fact that the claim seeks recovery for the loss of income to the Limited Partnership. Any recovery to be had would be to the Limited Partnership and not to the individual Plaintiffs. Plaintiffs lack standing to bring suit against Defendants for this claim.

Finally, with respect to the new claim of negligence (count 9), the Court finds that this claim also fails. The basis for this claim is that Mr. Rodham failed in his alleged duty to the Plaintiffs by not recording a lien on Greentech's assets that would have secured the loan made by the Limited Partnership to Greentech, thereby causing A-3 to lose priority in Greentech's bankruptcy. Plaintiffs seek recovery for the loss of income to the Limited Partnership which, as discussed above, Plaintiffs do not have standing to assert a claim against. Moreover, Plaintiffs have not alleged a plausible basis to find that Mr. Rodham owed them, in their individual capacities, a duty to record the lien. Count nine (9) fails.

For the reasons stated, the Court finds that Plaintiffs fail to state a claim on all counts. Accordingly, Defendants'

Appendix B

Motions to Dismiss are granted. This case is dismissed. An appropriate order shall issue.

/s/ Claude M. Hilton
CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
September 5, 2018

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED MARCH 30, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:17-cv-01459

XIA BI, *et al.*,

Plaintiffs,

v.

TERRY MCAULIFFE, *et al.*,

Defendants.

ORDER

THIS MATTER comes before the Court on Defendant Terry McAuliffe and Defendants' Anthony Rodham, American Immigration Center, LLC, Greentech Automotive Capital A-3 GP, LLC, Greentech Automotive, Inc., Gulf Coast Funds Management, LLC, and WM Industries Corporation's Motions to Dismiss.

This case has been stayed for defendants American Immigration Center, LLC, Greentech Automotive Capital A-3 GP, LLC, Greentech Automotive, Inc., Gulf Coast Management, LLC, and WM Industries Corporation

pending disposition by the U.S. Bankruptcy Court for the Eastern District of Virginia. This Order therefore addresses the remaining defendants who have brought motions to dismiss - Terry McAuliffe and Anthony Rodham.

On December 22, 2017, Defendants removed this action from Fairfax County Circuit Court to this Court based on federal question and supplemental jurisdiction. Plaintiffs filed eleven counts against Defendants including: Fraud in the Inducement (count 1); Fraud (count 2); Federal Securities Fraud (count 3); Securities Fraud Pursuant to Mississippi Code § 75-71-509 (count 4); Breach of Fiduciary Duty (count 5); Accounting (count 6); Aiding and Abetting Breach of Fiduciary Duty (count 7); Conspiracy to Commit Fraud and Breach Fiduciary Duties (count 8); Breach of Contract (count 9); Breach of Implied Covenant of Good Faith and Fair Dealing (count 10); and Unjust Enrichment (count 11).

The Court finds that Plaintiffs fail to state a claim for which relief may be granted on all counts. For the claims of fraud and fraud in the inducement (counts 1- 2), Plaintiffs fail to plead with particularity. Federal Rule of Civil Procedure 9(b) requires a heightened pleading standard of particularity for claims of fraud. To meet the FRCP 9(b) particularity standard, the complaint must (1) identify the fraudulent statements which were made and the documents or oral representations containing them, (2) the time and place of each statement and the person responsible for making (or not making - in the case of omissions) the same, and (3) the content of such

statements, the manner in which they misled the plaintiff, and the manner in which plaintiff relied on the statements. *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F. 3d 370, 379 (4th Cir. 2008).

Here, Plaintiffs fail to identify the facts needed to adequately plead claims of fraud and fraud in the inducement with particularity. The federal and Mississippi securities fraud claims (counts 3 - 4) suffer from the same defects. The federal securities fraud count, as a rule 10b-5 and fraud-based claim, is subject to FRCP 9(b)'s heightened pleading standard.

Similarly, the pleading standard for the Mississippi securities fraud claim is interpreted in line with federal law. *See Harrington v. Office of Mississippi Secretary of State*, 129 So. 3d 153, 159 (Ms. 2013) ("There exists a dearth of case law on Mississippi securities law, however, Mississippi's regulations are similar to the federal securities regulations, and we are able to look to federal case law for guidance."). Count 4 is therefore also subject to the particularity standard. Neither count 3 nor count 4 pleads with particularity as required under the law. Plaintiffs have therefore not stated a claim for any of the fraud counts upon which recovery may be had.

Plaintiffs next allege breach of fiduciary duty (count 5), and aiding and abetting breach of fiduciary duty (count 7). Virginia law does not recognize a separate tort for aiding and abetting breach of fiduciary duty. As for the breach of fiduciary duty claim, Plaintiffs lack standing to assert such a claim. Plaintiffs are partners in the Limited

Partnership, not in the defendant companies. The Limited Partnership merely loaned proceeds to Greentech. The Complaint does not state allegations that Plaintiffs have an interest in the defendant companies to create a fiduciary relationship. Any alleged injury that was suffered was suffered by the Limited Partnership and not by the Plaintiffs directly.

Count 8, conspiracy to commit fraud and breach fiduciary duties, fails because Plaintiffs do not state cognizable claims for the underlying actions of the conspiracy.

For the accounting claim (count 6), Plaintiffs fail to allege any right to such accounting measures. Plaintiffs are simply members of a partnership who loaned money to the defendant companies, and the partnership agreement does not expressly provide a right to accounting.

Plaintiffs further allege a breach of contract (count 9), and breach of the implied covenant of good faith and fair dealing (count 10). While Mr. Rodham is not a party to the contract and is therefore not liable on it, Plaintiffs fail to plausibly allege a breach of contract. Notably, Plaintiffs do not cite to any specific provisions in the Agreement that Defendants are alleged to have breached. Further, Plaintiffs agreement is with the partnership and not with the companies themselves. The implied covenant claim fails for the same reasons. Plaintiffs do not plausibly allege that an implied contract obligation existed with these defendants, and if and how those obligations were breached.

Lastly, the claim for unjust enrichment (count 11) fails because any recovery to be had would be to the Limited Partnership and not to the individual Plaintiffs. Plaintiffs lack standing to bring suit against Defendants for this claim.

For the reasons stated, the Court finds that Plaintiffs fail to state a claim on all counts. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss are GRANTED and this case is DISMISSED AS TO DEFENDANTS TERRY MCAULIFFE AND ANTHONY RODHAM. Plaintiffs shall have 20 days to file an Amended Complaint.

/s/ Claude M, Hilton
CLAUDE M, HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 30, 2018

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2194
(1:17-cv-01459-CMH-IDD)

XIA BI; NIAN CHEN; YUANYUAN CHEN; YING CHENG; JUN HUANG; KUI LE; CHUNGSHENG LI; ZHONGHUI LI; LIN LIN; LAN LIU; MEIMING SHEN; YUNPING TAN; BIXIANG TANG; CHUN WANG; RUI WANG; YAHONG WANG; YUE WANG; JIAN WU; LEI YAN; JUNPING YAO; JIN YOU; ZHEN YU; HOUQIAN YU; NIANQING ZHANG; XUEMEI ZHANG; HUIBIN ZHAO; YAN ZHAO,

Plaintiffs-Appellants,

v.

TERRY MCAULIFFE; ANTHONY RODHAM,

Defendants-Appellees,

and

XIAOLIN "CHARLES" WANG; DOES 1-100,

Defendants.

July 9, 2019, Filed

Appendix D

ORDER

The petition for rehearing *en banc* was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing *en banc*.

For the Court
/s/ Patricia S. Connor, Clerk