No. 26-

IN THE

Supreme Court of the United States

SAFRON CAPITAL CORPORATION, *et al.*,

Petitioners,

v.

ELANCO ANIMAL HEALTH INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 11 and 12(a)(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77k, 77l(a)(2), require companies to prepare and file with the Securities and Exchange Commission (the "SEC") a prospectus and registration statement providing detailed information about the company's business and financial health prior to initiating a public sale of their stock so prospective buyers may fairly assess whether to invest. The two sections, respectively, prohibit companies' registration statements and prospectuses from making materially false or misleading statements or omitting to state a required material fact necessary to ensure the statements therein are not misleading. In the federal securities law context, the issue of materiality requires delicate assessments of the inferences a reasonable shareholder would draw from a given set of facts and the significance of those inferences, which are uniquely suited to determination by the trier of fact.

Against this backdrop, this case presents the following question:

When, if ever, can the issue of materiality in an action alleging violations of the federal securities laws be determined by a court as a matter of law without findings of fact by the trier of fact?

PARTIES TO THE PROCEEDING

Petitioners Safron Capital Corporation and The General Retirement System of the City of Detroit, individually and on behalf of all others similarly situated, were the plaintiffs in the proceedings before the Marion Superior Court, Indiana Commercial Court (the "Superior Court" or "trial court"); the appellants in the proceedings before the Court of Appeals of Indiana (the "Court of Appeals"); and the appellants in the proceedings before the Indiana Supreme Court. Neither petitioners are publicly traded organizations with a stock ticker symbol.

Respondents Elanco Animal Health Inc. ("Elanco" or the "Company"); Jeffrey N. Simmons; Todd S. Young; James M. Meer; R. David Hoover; Kapila Kaput Anand; John P. Bilbrey; Art A. Garcia; Michael J. Harrington; Deborah T. Kochevar; Lawrence E. Kurzius; Kirk McDonald; Denis Scots-Knight; Goldman Sachs & Co. LLC ("Goldman Sachs"); Citigroup Global Markets Inc. ("Citigroup"); J.P. Morgan Securities LLC ("J.P. Morgan"); BofA Securities, Inc. ("BofA"); Barclays Capital Inc. ("Barclays"); BNP Paribas Securities Corp. ("BNP"); Mizuho Securities USA LLC ("Mizuho"); MUFG Securities Americas Inc. ("MUFG"); and Stifel Nicolaus & Co. Inc. ("Stifel") were the defendants in the proceedings before the Superior Court; the appellees in the proceedings before the Court of Appeals; and the appellees in the proceedings before the Indiana Supreme Court.

Elanco is a publicly traded company incorporated in Indiana and traded on the New York Stock Exchange ("NYSE") under the stock ticker symbol "ELAN";

Goldman Sachs is a wholly-owned limited liability company which is not publicly traded with a stock ticker symbol. Goldman Sachs' parent company, The Goldman Sachs Group, Inc., is publicly traded on the NYSE under the ticker symbol "GS"; Citigroup is a wholly-owned corporation which is not publicly traded with a stock ticker symbol. Citigroup's parent company, Citigroup, Inc., is publicly traded on the NYSE under the ticker symbol "C"; J.P. Morgan is a wholly-owned limited liability company which is not publicly traded with a stock ticker symbol. J.P. Morgan's parent company, JPMorgan Chase & Co., is publicly traded on the NYSE under the ticker symbol "JPM"; BofA is a wholly-owned corporation which is not publicly traded with a stock ticker symbol. BofA's parent company, Bank of America Corporation, is publicly traded on the NYSE under the ticker symbol "BAC"; Barclays is a wholly-owned corporation which is not publicly traded with a stock ticker symbol. Barclays' parent company, Barclays PLC, is publicly traded on the NYSE under the ticker symbol "BCS"; BNP is a wholly-owned corporation which is not publicly traded with a stock ticker symbol. BNP's parent company, BNP Paribas S.A., is publicly traded on the Paris Stock Exchange (Euronext Paris) under the ticker symbol "BNP" and is also on the over-the-counter (OTC) markets under the ticker symbols "BNPQF" and "BNPQY"; Mizuho is a wholly-owned limited liability company which is not publicly traded with a stock ticker symbol. Mizuho's parent company, Mizuho Financial Group, Inc., is publicly traded on the NYSE under the ticker symbol "MFG"; MUFG is a wholly-owned corporation which is not publicly traded with a stock ticker symbol. MUFG's parent company, Mitsubishi UFJ Financial Group, Inc., is publicly traded on the NYSE under the ticker symbol "MUFG" and on the Tokyo Exchange; Stifel is a wholly-owned corporation which is not publicly traded with a stock ticker symbol. Stifel's parent company, Stifel Financial Corp., is publicly traded on the NYSE under the ticker symbol "SF".

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Safron Capital Corporation states that there is no parent or publicly held company owning 10% or more of Safron Capital Corporation.

STATEMENT OF RELATED PROCEEDINGS

State Proceedings (Under Review)

Safron Capital Corp., et al. v. Elanco Animal Health, Inc., et al., No. 24A-CT-01164 (Ind. Feb. 26, 2026) (267 N.E.3d 463) (denying petition to transfer jurisdiction)

Safron Capital Corp., et al. v. Elanco Animal Health, Inc., et al., No. 24A-CT-01164 (Ind. Ct. App. Aug. 1, 2025) (267 N.E.3d 463) (affirming trial court), *petition for reh'g denied* (Sept. 23, 2025)

Safron Capital Corp., et al. v. Elanco Animal Health, Inc., et al., No. 49D01-2010-CT-36760 (Marion Super. Ct., Ind. Com. Ct. Apr. 17, 2024) (dismissing second amended complaint)

Related Federal Proceedings (Not Under Review)

Hunter, et al. v. Elanco Animal Health Inc., No. 1:20-CV-01460-SEB-MG, 2022 WL 3445173 (S.D. Ind. Aug. 17, 2022) (dismissing first amended complaint)

Hunter, et al. v. Elanco Animal Health Inc., No. 1:20-CV-01460-SEB-MG, 2023 WL 6295487 (S.D. Ind. Sept. 27, 2023) (denying leave to file second amended complaint), *appeal pending*, No. 23-3061 (7th Cir.)

Related Administrative Proceedings (Not Under Review)

In the Matter of Elanco Animal Health Inc., Respondent, Release No. 4537, 2024 WL 4752111 (Nov. 12, 2024) (instituting cease-and-desist proceedings regarding Elanco's public disclosures issued from May 2019 through May 2020) (the "Cease-and-Desist Order")

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PETITION FOR WRIT OF CERTIORARI

A case brought under Sections 11 and 12(a)(2) of the Securities Act generally rises and falls on the issue of materiality.

This petition gives the Court the opportunity to directly address the question that both the majority and dissent in *CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd.*, 589 U.S. 348, 372 (2020) appear to be in agreement on and which the circuit courts are inconsistent – can the issue of materiality in an action alleging violations of the federal securities laws be determined by a court as a matter of law without findings of fact by the trier of fact.

The Court's opinion in *CITGO* recognized that the issue of materiality in the securities context "involves factual determinations uniquely suited for a jury." *Id.* at 357 n.4. The dissent agreed, questioning whether materiality could ever be decided "as a pure question of law." *Id.* at 372. Notably, no discovery ever occurred in this action due to a stay order issued by the trial court.

Section 11 of the Securities Act requires a registration statement filed with the SEC in connection with the initial sale of securities to include "detailed information about the firm's business and financial health so prospective buyers may fairly assess whether to invest." *Slack Tech., LLC v. Pirani*, 598 U.S. 759, 762 (2023), *citing* 15 U.S.C. §§77f, 77g, 77aa. Similarly, Section 12(a)(2) creates liability for a person who offers or sells securities by means of, *inter alia*, a prospectus which includes a materially false statement or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. 15 U.S.C. §77l(a)(2).

Whether information is required to be disclosed under Sections 11 and 12(a)(2) depends upon whether that information is material. Information is material if there is a substantial likelihood that disclosure of the omitted information would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. *TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976).

Because, in this context, the issue of materiality is "uniquely suited for a jury," a materiality determination by the court is inappropriate both at a pleading stage and on a motion for summary judgment as such determinations deny the litigants their right to have this unique question of law and fact, and the related factual inferences required, decided by the trier of fact.

OPINIONS BELOW

The Supreme Court of Indiana's summary decision (Pet. 1a-2a) is reported at 275 N.E.3d 505. The Court of Appeals' decision (Pet. 3a-43a) is reported at 275 N.E.3d 463. The Superior Court's decision (Pet. 44a-102a) is unreported and reproduced as Appendix C.

JURISDICTION

On April 17, 2024, the Superior Court dismissed Petitioners' second amended complaint alleging violations of the Securities Act. Pet. Ex. 66a-67a, 79a-95a, 102a. Petitioners timely appealed the dismissal of their Securities Act claims to the Court of Appeals. Pet. 11a-12a, 16a-21a. The Court of Appeals affirmed the decision of the lower court on August 1, 2025. Pet. 4a, 43a. Petitioners timely filed their Petition for Rehearing, which the Court of Appeals denied on September 23, 2025. Pet. Ex. 103a-04a. On October 23, 2025, Petitioners timely filed their Petition to Transfer this litigation to the Indiana Supreme Court. Pet. 1a-2a; 105a-08a. The Indiana Supreme Court denied that petition to transfer on February 26, 2026. Pet. 1a-2a. On May 21, 2026, Justice Barrett granted Petitioners' application to extend the time for this petition to July 24, 2026. No. 25A1292.

The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a), as the operative complaint alleged violations of the Securities Act.

STATUTORY PROVISIONS INVOLVED

This case implicates Sections 11 and 12(a)(2) of the Securities Act, 15 U.S.C. §§ 77k, 77l(a)(2), and SEC Regulation S-K, Items 105 and 303, 17 C.F.R. §§ 229.105, 229.303). These provisions are reproduced at Pet. 109a-29a.

STATEMENT OF THE CASE

A. Statutory Framework

The Securities Act created causes of action for false or misleading statements or omissions made in connection with a public offering of securities. Section 11 creates liability for a false or misleading registration statement or for omissions of information otherwise required therein. 15 U.S.C. § 77k. Section 12(a)(2) creates liability for a false or misleading prospectus. 15 U.S.C. § 771(a)(2). Section 15 creates liability for persons who control those liable under Sections 11 or 12. 15 U.S.C. § 77o.

As this Court unanimously explained in 2023:

> [The Securities Act] requires a company to register the securities it intends to offer to the public with the Securities and Exchange Commission (SEC). See, *e.g.*, 15 U. S. C. §§77b(a)(8), 77e; see also §77d. As part of that process, ***a company must prepare a registration statement that includes detailed information about the firm's business and financial health so prospective buyers may fairly assess whether to invest.*** See, e.g., §§77f, 77g, 77aa. The law imposes strict liability on issuing companies when their registration statements contain material misstatements or misleading omissions. §77k; see also *Herman & MacLean v. Huddleston*, 459 U. S. 375, 380 (1983).

Slack Tech., 598 U.S. at 762 (emphasis added).[1]

As this Court unanimously further explained in 2024:

> Congress imposed liability for pure omissions in § 11(a) of the Securities Act of 1933. Section 11(a) prohibits any registration statement that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required

1. The Securities Act also imposes liability on anyone selling a security "by means of a prospectus or oral communication" that includes a materially false statement "or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading". 15 U.S.C. § 77l(a)(2).

> to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). ***By its terms, in addition to proscribing lies and half-truths, this section also creates liability for failure to speak on a subject at all.*** *Omnicare*, [*Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186, n.3 (2015)] ("Section 11's omissions clause also applies when an issuer fails to make mandated disclosures—those 'required to be stated'—in a registration statement").

Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257, 264-65 (2024).

B. Respondent Elanco's Business and Changes to Its Distribution Processes

Elanco is a publicly traded animal health company that develops, manufactures, and markets products for animals. Pet. 4a-5a. Its business is broken into two segments: the Companion Animal segment and the Food Animal segment. *Id.*

Prior to the Offering, Elanco announced it had entered into an agreement to purchase Bayer Aktiengesellschaft's ("Bayer") animal health business for $7.5 billion. Pet. 5a. Elanco disclosed that the combined business would result in the second largest animal health company in the world and would double Elanco's total annual revenue. *Id.* The successful completion of the subject Offering, as defined *infra*, was necessary for Elanco to complete the Bayer acquisition. *Id.*

Just over two weeks before the Offering, Elanco informed investors that its 2020 fiscal year expected earnings would exceed $3 billion dollars. *Id.* In 2019, Elanco's Companion Animal segment accounted for approximately 37% of its total annual revenue. *Id.* At that time, the revenues attributable to the Companion Animal segment were derived primarily from the sales of its products to third-party wholesale distributors (the "Distributors"). *Id.*

Prior to the Offering, but unknown to investors and analysts, by December 2019 Elanco began changing the way it conducted sales, distribution, and delivery of its Companion Animal Products (the "Distribution Changes"). Pet. 6a, 8a-9a. Instead of predominately relying on Distributors to drive product demand creation, Elanco transitioned to a primarily Company-driven Companion Animal Product demand creation model. Pet. 6a, 8a. This new model would entail reducing sales to Distributors, bringing down their inventory, and creating the risk of materially decreasing near-term sales. Pet. 8a-9a.

As part of the Distribution Changes, Elanco substantially reduced its distributor inventory levels while also halving the number of its Distributors from eight to four. Pet. 6a, 8a-9a. This amounted to overhauling its entire distribution processes.

C. The Offering

On January 21, 2020, Elanco filed the operative registration statement and its accompanying preliminary prospectuses with the SEC. Pet. 6a. Three days later the Company filed amended and supplemented final prospectuses with the SEC. *Id.* Those prospectuses incorporated the registration statement, and together these documents constituted the offering documents (the "Offering" or the "Offering Documents") for the relevant securities. *Id.*

The Offering closed on January 27, 2020. *Id*. In total, in the Offering, Elanco sold approximately 25 million shares of common stock and 11 million equity units, resulting in approximately $1.3 billion in net proceeds. *Id.*

Among other things, the Offering Documents emphasized Elanco's strong relationship with its third-party Distributors. *See, e.g.*, Pet. 23a-32a. The Offering Documents also emphasized that changes to Elanco's distribution of products "could have a material adverse effect on our business, financial condition and results of operations." Pet. 33a-35a; *see also* Pet. 34a ("For our companion animal products, increased use of alternative distribution channels, or changes within existing distribution channels, could negatively impact our market share, margins and distribution of our products."). The Offering Documents, however, failed to disclose that the Distribution Changes were already being enacted. *See, e.g.* Pet. 8a-9a.

D. Elanco's Post-Offering Financial Disclosures and the Market's Reaction Thereto

On May 7, 2020, to the shock of investors and analysts, Elanco disclosed the Distribution Changes and their material impact on the Company's financial results. *Id.* On that same day, Elanco reported disappointing results for its first fiscal quarter, which ended March 31, 2020, including a 9% decline in revenue, as a result of its sudden $60 million reduction in the earnings of its Companion Animal segment. *Id.*[2] Following these disclosures, the price of Elanco common stock and equity units substantially declined. *Id.*

As detailed in the operative complaint, multiple securities analysts reacted to Elanco's May 7, 2020 disclosures. *See, e.g.*, Pet. 39a. Among other things, analysts stated: "[M]ost surprisingly, while many other manufacturers in the space saw positive stocking effects due to the [COVID-19] pandemic, Elanco disclosed a shift in distribution strategy that caused the company to reduce its level of channel inventory, leading to lower-than-expected companion animal revenues." *Id.* Another analyst stated: "Elanco's Q1 results were heavily impacted by the strategic decision to reduce inventory within distribution channels. The disruptions from COVID-19 across the supply chain led [Elanco] to accelerate its shift away from distributors, leading to a $60M destocking headwind that mostly impacted the companion business ($206M, - 22%)." *Id.* Both the trial court and the Court of Appeals provided little to no analysis regarding the analysts' reports. Pet. 3a-102a.

E. The Orders Below Held that Materiality May Be Decided as a Matter of Law

Respondents' motion to dismiss the second amended complaint filed by Petitioners on June 8, 2023, was the

2. Notably, Defendant Simmons disclosed during the May 7, 2020 earnings call that COVID-19 did not impact Elanco during the relevant quarter. Pet. 64a.

only motion to dismiss considered by the trial court. Pet. 12a. After full briefing thereon, the trial court granted Respondents' motion on April 17, 2024. Pet. 12a-13a.

In part, the trial court held that:

> Elanco had no duty to disclose the Distribution Changes because the omission of the Distribution Changes from the Registration Statement did not render the Registration Statement ***materially*** misleading. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268 (emphasis added). An examination of the Disclosures reveals that the allegedly omitted information regarding the Distributor Changes was immaterial to each Disclosure and that each Disclosure was not rendered misleading by the omission when read in context.

Pet. 101a.

Similarly, in affirming the dismissal, the Court of Appeals held, in part, that:

> [T]he changes in Elanco's relationship with the Companion Animal Distributors were not material because such information would have been unimportant to the reasonable investor in evaluating the Business Disclosures. Specifically, the Business Disclosures primarily concerned historical facts that were accurately reported, general statements of belief and intent rather than specific commitments, and information that constituted a small portion

> of Elanco's overall business operations. As such, the Business Disclosures are incapable of supporting relief under any set of circumstances. We cannot say the Business Disclosures contained any untrue statement of material fact or omitted any material fact that was required or otherwise necessary to make them not misleading.

Pet. Ex. B at 32a; *see also* Pet. 38a-39a. The Court of Appeals reasoned that "there is a substantial likelihood that the reasonable investor would not have viewed information about Elanco's changes to its relationships with some of the Companion Animal Distributors as significantly altering the total mix of the information in the Offering Documents." Pet.41a. The Court of Appeals also found the post-Offering analyst statements to be "unpersuasive" as to materiality. *Id.*

F. The SEC's Cease-And-Desist Order Found Elanco's Statements Made Seventeen Days Before the Close of the Offering Were Materially Misleading

As recognized by the SEC's Cease-and-Desist Order, the Distribution Changes were adopted, in part, for the purpose of reducing Elanco's inventory (and consequently, revenues) inflated by undisclosed prior channel stuffing. Cease-and-Desist Order, 2024 WL 4752111, at *2, 7-9. Accordingly, the Cease-and-Desist Order found that Elanco's January 10, 2020 statements regarding annual revenue guidance for 2020, issued immediately prior to the Offering, were "materially misleading" because, *inter alia*, "Elanco had already determined to issue lower annual revenue guidance and take steps to gradually reduce channel inventory because of the risk it posed to future revenue growth[.]" *Id.,* *7.

Among other things, the SEC Order found that "prior to the onset of the COVID-19 pandemic, Elanco had already planned to gradually reduce channel inventory levels each quarter and issued lower annual revenue guidance at the start of 2020 that incorporated that change. In addition, internal documents and communications from prior to the COVID-19 pandemic reflect that Elanco was planning to make a larger change to its channel inventory levels in connection with a planned merger in the second half of the year." *Id.*, at *2; *see also id.*, *7 (recognizing that "[d]uring the last two weeks of December 2019, Elanco reduced the number of U.S. Companion Animal distributors . . . represent[ing] about $61 million in fourth quarter sales."); *id.* ("sales to distributors declined in January and February 2020"); *id.* (during the first quarter "Elanco's leadership team had discussed decreasing channel inventory and, in addition to gradual reductions already planned at the start of the year, was considering a more aggressive plan to change its sales model and target channel inventories[.]").

The Court of Appeals specifically declined to consider the Cease-and-Desist Order. Pet. 13a n.14.

REASONS FOR GRANTING THE PETITION

This case presents important questions regarding when, if ever, the issue of materiality in an action alleging violations of the federal securities laws can be determined by a court as a matter of law without findings of fact by the trier of fact. Further, if a securities action can be dismissed as a matter of law on the grounds of materiality, what standard should the lower courts use in making such a determination. As detailed herein, circuit courts have adopted differing standards which should be harmonized to avoid, *inter alia*, unfairness and forum shopping.

Plaintiffs bringing actions under Sections 11 and 12(a)(2) of the Securities Act, like this one, have "relatively minimal" requirements to establish their *prima facie* case. *Huddleston*, 459 U.S. at 382). A plaintiff "need only show a material misstatement or omission[.]" *Id.*; *see also Slack Tech,* 598 U.S. at 762.

If materiality may be decided as a matter of law, a case brought under the Securities Act may be dismissed with no input from the trier of fact. Similarly, a court may also grant summary judgment in favor of a plaintiff without a jury's involvement.[3]

3. Under Indiana law, civil litigants are entitled to a trial by jury. Ind. Const. art. 1, § 20 ("In all civil cases, the right of trial by jury shall remain inviolate."); *see also* Ind. Trial Rule 38(a) ("Any party may demand a trial by jury of any issue triable of right by a jury. . ."); *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109 (2024) (holding the Seventh Amendment jury-trial right extends to statutory claims brought under the federal securities laws if they are legal in nature).

In light of the opinion and dissent in *CITGO* 589 U.S. at 357 n.4., 372, as provided herein, the Court should take this opportunity to clarify whether, in the securities law context, the issue of materiality may be determined without the input and involvement of the trier of fact.

A. A *Prima Facie* Securities Act Claim Requires Materiality

As provided *supra*, this Court has explicitly held that the requirements for claims brought under Sections 11 and 12(a)(2) are "relatively minimal." *Huddleston*, 459 U.S. at 382. Indeed, a plaintiff "need only show a material misstatement or omission to establish a *prima facie* case." *Id.*; *see also Slack Tech.,* 598 U.S. at 762.

Therefore, the applicable standard for whether information is required to be disclosed under §§ 11 and 12(a)(2) is simply the standard for materiality: Is there a substantial likelihood that disclosure of the omitted information would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. *TSC*, 426 U.S.at 449.[4]

4. Similarly, "[a]bsent proof of materiality, the claim of the Rule 10b-5 class will fail in its entirety; there will be no remaining individual questions to adjudicate." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013).

B. Both a Recent Opinion by This Court and The Accompanying Dissent Support a Holding that Materiality Cannot Be Decided as a Matter of Law in the Securities Law Context

In dismissing the complaint in this action, the Indiana trial court quoted and relied on, *inter alia*, the Seventh Circuit's jurisprudence. The trial court stated that "'While materiality is normally a question of fact reserved for the trier of fact, we can resolve materiality as a matter of law when the information at issue is so obviously unimportant that reasonable minds could not differ.'" *Safron Cap. Corp. v. Elanco Animal Health Inc.*, 267 N.E.3d 463, 474 (Ind. Ct. App. 2025), *reh'g denied* (Sept. 23, 2025), *transfer denied sub nom. Safron Cap. Corp. v. Elanco Animal Health Corp.*, 275 N.E.3d 505 (Ind. 2026), *quoting Smykla v. Molinaroli*, 85 F.4th 1228, 1236 (7th Cir. 2023) (further citations omitted).

However, in the *CITGO* dissent, Justice Thomas recognized that "[a]lthough this Court has relied on factual findings to support a materiality conclusion, *Davison v. Von Lingen*, 113 U.S. 40, 50, 5 S.Ct. 346, 28 L.Ed. 885 (1885), I am not aware of a case in which this Court has treated the materiality inquiry as a pure question of law without relying on any factual findings whatsoever." *CITGO*, 589 U.S. at 372. Writing for the majority of the Court, Justice Sotomayer responded to the dissent, in part:

> For not all questions of materiality are alike: Sometimes materiality is a question of law. See, *e.g.*, 30 Williston § 75:30, at 108 (whether an alteration of a contract is material). Other times,

> it involves factual determinations uniquely suited for a jury. See, *e.g.*, *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (whether a company's misstatements to the public are material for securities-fraud purposes).

CITGO, 589 U.S. at 357 n.4.

Accordingly, both the *CITGO* opinion and dissent support holding that, in the securities law context, materiality cannot be decided as a question of law. Despite this, circuit and district courts regularly decide the issue of materiality as a matter of law in the securities law context. *See*, *e.g.*, *S.E.C. v. Ficken*, 546 F.3d 45 (1st Cir. 2008); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993); *Longman v. Food Lion, Inc.*, 197 F.3d 675 (4th Cir. 1999); *Isquith for & on Behalf of Isquith v. Middle S. Utilities, Inc.*, 847 F.2d 186 (5th Cir. 1988); *Kuebler v. Vectren Corp.*, 13 F.4th 631 (7th Cir. 2021); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997) *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009).

However, as this Court explained, materiality in the securities law context is a "mixed question of law and fact," which involves "the application of a legal standard to a particular set of facts." *TSC*, 426 U.S. at 450 (reversing partial summary judgment because a genuine issue of material fact existed as to whether any of the omissions were material). Accordingly, even at the summary judgment stage, "[t]he determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *Id.*

Even where the underlying facts are not in contention such as where they are not disputed or where they are assumed to be true for purposes of a motion to dismiss, the issue of materiality remains a mixed question of law and fact as the trier of fact must still determine the inferences a "reasonable shareholder" would draw from those facts and the significance of those inferences to him when deciding whether to invest in the securities at issue, *i.e.*, would a "reasonable shareholder" have deemed them to alter the "total mix" of information. *See TSC*, 426 U.S. at 450. Accordingly, the determinations of these factual questions are "uniquely suited for a jury" and consequently should not be determined by a court. *CITGO*, 589 U.S. at 357 n.4.

Under both the *CITGO* opinion and dissent, this appears to be true without exception. Thus, as a general rule, determination by a court of the question of materiality in the context of the federal securities laws and corporate misstatements is inappropriate in connection with motions for dismissal on the pleadings or for summary judgment, as such determinations deny the litigants their right to have these unique questions of law and fact, and the related factual inferences required, determined by the jury. Consequently, when it comes to Securities Act cases such as this one, a court can neither find as a matter of law that materiality is either present or that materiality is lacking in order to support its granting of summary judgment in favor of either the plaintiffs or defendants or lacking materiality in order to support dismissal of an action on the pleadings. These determinations by their very nature require at a minimum, a developed factual record and jury input. Otherwise, courts will be free to deprive litigants of the right to have these determinations made by juries.

C. If the Court Holds That, in the Securities Law Context, Materiality May Be Decided as a Matter of Law, the Court Should Establish a Uniform Standard to Evaluate Materiality

As noted *supra* and quoted by the Court of Appeals, the Seventh Circuit provides that "'While materiality is normally a question of fact reserved for the trier of fact, we can resolve materiality as a matter of law when the information at issue is so obviously unimportant that reasonable minds could not differ.'" *Elanco*, 267 N.E.3d at 474, *quoting Smykla*, 85 F.4th at 1236 (7th Cir. 2023).[5] Further, in reaching its findings, the Court of Appeals never determined that the Distribution Changes were "so obviously unimportant that reasonable minds could not differ." *See Elanco*, 267 N.E.3d at 474. Instead, by considering the mindset of the "reasonable investor,"

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5. Notably, this Court has never found that materiality was lacking as a matter of law because the information at issue was "so obviously unimportant" that dismissal of the action was warranted but, rather, only stated that if the established omissions are "'so obviously important to an investor, that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment." *TSC*, 426 U.S. at 450; *see also Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). After *CITGO*, materiality in the securities law context is a mixed question of fact and law that cannot be determined as a matter of law alone. *See CITGO*, 589 U.S. at 357 n.4.

the Court of Appeals supplanted themselves as the trier of fact. Pet. 32a, 38a-39a. Moreover, the standards enunciated by multiple circuits, including the First, Eighth and Ninth, differ from the standard enunciated by the Seventh Circuit as relied on by the lower court.

While the Eighth Circuit has explicitly held that materiality may be determined as matter of law, in making that determination, it held that a court must consider whether "a reasonable investor could not have been swayed by an alleged misrepresentation." *Parnes*, 122 F.3d at 546; *see also Romine v. Acxiom Corp.*, 296 F.3d 701, 706 (8th Cir. 2002). Notably, unlike the Seventh Circuit's approach which asks whether the alleged misrepresentation is so obviously unimportant that reasonable minds cannot differ, the Eighth Circuit asks whether the information could have influenced a hypothetical reasonable investor. *Parnes*, 122 F.3d at 547.

Conversely, while the Ninth Circuit applies *TSC*'s "substantial likelihood" standard for the trier of fact to determine whether the plaintiff has established materiality (TSC, 426 U.S. at 449), it does not employ the "so obviously unimportant" phrase enunciated by the Seventh Circuit for the court to determine materiality as a matter of law. As interpreted by the Ninth Circuit, for purposes of determining materiality as a matter of law, "[a] misrepresentation or omission is material when there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" *In re Novatel Wireless Sec. Litig.*, 830 F. Supp. 2d 996, 1012 (S.D. Cal. 2011), *abrogated by Sodha v. Golubowski*, 154 F.4th 1019 (9th Cir. 2025).

Similarly, the First Circuit holds in the context of determining materiality as a matter of law that "[a] misrepresentation is material if there is a substantial likelihood that the misrepresentation would affect the behavior of a reasonable investor." *S.E.C. v. Ficken*, 546 F.3d 45, 47 (1st Cir. 2008), *citing Basic Inc.*, 485 U.S. at 231-32. Thus, the First Circuit also does does not require the "so obviously unimportant" analysis.

While each of these standards allows a trial court to supplant itself in the shoes of the jury and effectively become the trier of fact, the Eighth Circuit's "could not have been swayed by an alleged misrepresentation" (*Parnes*, 122 F.3d at 546; *Romine* 296 F.3d at 706) allows the court to be play an activist gatekeeper role on an issue which this Court has stated is "uniquely suited for a jury." *CITGO*, 589 U.S. at 357 n.4.

According to the Eighth Circuit, "the role of the materiality requirement is not to attribute to investors a childlike simplicity but rather to determine whether a reasonable investor would have considered the omitted information significant at the time." *Id.* Implicit in this language and decision is that a court may may supplant its judgment for that of the trier of fact.

In this action, Defendants' Offering Documents failed to include "detailed information about the [Company's] business and financial health so prospective buyers [could] fairly assess whether to invest." *Slack Tech.*, 598 U.S. at 762. In particular, prior to the Offering, Elanco failed to disclose that it was instituting the Distribution Changes and materially changing its long standing and established method of conducting the sales generation of its Companion Animal products. The Respondents were mandated in order to avoid misleading their investors with their statements and as otherwise required by Item 303 and Item 105 of SEC Regulation S-K, 17 CFR § 229.105, § 229.303 to, among other things, disclose the Distribution Changes and their potential risks likely to impact Elanco. *Macquarie*, 601 U.S. at 263-65.[6] They did not do so.

Notably, the Court of the Appeals and trial court failed to recognize that analysts' alarm regarding the Distribution Changes supports a finding of materiality. Instead, both courts negate this information despite this Court's guidance regarding the importance of market analysts. *See* Pet. 39a-40a, 50a, 100a ("the Court cannot rely on the opinions of analysts, months after the Offering and with the benefit of hindsight, that Elanco should have disclosed the Distribution Changes."). The lower courts' analysis is wrong and fails to understand the importance of analysts in the securities law context. The operative complaint did not plead materiality by hindsight and

6. Respondents had an affirmative duty to disclose (i) the risk of declining future revenues caused by undisclosed efforts to sell off inflated inventory, as required by Item 105; and (ii) the uncertain impact of such changes on Elanco's financial condition and its anticipated revenues, as required by Item 303. *See Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, No. 21-2524, 2022 WL 17815767, at *1 (2d Cir. Dec. 20, 2022) (cleaned up), *abrogated on other grounds*, *Macquarie*, 601 U.S. 257 (2024) ("a duty may arise when there is a statute or regulation requiring disclosure, . . . such as Items 303 and [105] of SEC Regulation S-K."). Completely overhauling how Elanco's second largest division conducts sales generation, distribution, and delivery processes is, in and of itself, a risky endeavor and created uncertainty for Elanco going forward. *See, e.g.*, 3a-8a, 20a-22a, 49a-50a, 56a-57a, 78a.

analysts' shocked reaction to the May 7, 2020 disclosures demonstrates materiality.

As recognized by this Court and the SEC, market analysts "are necessary to the preservation of a healthy market." *Dirks v. S.E.C.*, 463 U.S. 646, 658 n.17 (1983) ("The SEC expressly recognized that 'the value to the entire market of analysts' efforts cannot be gainsaid; market efficiency in pricing is significantly enhanced by their initiatives to ferret out and analyze information, and thus the analyst's work redounds to the benefit of all investors.' 21 S.E.C., at 1406.") (cleaned up). Indeed, "information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities." *Id.*, 463 U.S. at 658-59. Therefore, "the central role . . . that analysts in general can play in revealing information that corporations may have reason to withhold from the public[] is an important one." *Id.*, 463 U.S. at 659 n.18. Contrary to the Court of Appeals and trial court's findings, the published assessments of professional analysts tasked with routinely reporting on Elanco indicated that the Distribution Changes were significant and of obvious importance to investors, and should have been disclosed earlier, and support finding that materiality was properly pled.

The analysts' reactions, combined with the SEC's findings in the Cease-and-Desist Order and drop in the price of Elanco's stock, demonstrate that Defendants' alleged false and misleading statements and omissions should not have been found immaterial as a matter of law, and the state courts' decisions should be overturned.

CONCLUSION

This Court should take this opportunity to resolve the question as to whether materiality can ever be decided as a matter of law in the securities law context, and, if it can, resolve the inconsistencies among the circuit courts regarding the standard by which the issue of materiality should be determined as a matter of law.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE INDIANA SUPREME COURT, FILED FEBRUARY 26, 2026

IN THE INDIANA SUPREME COURT

Court of Appeals Case No. 24A-CT-01164
Trial Court Case No. 49D01-2010-CT-36760

SAFRON CAPITAL CORPORATION, AND THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

ELANCO ANIMAL HEALTH, INC., *et al.*,

Appellees.

Filed February 26, 2026

ORDER

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on February 26, 2026.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF INDIANA FILED AUGUST 1, 2025

COURT OF APPEALS OF INDIANA

Court of Appeals Case No. 24A-CT-1164

SAFRON CAPITAL CORPORATION, AND THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants-Plaintiffs

v.

ELANCO ANIMAL HEALTH INCORPORATED, *et al.*,

Appellees-Defendants

Filed August 1, 2025
Rehearing Denied September 23, 2025

OPINION

Appeal from the Marion Superior Court,
Indiana Commercial Court, The Honorable
Christina R. Klineman, Judge,
Trial Court Cause No. 49D01-2010-CT-036760

STATEMENT OF THE CASE

[1] Shortly before a January 2020 public offering of securities (the "Offering"), Elanco Animal Health Inc. began implementing changes to its distribution strategy

for the companion animal segment of its business. Soon after the Offering concluded, Elanco publicly revealed for the first time its distribution changes. A few months later, Elanco reported revenue decreases for the first quarter of 2020. Consequently, Safron Capital Corp. and others who purchased securities in the Offering (collectively, the "Investors") sued Elanco and others (collectively, the "Offerors") for alleged violations of federal securities law in connection with that offering. Elanco filed a motion to dismiss the Investors' complaint pursuant to Indiana Trial Rule 12(B)(6), which the trial court granted. The Investors now appeal and raise one issue for our review, which we revise and restate as the following two issues:

> 1. Whether the trial court erred by dismissing the Investors' complaint under Trial Rule 12(B)(6); and
>
> 2. Whether the trial court erred by not addressing the Investors' preemptive request for leave to amend their complaint if the trial court granted the motion to dismiss.

[2] We affirm.

FACTS AND PROCEDURAL HISTORY

[3] The facts described herein are primarily those alleged by the Investors in their Second Amended Complaint.

[4] Elanco is a publicly traded animal health company located in Greenfield, Indiana. Elanco develops,

manufactures, and markets products in two segments of the animal health industry: (1) Companion Animal and (2) Food Animal. Elanco's Companion Animal products fall into two primary categories: (1) disease prevention and (2) therapeutics. In 2019, Elanco's Companion Animal segment accounted for approximately 37% of its total revenue. Elanco primarily sold its Companion Animal products to eight third-party distributors, and in 2019, the largest of those eight distributors accounted for approximately 13% of Elanco's total revenue.

[5] On August 20, 2019, Elanco announced it had entered an agreement to purchase Bayer Aktiengesellschaft's animal health business for approximately $7.5 billion, which Elanco stated would make it the second largest animal health company in the world and would likely double its total annual revenue. On January 10, 2020, in a press release regarding its initial financial guidance for 2020, Elanco projected its total revenue would be in the range of $3.05 to $3.11 billion and stated, "the Bayer transaction . . . is developing even better than originally expected in August." Appellants' App. Vol. II at 115. During an earnings call that same day, Elanco's chief executive officer ("CEO") stated in relevant part that "the biggest change going into 2020 is our holistic approach, looking at channels, both in the clinic and retail. Again, we have a retail group looking at how we're going to utilize distribution in a more targeted way, value-based way, certain portfolio against certain segments." *Id.*

[6] To raise part of the funds needed to pay the $7.5 billion purchase price of Bayer's animal health business,

Elanco decided to make a public offering of common shares and equity units. To that end, on January 21, 2020, Elanco filed a registration statement[1] with the SEC; the same day, Elanco filed its preliminary prospectuses[2] with the SEC, which it amended and supplemented by final prospectuses that it filed with the SEC three days later. The prospectuses incorporated the registration statement, and together these documents constituted the Offering Documents. On January 27, 2020, the Offering concluded; in total, Elanco sold approximately 25 million shares of common stock and 11 million equity units, resulting in approximately $1.3 billion in net proceeds.

[7] On February 19, 2020, Elanco's CEO stated in an earnings call that Elanco had "cut [its] distribution down to four major distributors" in its Companion Animal segment prior to the Offering "to achieve a 'targeted approach'" that it "set up" for 2020. Appellants' App. Vol. V at 123. According to Elanco's CEO, "a lot of analysis was done in putting this strategy together. And we do not see disruption in the year, still yet to be seen as disruption in the quarter," *id.*; the CEO further stated that Elanco would "be monitoring this month-to-month as we look at it. But we feel very good about [the] distribution strategy. Distributors are key and again, a very value-based approach as we move forward," *id.* at 124.

[8] Also during this call, Elanco's CEO asserted that Elanco had "not seen a material impact" on "local logistics

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1. 15 U.S.C. §§ 77b(a)(8), 77f, 77aa.

2. *Id.* §§ 77b(a)(10), 77j.

and the ability to move products throughout China" due to COVID-19. Appellants' App. Vol. V at 127. At that time, Elanco had not experienced any significant interruptions in "product flows into the market," which it attributed to having "safety stock throughout our supply chain, that enables us to minimize impacts from short-term supply disruptions." *Id.* Less than one week later, Elanco's chief financial officer reiterated that Elanco was not having supply chain issues because of COVID-19, and stated in relevant part:

> [Elanco] carr[ies] a lot of inventory . . . . And so with that, we have no issues with respect to supply chain or API in 2020. Obviously, if it became a much longer [term], then we'd have to think about what that means. We've got . . . somewhere in the 8 to 9 contract manufacturers in China. So of the 90 contract manufacturers we have, a small part's in China and they don't dedicate themselves 100% to use by any stretch. It may be that we're set up to have our run of product in August. Okay, well, if that gets pushed to December, it's probably not going to be the end of the world. It gets pushed to August of 2021, all right, then we have to think about it. But overall, we don't think there's an impact on us from a supply chain perspective.

Id. at 128 (emphasis omitted) (alterations in original).

[9] On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. Five days later, Indiana

reported its first COVID-19 death, and on March 23, Indiana Governor Eric Holcomb issued a stay-at-home order. On March 31, Elanco's first quarter of 2020 ended.

[10] On May 7, 2020, Elanco released its financial results for the first quarter of 2020; it reported $657.7 million in quarterly revenue, which was a $60 million—or 9%—decline. In a press release accompanying this report, Elanco attributed the decline in revenue to, among other things, "distributor performance." Appellants' App. Vol. V at 125. Elanco noted that it had "made initial progress to meaningfully reduce channel inventory" of its Companion Animal third-party distributors. *Id.* Elanco's CEO stated this reduction in inventory was "to tighten [Elanco's] approach across . . . [its] distributor relationships" and "drive demand for [Elanco's] products over the long term." *Id.* (all but first alteration in original).

[11] During an earnings call that same day, Elanco's CEO stated that Elanco had "consolidated our U.S. Companion Animal distributors from 8 to 4" at the beginning of 2020, and it "instituted specific targets for [those four distributors] to generate end-customer demand." Appellants' App. Vol. V at 126. Elanco's CEO noted that the distributors' "ability to generate demand is much less effective than our own, especially in generating new clinic placements for our products." *Id.* Additionally, Elanco's CEO detailed the new distribution strategy for its Companion Animal products in relevant part as follows:

> Consequently, in Q1, we reduced the amount of product and distributor inventory by approximately $60 million, mainly in the U.S.

> companion animal space. And we expect to further reduce an additional $80 million to $100 million, mainly in the second quarter, as we apply these new tactics across our business and geographies. The evaluation of our distributors was a priority, as I took primary responsibility for our U.S. operations last December. With the insights gained into distributors' capabilities and broader actions that drive demand as well as the upcoming close on the Bayer acquisition, I'm excited by the changes in Elanco's commercial leadership, and I'm confident we'll continue to create industry-leading execution in demand creation, product launches and full utilization of the omnichannel. This is an important modification in our tactics. And the COVID pandemic was a trigger that accelerated this change at the end of March and into Q2. We've gained important insight where our own capabilities are superior, and we're adjusting our investments accordingly.

Id. at 125–26 (emphases omitted).

[12] After Elanco released its first quarter financial report, its common stock price decreased by $3.05 and closed at $19.88 per share on May 7, 2020. By May 21, 2020, Elanco's common stock price had decreased to $18.94. Similarly, the price of Elanco's equity units decreased by $6.26 and closed at $37.00 per unit on May 7, 2020. By May 22, 2020, Elanco's equity unit price had decreased to $35.11. (***Id.***)

[13] On May 20, 2020, in the District Court for the Southern District of Indiana, several individuals who purchased securities through the Offering filed a class action complaint against Elanco and others for alleged violations of federal securities law (the "Federal Case").[3] While the Federal Case was pending, on October 16, 2020, in Marion County, Indiana, the Investors[4] filed a class action complaint against the Offerors[5] (the "State Case"), alleging the Offerors violated certain sections of the Securities Act of 1933[6] (the "1933 Act") and related regulations. In December 2020, the Investors filed their first amended complaint in the State Case. In January 2021, the defendants in the Federal Case filed a motion to dismiss that complaint, and shortly thereafter, the Offerors sought a stay of proceedings in the State Case, which the trial court granted. On August 17, 2022, the

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3. The parties and claims in the Federal Case are similar but not identical to the parties and claims in this case. For instance, the Federal Case includes claims sounding in fraud; the State Case does not include such allegations.

4. Safron Capital Corporation and The General Retirement System of the City of Detroit.

5. Elanco; Jeffrey N. Simmons; Todd S. Young; James M. Meer; R. David Hoover; Kaila Kaput Anand; John P. Bilbrey; Art A. Garcia; Michael J. Harrington; Deborah T. Kochevar; Lawrence E. Kurzius; Kirk McDonald; Denis Scots-Knight; Goldman Sachs & Co. LLC; Citigroup Global Markets Inc.; J.P. Morgan Securities LLC; BofA Securities, Inc.; Barclays Capital Inc.; BNP Paribas Securities Corp.; Mizuho Securities USA LLC; MUFG Securities Americas Inc.; Stifel Nicolaus & Co. Inc.

6. 48 Stat. 74, 15 U.S.C. §§ 77a–77bbb.

District Court for the Southern District of Indiana dismissed with prejudice all the plaintiffs' claims in the Federal Case. *Hunter v. Elanco Animal Health Inc.*, No. 1:20-CV-01460-SEB-MG, 2022 WL 3445173 (S.D. Ind. Aug. 17, 2022).

[14] The trial court in the State Case subsequently lifted the stay, and the Offerors filed a Trial Rule 12(B)(6) motion to dismiss the Investors' first amended complaint. One week before the scheduled hearing on the Offerors' motion, the Investors sought leave to amend their complaint for a second time; the Offerors did not oppose this request, and the trial court granted it. On June 8, 2023, the Investors filed their second amended complaint (the "Second Amended Complaint"), alleging in relevant part that eight disclosures in the Offering Documents[7]

7. In the Second Amended Complaint, the Investors also challenge statements made by Elanco's CEO during the February 19, 2020, earnings call. The Investors did not address those statements in their briefing regarding the Offerors' motion to dismiss or in their appellate briefing. The Investors have thus abandoned and waived for our review their claim based on the February 19 earnings call statements. *See Morris v. BioSafe Eng'g, Inc.*, 9 N.E.3d 195 (Ind. Ct. App. 2014) (quoting Webster's 3d New Int'l Dictionary 2 (2002)) ("To 'abandon' a claim means 'to cease to assert or exercise an interest, right, or title' to it, especially 'with the intent of never again resuming or reasserting it.'"); *New Hampshire Ins. Co. v. Indiana Auto. Ins. Plan*, 176 N.E.3d 514, 524 (Ind. Ct. App. 2021) (citing *L.H. Controls, Inc. v. Custom Conveyor, Inc.*, 974 N.E.2d 1031, 1042 (Ind. Ct. App. 2012); *Dunaway v. Allstate Ins. Co.*, 813 N.E.2d 376, 387 (Ind. Ct. App. 2004)) ("It is well-established that failure to raise an argument or issue below results in waiver of that issue.").

contained materially false or misleading statements regarding Elanco's relationship with the Companion Animal Distributors and the risks associated therewith, which violated Sections 11(a),[8] 12(a)(2),[9] and 15(a)[10] of the 1933 Act and failed to comply with Items 105[11] and 303[12] of Securities and Exchange Commission Regulation S-K.

[15] In August 2023, the Offerors filed a Trial Rule 12(B)(6) motion to dismiss the Second Amended Complaint. As part of their response in opposition to this motion, the Investors requested leave to amend their complaint if the trial court granted the motion. On April 17, 2024, the trial court granted the Offerors' motion. The trial court stated in relevant part as follows:

> Elanco had no duty to disclose the Distribution Changes because the omission of the Distribution Changes from the Registration Statement did not render the Registration Statement ***materially*** misleading. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268 (emphasis added). An examination of the Disclosures reveals that the allegedly omitted information regarding the Distributor Changes was immaterial to

8. 15 U.S.C. § 77k(a).

9. 15 U.S.C. § 77*l*(a)(2).

10. 15 U.S.C. § 77*o*(a).

11. 17 C.F.R. § 229.105.

12. 17 C.F.R. § 229.303.

> each Disclosure and that each Disclosure was not rendered misleading by the omission when read in context.

Appellant's App. Vol. II at 83–84. This appeal ensued.[13,14]

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13. We remind Investors' counsel that the Statement of Facts must be "devoid of argument." *Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 365 (Ind. Ct. App. 2021) (citing *Ramsey v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 789 N.E.2d 486, 488 (Ind. Ct. App. 2003)).

14. The Investors filed a motion for oral argument in this case; on March 20, 2025, we issued an order denying that motion. Additionally, after briefing in this case concluded, the Investors filed a notice of additional authority (the "Notice") pursuant to Indiana Appellate Rule 48, requesting us to consider an order issued by the SEC in November 2024. The SEC's order was based on an offer of settlement submitted by Elanco and primarily concerns "channel stuffing" allegations. "Channel stuffing" refers to "shipping to one's distributors more of one's product than one thinks one can sell." *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 709 (7th Cir. 2008). Channel stuffing can be "innocent," but it can also become "a form of fraud . . . when it is used . . . to book revenues on the basis of goods shipped but not really sold because the buyer can return them." *Id.*

The SEC's order is irrelevant to our analysis of the allegations in this case, allegations that Elanco contests and that do not concern "channel stuffing." We therefore decline to consider the SEC's order. Consequently, simultaneously with this Opinion, we have issued an order denying the Offerors' motion for leave to respond to the Notice.

DISCUSSION AND DECISION

1. The Trial Court Did Not Err by Dismissing the Investors' Second Amended Complaint Pursuant to Trial Rule 12(B)(6)

[16] The Investors allege the trial court erred by granting the Offerors' motion to dismiss the Second Amended Complaint pursuant to Trial Rule 12(B)(6). Our Supreme Court has explained our standard of review for such a decision as follows:

> Appellate review of a ruling on a Trial Rule 12(B)(6) motion is de novo. *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120, 1122 (Ind. 2010). "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 134 (Ind. 2006) (citation omitted). Appellate courts do not test the sufficiency of the facts alleged regarding their adequacy to provide recovery but test the sufficiency of whether a legally actionable injury has occurred in a plaintiff's stated factual scenario. *Id.* The appellate court accepts the alleged facts as true, drawing every reasonable inference in favor of the non-moving party. *Id.* An order to dismiss is affirmed when it is "apparent that the facts alleged in the challenged pleading are

> incapable of supporting relief under any set of circumstances." *McQueen v. Fayette Cnty. Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied.*

Safeco Ins. Co. of Ind. v. Blue Sky Innovation Grp., Inc., 230 N.E.3d 898, 901–02 (Ind. 2024), *reh'g denied* (June 3, 2024).

[17] Indiana is a notice-pleading state. *ResCare Health Servs., Inc. v. Ind. Fam. & Soc. Servs. Admin.*, 184 N.E.3d 1147, 1153 (Ind. 2022). As such, Trial Rule 8 only requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Ind. Trial Rule 8(A)(1). "The purpose of notice pleading is to inform a defendant of a claim's operative facts so the defendant can 'prepare to meet it.'" *ResCare Health Servs.*, 184 N.E.3d at 1153 (quoting *Bayer Corp. v. Leach*, 147 N.E.3d 313, 315 (Ind. 2020)). "A complaint's allegations are sufficient if they put a reasonable person on notice as to why a plaintiff sues." *Id.* (quoting *ARC Constr. Mgmt., LLC v. Zelenak*, 962 N.E.2d 692, 697 (Ind. Ct. App. 2012)).

[18] The Investors specifically contend that the Second Amended Complaint sufficiently alleged that eight disclosures in the Offering Documents violated certain provisions of the 1933 Act and Regulation S-K. Our discussion of the Investors' claims proceeds in four parts: (a) first, we review the relevant law regarding the 1933 Act; (b) second, we review the relevant law concerning Regulation S-K; (c) third, we apply these laws to the eight

disclosures the Investors challenge to determine if there is any set of circumstances under which the Investors are entitled to relief; and (d) fourth, we summarize our analysis.

a. The 1933 Act

[19] The 1933 Act "protects investors by ensuring that companies issuing securities (known as 'issuers') make a 'full and fair disclosure of information' relevant to a public offering." *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 501, 137 S.Ct. 2042, 198 L.Ed.2d 584 (2017) (quoting *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 178, 135 S.Ct. 1318, 191 L.Ed.2d 253 (2015)). Pursuant to the 1933 Act, the issuer must file certain offering documents that contain specified information about both the company itself and the security for sale. *Id.* (citing *Omnicare*, 575 U.S. at 178, 135 S.Ct. 1318); *see also* 15 U.S.C. §§ 77g, 77aa. Sections 11 and 12 of the 1933 Act promote compliance with these disclosure requirements by giving purchasers a right of action against an issuer and other designated individuals for misstatements or omissions of material facts in the offering documents. *See Omnicare*, 575 U.S. at 178, 135 S.Ct. 1318; 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Section 15 of the 1933 Act further promotes compliance by extending liability under Sections 11 and 12 to persons who control those who are liable under those sections. 15 U.S.C. § 77*o*.

[20] Section 11(a) provides in relevant part as follows:

> In case any part of the registration statement, when such part became effective, contained an

> untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security may . . . sue . . . .

15 U.S.C. § 77k(a). Section 12(a)(2) provides in relevant part as follows:

> Any person who . . . offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), . . . shall be liable . . . to the person purchasing such security from him, who may sue . . . .

15 U.S.C. § 77*l*(a)(2).

[21] Both Sections 11(a) and 12(a)(2) create two ways to hold issuers and sellers liable for the contents of offering documents: (1) for what those documents say, and (2) for what those documents do not say. *See* 15 U.S.C. §§ 77k(a), 77*l*(a)(2); *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*, 601 U.S. 257, 263–65, 144 S.Ct. 885, 218 L.Ed.2d 214 (2024) (citing *Omnicare*, 575 U.S.

at 186 n.3, 135 S.Ct. 1318) ("By its terms, in addition to proscribing lies and half-truths, [Section 11] also creates liability for failure to speak on a subject at all."). Under either theory of liability, "the buyer need not prove (as he must to establish certain other securities offenses) that the defendant acted with any intent to deceive or defraud." *Omnicare*, 575 U.S. at 179, 135 S.Ct. 1318 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–382, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983)).

[22] A key question under both theories of liability is whether the fact that is falsely stated or omitted is *material. See* 15 U.S.C. §§ 77k(a), 77*l*(a)(2). "While materiality is normally a question of fact reserved for the trier of fact, we can resolve materiality as a matter of law when the information at issue is so obviously unimportant that reasonable minds could not differ." *Smykla v. Molinaroli*, 85 F.4th 1228, 1236 (7th Cir. 2023) (internal citations omitted); *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (quoting *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)); *Omni Ins. Grp. v. Poage*, 966 N.E.2d 750 (Ind. Ct. App. 2012) (citing *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 673 (Ind. 1997)). To be material, there must be a substantial likelihood that the misstatement or omission "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of the information made available." *TSC Indus.*, 426 U.S. at 449, 96 S.Ct. 2126; *see also Manns v. Skolnik*, 666 N.E.2d 1236, 1249 n.8 (Ind. Ct. App. 1996) (quoting *TSC Indus.*, 426 U.S. at 449, 96 S.Ct. 2126), *trans. denied.*

[23] "We 'look at all available information in determining the materiality of a challenged omission or misstatement.'" *Smykla*, 85 F.4th at 1236 (quoting *Kuebler v. Vectren Corp.*, 13 F.4th 631, 639 (7th Cir. 2021)). We assume the reasonable investor "reads each statement within . . . a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information." *Omnicare*, 575 U.S. at 190, 135 S.Ct. 1318. We also assume "the investor takes into account the customs and practices of the relevant industry." *Id.*

[24] Notably, regarding omissions, "firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose." *Gallagher v. Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001) (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n. 17, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988); *Dirks v. SEC*, 463 U.S. 646, 653–54, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983); *Chiarella v. United States*, 445 U.S. 222, 227–35, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980); *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1331 (7th Cir. 1995); *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir. 1990) (en banc)). By their plain language, Sections 11(a) and 12(a)(2) do not create an affirmative duty to disclose *any and all* material information. *See* 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Disclosure is required under Section 11(a) if it is mandated by law or if a statement, when read in context, would be misleading without the additional information. *See* 15 U.S.C. § 77k(a). Similarly, disclosure is required under Section 12(a)(2) if a statement, when read in context, would be misleading without the additional information. *See id.* § 77*l*(a)(2).

b. Regulation S-K

[25] Regulation S-K generally outlines how companies should disclose material qualitative descriptors of their businesses on registration statements and certain other SEC filings. To that end, Item 105 requires, in relevant part, that a reporting company disclose certain risk factors:

> (a) Where appropriate, provide under the caption "Risk Factors" a discussion of the material factors that make an investment in the registrant or offering speculative or risky . . . . [E]ach risk factor should be set forth under a subcaption that adequately describes the risk. . . .
>
> (b) Concisely explain how each risk affects the registrant or the securities being offered. . . .

17 C.F.R. § 229.105.

[26] Item 303 requires, in relevant part, that a reporting company include a discussion and analysis of its financial condition and results of operations, including a description of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii) (effective from May 2, 2019, to Feb. 9, 2021). In addition, if the company "knows of events that will cause a material change in the relationship

between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed." *Id.* Notably, these discussions must "focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition," *id.* § 229.303(a) Instruction 3, and any "forward-looking information" the reporting company provides "is expressly covered by the safe harbor rule for projections," *id.* Instruction 7; *see also* 15 U.S.C. § 77z-2 (safe harbor); 17 C.F.R. § 230.175 (safe harbor).

[27] Item 303 triggers a duty to disclose when "a trend, demand, commitment, event, or uncertainty" is (1) "presently known to management" and (2) "reasonably likely to have material effects on the [company]'s financial condition or results of operations." *Indiana Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1269 (10th Cir. 2022) (quoting *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013)); Management's Discussion and Analysis of Financial Condition, Securities Act Release No. 6835, 54 Fed. Reg. 22427-01, 22429 (May 24, 1989). Generally, "risk factors that are not 'reasonably likely to be material under Item 303' are not material factors that render an offering speculative or risky under Item 105." *Kolominsky v. Root, Inc.*, 100 F.4th 675, 685 (6th Cir. 2024) (quoting *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 484 n.4 (2d Cir. 2011)).

c. The Challenged Disclosures

[28] The Investors allege that eight disclosures in the Offering Documents were false or misleading, thereby violating Sections 11(a), 12(a)(2), and 15. In the Second Amended Complaint, the Investors allege all eight disclosures are false or misleading because the Offering Documents should have disclosed the following:

> (i) prior to the Offering Elanco had initiated a plan to have Elanco internally drive the demand creation of its Companion Animal segment; (ii) as part of that plan, Elanco decided to bring down distributor inventory of such Companion Animal products; (iii) also as part of that plan, Elanco reduced its Distributors from eight to four; (iv) these Distribution Changes created a material risk that Elanco's Companion Animal segment would have substantially reduced sales and that segment's earnings, at a minimum, would be substantially reduced during 1Q 2020; and (v) as a result, Elanco's financial results were likely to be materially adversely impacted.

Appellants' App. Vol. V at 118–19, 122, 124–25, 135. The Investors further assert that the Offering Documents "led investors to believe that [Elanco] was continuing with its stable distribution relationships, while, in fact, it was overhauling the entire distribution process." *Id.* at 117, 120.

[29] First, we address the Investors' allegations in the context of the five challenged business disclosures

(collectively, the "Business Disclosures"). Second, we address the allegations in the context of the three challenged risk disclosures (collectively, the "Risk Disclosures"). Third, we address the Investors' arguments regarding post-Offering analyst statements.

i. The Business Disclosures

[30] First, the Investors challenge the following business disclosure ("Business Disclosure 1") that appears under the heading "**Industry**" and the subheading "***Key Structural Characteristics of the Animal Health Industry***":

> ***Deep customer relationships.*** Direct customer models allow animal health sales representatives and veterinary consultants to develop a deep understanding of customer needs, which often facilitate strong and impactful relationships. Representatives and consultants frequently partner with customers through product support and analytics, driving additional value for the customer[.]

Appellants' App. Vol. VII at 50 (emphasis in original); *see also* Appellants' App. Vol. V at 117–18.

[31] Second, the Investors challenge the following business disclosure that appears under the heading "**Sales and Marketing**":

> Our sales organization includes sales representatives, veterinary consultants and

other value-added specialists. In markets where we do not have a direct commercial presence, we generally contract with distributors that provide logistics and sales and marketing support for our products.

Our sales representatives visit our customers, including consultants, veterinarians, food animal producers, and resellers, to inform, promote and sell our products and to support customers. Our veterinary consultants provide scientific consulting focused on disease management and herd management, training and education on diverse topics, including responsible product use, and generally have advanced degrees in veterinary medicine, veterinary nutrition or other agriculture-related fields. These direct relationships with customers allow us to understand their needs. Additionally, our sales representatives and veterinary consultants focus on collaborating with our customers to educate and support them on topics such as local disease awareness and to help them adopt new and more sophisticated animal health solutions, including through the use of our products. As a result of these relationships, our sales and consulting visits provide us with access to customer decision makers. In addition, our sales and marketing organization provides enhanced value by providing support to food animal producers to help maximize their yields and reduce costs. Our analytics help

> customers analyze large amounts of health and production data. As of September 30, 2019, we had approximately 1,400 sales representatives.

Appellants' App. Vol. VII at 186–87; Appellants' App. Vol. V at 118.

[32] Third, the Investors challenge the following business disclosure ("Business Disclosure 3") that appears under the heading "**Our Competitive Strengths**":

> We believe the following strengths create sustainable competitive advantages that will enable us to continue to grow as a leader in the animal health industry.
>
> - ***Established leader with a global presence, diversified product portfolio and full channel coverage.*** We are the fourth largest animal health company in the world, with over $3 billion in revenue for the year ended December 31, 2018. Globally, we are #1 in medicinal feed additives, #2 in poultry, and #3 in other pharmaceuticals, which are mainly companion animal therapeutics, measured by 2018 revenue, according to Vetnosis. We also have one of the broadest portfolios of pet parasiticides in the companion animal sector, based on indications, species and formulations. We have a comprehensive and diversified product portfolio, with more than 125

> brands sold in more than 90 countries. In 2018, our top 10 products accounted for 42% of our revenue, with our top selling product accounting for approximately 11% of our revenue. Our global footprint includes a local sales force presence in 43 countries and third-party distribution relationships serving other relevant markets. . . .

Appellants' App. Vol. VII at 51 (emphasis in original); *see also* Appellants' App. Vol. V at 118.

[33] Fourth, the Investors challenge the following portions of the business disclosure ("Business Disclosure 4") that appears under the heading "**Our Targeted Value-Generating Strategies**":

> We intend to continue to grow our business and create value for our shareholders through a targeted value-generating strategy with three key pillars: a Portfolio Strategy for our marketed products, an Innovation Strategy for our R&D pipeline and a Productivity Strategy for our margin expansion initiatives. The acquisition of the Bayer Animal Health Business is expected to further strengthen and accelerate our value-generating strategy.
>
> ***Portfolio Strategy***
>
> - ***Invest in categories with the greatest potential for growth.*** We are focusing the

majority of our resources, including more than 75% of our R&D funding, on our three targeted growth categories: CA Disease Prevention, CA Therapeutics and FA Future Protein & Health, where we believe we are well positioned to grow faster than the market. These categories represented 59% of our revenue in 2018.

- ***CA Disease Prevention*** — Parasiticides and vaccines are fundamental to preventing disease in companion animals. We have a strong vaccines portfolio as well as products that protect pets from a broad spectrum of parasites, such as fleas, ticks, heartworms, roundworms, hookworms, whipworms and tapeworms. We believe we are well positioned to drive additional growth through continued product innovation and sales channel expansion.

* * *

Productivity Strategy

- ***Leverage our productivity capabilities to improve operating margins***. . . .

* * *

- ***SG&A excellence***. Our sales strategy is focused on achieving growth in our targeted

> product categories while increasing productivity within our sales force. We plan to utilize both our sales force's strong customer relationships and our strategic distributor partnerships to efficiently grow demand for our products. . . .

Appellants' App. Vol. VII at 54–56; *see also* Appellants' App. Vol. V at 118.

[34] Fifth, the Investors challenge the following business disclosure ("Business Disclosure 5") that appears under the heading "**Customers**":

> . . . We primarily sell our companion animal products to third-party distributors, as well as directly to veterinarians that typically then sell our products to pet owners. We are also expanding into retail channels in order to meet pet owners where they want to purchase. Our largest customer, an affiliate of AmerisourceBergen Corp., is a third-party veterinary distributor and represented approximately 12% of our revenue for the year ended December 31, 2018. Our next largest customer represented approximately 7% of our revenue for the year ended December 31, 2018 and no other customer represented more than 5% of our revenue for the same period.

Appellants' App. Vol. VII at 187; *see also* Appellants' App. Vol. V at 119 (emphases omitted).

[35] Business Disclosure 1 does not focus on or even mention the Companion Animal segment of Elanco's business, let alone the Companion Animal Distributors; this disclosure instead focuses on the value added by Elanco's internal sales force when it directly deals with customers. Similarly, Business Disclosure 2 primarily focuses on Elanco's direct relationships with customers and how these relationships help Elanco's business. The disclosure mentions that where Elanco does "not have a direct commercial presence," it "generally contract[s] with distributors that provide logistics and sales and marketing support for [its] products," Appellants' App. Vol. V at 186, but this small caveat to Elanco's discussion of its sales and marketing is not specific to the Companion Animal segment of its business or the Companion Animal Distributors.

[36] Business Disclosures 3 and 5 predominantly focus on data from 2018. Elanco's failure to disclose the distribution changes that occurred in late 2019 and early 2020 did not render the historical facts in these disclosures false or misleading. *See McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) (collecting cases) ("It is well-established that the accurate reporting of historic successes does not give rise to a duty to further disclose contingencies that might alter the revenue picture in the future.") In fact, the historical information in Business Disclosure 3 suggests that the distribution changes were not likely to be material because Elanco's "global footprint" was primarily comprised of "a local sales force presence" while its "third-party distribution relationships serv[ed] other relevant markets." Appellants'

App. Vol. V at 51. Likewise, the historical information in Business Disclosure 5 suggests that the distribution changes were not likely to be material because most of Elanco's Companion Animal Distributors accounted for five percent or less of Elanco's total revenue in 2018.

[37] Business Disclosure 4 focuses on Elanco's current and future plans to grow its business. The Investors argue that this disclosure "provided a specific goal and intended approach for reaching it – growth through Elanco's 'strategic partnerships.'" Appellants' Br. at 40 (quoting Appellants' App. Vol. V at 118). Therefore, Elanco was "'under an obligation to disclose other approaches to reaching the goal' – particularly considering that 'those approaches' were not just 'under active and serious consideration,' but had been planned and at least partially instituted prior to the Offering." *Id.* (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993)). The Court of Appeals for the Second Circuit has held that "when a corporation is pursuing a specific business goal and announces that goal as well as an intended approach for reaching it, it may come under an obligation to disclose other approaches to reaching the goal when those approaches are under active and serious consideration." *Time Warner*, 9 F.3d at 268. For instance, in *In re Time Warner Inc. Securities Litigation*, Time Warner was in desperate need of capital, so it "embarked on a highly publicized campaign to find international 'strategic partners,'" made positive public statements about its progress in this endeavor that "impl[ied] to varying degrees that significant partnerships will be consummated and announced in the near future," and

failed to disclose that the search for strategic partners was not going as well as expected and Time Warner was investigating alternative methods of raising capital such as a stock offering. *Id.* at 262. According to the Second Circuit, a "successful strategic alliance . . . would have improved the corporation's expected profit stream, and should have served to drive up the share price," but offering new shares of the company to raise the necessary capital "would dilute the ownership rights of existing shareholders, likely decrease dividends, and drive down the price of the stock." *Id.* at 267. The Second Circuit concluded that "Time Warner *may* have come under a duty to disclose facts that would place the statements concerning strategic alliances in a materially different light" because it "publicly hyped strategic alliances" and its "public statements could have been understood by reasonable investors to mean that the company hoped to solve the *entire* debt problem through strategic alliances." *Id.* at 268 (first emphasis added, second emphasis in original).

[38] The information disclosed in Business Disclosure 4, the other challenged disclosures, and the Offering Documents as a whole do not give rise to such a duty. In relevant part, Business Disclosure 4 identifies Elanco's Companion Animal disease prevention products as having potential for growth and then states Elanco's *belief* that it is "well positioned to drive additional growth through continued product innovation and sales channel expansion." Appellants' App. Vol. V at 56. The disclosure also states that Elanco "*plan*[*s*] to utilize both [its] sales force's strong customer relationships and [its] strategic

distributor partnerships to efficiently grow demand for [its] products." *Id.* at 57 (emphasis added). Unlike the statements at issue in *Time Warner*, the statements in Business Disclosure 4 are general statements of belief and intent, not statements of specific plans.

[39] Based on the foregoing and accepting all alleged facts as true and drawing every reasonable inference in favor of the Investors as the nonmovants, the changes in Elanco's relationship with the Companion Animal Distributors were not material because such information would have been unimportant to the reasonable investor in evaluating the Business Disclosures. Specifically, the Business Disclosures primarily concerned historical facts that were accurately reported, general statements of belief and intent rather than specific commitments, and information that constituted a small portion of Elanco's overall business operations. As such, the Business Disclosures are incapable of supporting relief under any set of circumstances. We cannot say the Business Disclosures contained any untrue statement of material fact or omitted any material fact that was required or otherwise necessary to make them not misleading. Accordingly, we cannot say the trial court erred in granting the Offerors' motion to dismiss as to the Investors' claims concerning the Business Disclosures.

ii. The Risk Disclosures

[40] First, the Investors challenge the following risk disclosure ("Risk Disclosure 1") that appears under the heading "**Risks Related to Our Business**" and

the subheading "***Consolidation of our customers and distributors could negatively affect the pricing of our products.***":

> Third-party distributors, veterinarians and food animal producers are our primary customers. In recent years, there has been a trend towards the concentration of veterinarians in large clinics and hospitals. In addition, food animal producers, particularly swine and poultry producers, and our distributors have seen recent consolidation in their industries. Furthermore, we have seen the expansion of larger cross-border corporate customers and an increase in the consolidation of buying groups (cooperatives of veterinary practices that leverage volume to pursue discounts from manufacturers). The pace of consolidation and structure of markets varies greatly across geographies. If these trends towards consolidation continue, our customers could attempt to improve their profitability by leveraging their buying power to obtain favorable pricing. The resulting decrease in our prices could have material adverse effect on our business, financial condition and results of operations.

Appellants' App. Vol. VII at 84; *see also* Appellants' App Vol. V at 120 (emphasis omitted).

[41] Second, the Investors challenge the following risk disclosure ("Risk Disclosure 2") that appears under

the heading "**Risks Related to Our Business**" and the subheading "***For our companion animal products, increased use of alternative distribution channels, or changes within existing distribution channels, could negatively impact our market share, margins and distribution of our products.***":

> In most markets, pet owners typically purchase their animal health products directly from veterinarians. However, pet owners increasingly have the option to purchase animal health products from sources other than veterinarians, such as online retailers, "big-box" retail stores or other over-the-counter distribution channels. This trend has been demonstrated by the significant shift away from the veterinarian distribution channel in the sale of flea and tick products in recent years.
>
> * * *
>
> Over time, these and other competitive conditions may increase our use of online retailers, "big-box" retail stores, or other over-the-counter distribution channels to sell our companion animal products. We may not be adequately prepared or able to distribute our companion animal products if an increased portion of our sales occur through these channels. Also, we may realize lower margins on sales through these distribution channels than we do on sales through veterinarians. Any

> of these events could materially adversely affect our business, financial condition and results of operations.
>
> In addition, if one or more of our companion animal distributors discontinues or modifies their relationship with us, our business, financial condition and results of operations may be materially adversely affected. For example, in 2017, a change in our U.S. inventory management practices resulted in a revenue lag as existing inventory was sold down.

Appellants' App. Vol. VII at 88–89; *see also* Appellants' App Vol. V at 121 (emphasis omitted).

[42] Third, the Investors challenge the following risk disclosure ("Risk Disclosure 3") that appears under the heading "**Risks Related to Our Business**" and the subheading "***Increased or decreased inventory levels at our channel distributors lead to fluctuations in our revenues and variations in payment terms extended to our distributors can impact our cash flows.***":

> In addition to selling our products directly to veterinarians, we sell to distributors who, in turn, sell our products to third parties. Inventory levels at our distributors may increase or decrease as a result of various factors, including end customer demand, new customer contracts, heightened and generic competition, required minimum inventory levels, our ability to renew

> distribution contracts with expected terms, our ability to implement commercial strategies, regulatory restrictions, unexpected customer behavior, and procedures and environmental factors beyond our control, including weather conditions or an outbreak of infectious disease carried by food animals, such as African Swine Fever. These increases and decreases can lead to variations in our quarterly and annual revenues. In addition, like all companies that manufacture and sell products, we have policies that govern the payment terms that we extend to our customers. Due to consolidation amongst our distributors, as well as changes in the buying habits of end customers or the need for certain inventory levels at our distributors to avoid supply disruptions, from time to time, our distributors have requested exceptions to the payment term policies that we extend to them. Extensions of customer payment terms can impact our cash flows, liquidity and results of operations.

Appellants' App. Vol. VII at 90; *see also* Appellants' App Vol. V at 121–22 (emphases omitted).

[43] Risk Disclosure 1 focuses on certain segments of Elanco's customers—such as veterinarians, distributors, product producers, and buying groups—consolidating among themselves, in part to pursue discounts from manufacturers. Such consolidation, according to Risk Disclosure 1, could lead these customers to also

pursue discounts from Elanco, which could negatively impact Elanco's business. In short, and contrary to the Investors' assertions, Risk Disclosure 1's discussion of consolidation focuses on customer consolidation, not Elanco's consolidation of its Companion Animal Distributors. Risk Disclosure 1 is also not specific to the Companion Animal segment of Elanco's business. Therefore, contrary to the Investors' allegations, the risks contemplated by Risk Disclosure 1 had not yet materialized.

[44] Risk Disclosure 2 discusses trends in and risks for Elanco's distribution channels, and it primarily focuses on consumers' decreasing reliance on veterinarians and increasing reliance on other retailers for their Companion Animal product needs. It is in the context of this trend that Elanco states a Companion Animal Distributor's choice to discontinue or modify its relationship with Elanco would pose a risk to Elanco's Companion Animal business, especially because Elanco "may not be adequately prepared or able to distribute [its] companion animal products if an increased portion of [its] sales occur through" online retailers, stores, and over-the-counter distribution channels, Appellants' App Vol. VII at 89. The Investors allege that the risks associated with the Companion Animal Distributors "had already materialized and were not mere possibilities." Appellants' App. Vol. V at 123. However, the Investors read the portion of Risk Disclosure 2 about the Companion Animal Distributors in isolation. Reading Risk Disclosure 2 in its entirety shows that the discussed risks had not yet materialized because they were contingent on consumers

increasingly buying Companion Animal products from non-veterinarian retailers.

[45] Risk Disclosure 3 focuses on the effect distributors' inventory level changes have on Elanco's business. In relevant part, this disclosure states that "increases and decreases [in inventory levels] can lead to variations in [Elanco's] quarterly and annual revenues." Appellants' App. Vol. V at 90. It also warns that distributors "have requested exceptions to the payment term policies that [Elanco] extend[s] to them" based on a number of factors, including "consolidation amongst [Elanco's] distributors," "changes in the buying habits of end customers," and "changes in . . . the need for certain inventory levels at [Elanco's] distributors." *Id.* These extensions of "payment terms can impact [Elanco's] cash flow, liquidity and results of operations." *Id.* Notably, none of the risks discussed in Risk Disclosure 3 are specific to the Companion Animal Distributors, and those risks are generic, forward-looking warnings about using distributors to move product.

[46] Based on the foregoing and accepting all alleged facts as true and drawing every reasonable inference in favor of the Investors as the nonmovants, the changes in Elanco's relationship with the Companion Animal Distributors was not material because such information would have been unimportant to the reasonable investor in evaluating the Risk Disclosures. The same is true of the Offering Documents as a whole. We thus cannot say the Risk Disclosures contained any untrue statement of material fact or omitted any material fact that was

necessary to make them not misleading. We also cannot say that the Risk Disclosures failed to include information required by Items 105 and 303. Accordingly, we cannot say the trial court erred in granting the Offerors' motion to dismiss as to the Investors' claims concerning the Risk Disclosures.

iii. Post-Offering Statements

[47] In addition to the Business and Risk Disclosures, the Investors point to statements made by analysts after Elanco released its financial results for the first quarter of 2020 to demonstrate that information regarding the distribution changes was material. For instance, one analyst stated: "[M]ost surprisingly, while many other manufacturers in the space saw positive stocking effects due to the [COVID-19] pandemic, Elanco disclosed a shift in distribution strategy that caused the company to reduce its level of channel inventory, leading to lower-than-expected companion animal revenues." Appellants' App. Vol. V at 130 (emphasis omitted). Another analyst stated: "Elanco's Q1 results were heavily impacted by the strategic decision to reduce inventory within distribution channels. The disruptions from COVID-19 across the supply chain led ELAN to accelerate its shift away from distributors, leading to a $60M destocking headwind that mostly impacted the companion business ($206M, - 22%)." *Id.* (emphasis omitted).

[48] When evaluating claims under the 1933 Act and its disclosure requirements, we take an "ex ante" approach, not an "ex post" approach. *Wielgos v. Commonwealth*

Edison Co., 892 F.2d 509, 518 (7th Cir. 1989) (emphases omitted); *see also Nguyen v. MaxPoint Interactive, Inc.*, 234 F. Supp. 3d 540, 545–46 (S.D.N.Y. 2017) (quoting *Charter Twp. of Clinton Police & Fire Ret. Sys. v. KKR Fin. Holdings LLC*, No. 08 CIV. 7062 PAC, 2010 WL 4642554 at *11 (S.D.N.Y. Nov. 17, 2010)) ("'[P]laintiffs are not allowed to plead Section 11 claims with the benefit of 20/20 hindsight' because 'Section 11 claim[s] cannot be based on a "backward-looking assessment" of the registration statement.'" (second alteration in original)). "Issuers and underwriters must decide what information will be useful without burying investors under a blizzard of paper." *Wielgos*, 892 F.2d at 518 (citing *Greenapple v. Detroit Edison Co.*, 618 F.2d 198, 210 (2d Cir. 1980)). "No one's interests would be served by requiring the details [an investor] demands from the privileged position of hindsight, as opposed to the 'brief[ ]' description the SEC solicited" via the 1933 Act. *Id.* (second alteration in original).

[49] The Investors' reliance on post-Offering analyst statements to establish the materiality of the distribution changes is exactly the type of materiality-by-hindsight approach in which we cannot engage. *See Wielgos*, 892 F.2d at 518; *see also Nguyen*, 234 F. Supp. 3d at 545–46 (quoting *Charter Twp. of Clinton Police & Fire Ret. Sys.*, No. 08 CIV. 7062 PAC, 2010 WL 4642554 at *11). Consequently, the Investors' arguments based on the post-Offering analyst statements are unpersuasive.

d. Summation

[50] Accepting all the alleged facts as true and drawing every reasonable inference in favor of the Investors, there is a substantial likelihood that the reasonable investor would not have viewed information about Elanco's changes to its relationships with some of the Companion Animal Distributors as significantly altering the total mix of the information in the Offering Documents. The distribution change information was therefore not material,[15] so the Offerors had no duty to disclose it and its omission from the Offering Documents is not actionable under Sections 11(a), 12(a)(2), and 15. Consequently, the Investors have failed to state a claim upon which relief can be granted, and the trial court did not err by dismissing the Second Amended Complaint.

2. The Trial Court Did Not Err by Not Addressing the Investors' Preemptive Request for Leave to Amend their Complaint if the Trial Court Granted the Motion to Dismiss

[51] The Investors also argue that the trial court erred by not addressing their preliminary request for leave to amend their complaint if the trial court granted

15. Because we conclude that the distribution changes were not material facts or circumstances that had to be disclosed, we need not address the Investors' argument regarding the Private Securities Litigation Reform Act, which provides a safe harbor for private actions arising thereunder that are based on untrue statements of material fact or omissions of material facts, 15 U.S.C. § 78u-5(c)(1).

the Offerors' motion to dismiss. However, as the Offerors contend, the trial court did not need to address this request because Trial Rule 12(B) gave the Investors the right to amend their complaint within 10 days of the dismissal order: "When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule *the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days* after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule," T.R. 12(B) (emphasis added).

[52] The Indiana Supreme Court has held that a plaintiff who has already amended a complaint pursuant to Trial Rule 15 still has "the right and opportunity to plead over within ten days" pursuant to Trial Rule 12(B) after a Trial Rule 12(B)(6) motion is granted. *Constantine v. City-Cnty. Council of Marion Cnty.*, 267 Ind. 279, 281–82, 369 N.E.2d 636, 638 (1977); *see also State Farm Mut. Auto. Ins. Co. v. Shuman*, 175 Ind. App. 186, 194, 370 N.E.2d 941, 949 (1977) (holding that when a Trial Rule 12(B)(6) motion is granted, the "plaintiff has an absolute right to correct any deficiencies in his complaint within ten days"); *cf. Gordon v. Purdue Univ.*, 862 N.E.2d 1244, 1253 (Ind. Ct. App. 2007) (holding that when a complaint has been dismissed under Trial Rule 12(B)(6) once and consequently amended, the plaintiff does not have automatic right to replead when the complaint is dismissed a second time under Trial Rule 12(B)(6)).

[53] Furthermore, Indiana law is clear that once a complaint is dismissed under Trial Rule 12(B)(6), the

plaintiff has two options: "(1) determine that the claims only currently lack merit because of the way in which they are pleaded—a matter of form—and correct the pleadings; or (2) reject the trial court's ruling and its implication and challenge the ruling on appeal." *DeCola v. Steinhilber*, 207 N.E.3d 440, 446–47 (Ind. Ct. App. 2023), *reh'g denied* (May 9, 2023); *see also Thacker v. Bartlett*, 785 N.E.2d 621, 624–25 (Ind. Ct. App. 2003). The Investors failed to exercise their right to replead within 10 days, and instead of seeking leave to belatedly amend their complaint after the ten-day window passed, they initiated this appeal. The Investors cannot now complain that the trial court erred by not addressing their preemptive request for leave.

CONCLUSION

[54] In sum, the trial court did not err by dismissing the Second Amended Complaint, and it did not err by not addressing the Investors' preliminary request for leave to amend their complaint if it was dismissed. We therefore affirm the trial court on all issues raised.

[55] Affirmed.

Pyle, J., and Weissmann, J., concur.

APPENDIX C — ORDER OF THE MARION SUPERIOR COURT 1, INDIANA COMMERCIAL COURT, FILED APRIL 17, 2024

INDIANA COMMERCIAL COURT
MARION SUPERIOR COURT
COMMERCIAL COURT DOCKET

CAUSE NO. 49D01-2010-CT-036760

SAFRON CAPITAL CORPORATION, *et al.*,

Plaintiffs,

v.

ELANCO ANIMAL HEALTH INCORPORATED, *et al.*,

Defendants.

Filed April 17, 2024

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

This matter comes before the Court on Defendants', Elanco Health Incorporated ("Elanco") and various individuals and financial institutions that will later be defined (collectively, "Defendants"), Motion to Dismiss Plaintiffs' Second Amended Complaint filed on August 14, 2023. Plaintiffs, Safron Capital Corporation ("Safron") and the General Retirement System of the City of Detroit, individually and on behalf of all others similarly situated (collectively, "Plaintiffs"), filed a Response in Opposition on October 20, 2023. Defendants filed a Reply on November 20, 2023. A hearing was held on March 7, 2024.

Having been fully briefed on the issues set forth in this matter, the Court rules as follows:

I. Procedural History

1. On May 20, 2020, a similar action with similar plaintiffs and defendants was filed in the District Court for the Southern District of Indiana and was assigned to Judge Barker ("Federal Action").

2. On October 16, 2020, Plaintiffs filed suit in this Court.

3. On December 23, 2020, Plaintiffs filed their First Amended Complaint.

4. On January 13, 2021, the Federal Action defendants filed a Motion to Dismiss the federal complaint.

5. On January 25, 2021, in light of the motion to dismiss in the Federal Action, Defendants filed a Motion to Stay Proceedings in this Court, which was granted by Judge Welch on February 18, 2021.

6. On August 17, 2022, Judge Barker dismissed all of the plaintiffs' claims without prejudice in the Federal Action.

7. Following Judge Barker's order for dismissal, Defendants filed their Motion to Dismiss in this Court. Before the hearing on Defendants' Motion to Dismiss, Plaintiffs sought leave to amend their First Amended Complaint which was unopposed by Defendants.

8. On June 15, 2023, Plaintiffs filed their Second Amended Complaint.

9. On August 14, 2023, Defendants filed their Motion to Dismiss.

10. On September 27, 2023, Judge Barker denied the plaintiffs' motion to amend their complaint in the Federal Action because doing so would be futile.

11. On October 20, 2023, Plaintiffs filed their Response in Opposition.

12. On November 20, 2023, Defendants filed their Reply.

II. Facts and Allegations

13. A majority of the following facts and allegations are taken from Plaintiffs' Complaint and are accepted as true for the purpose of reviewing Defendants' Motion to Dismiss. *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 134 (Ind. 2006).

A. The Parties

i. Plaintiffs

14. Safron is a financial entity which purchased shares of Elanco. Compl., ¶ 13.

15. The General Retirement System of the City of Detroit similarly purchased shares of Elanco. Compl., ¶ 14.

ii. Defendants

16. Elanco is an Indiana corporation which develops, manufactures, and markets products for companion and food animals. Although initially founded as part of Eli Lilly & Company, Elanco commenced its initial public offering on September 20, 2018 as a stand-alone entity. Compl., ¶¶ 2, 15, 45.

17. Jeffrey N. Simmons ("Simmons") served as Elanco's CEO and as a member of Elanco's Board of Directors ("Board") during all relevant times. Compl., ¶ 16.

18. Todd S. Young ("Young") served as Elanco's CFO during all relevant times. Compl., ¶ 17.

19. Other individual Defendants include various officers of Elanco and members of Elanco's Board ("Individual Defendants"). Compl., ¶¶ 18-27.

20. Other Defendants also include various underwriters which made Elanco's shares available to

the investing public, including Goldman Sachs & Co., LLC, Citigroup Global Markets, Inc., J.P. Morgan Securities, LLP, and Bank of America Securities, Inc., among others (collectively, "Underwriter Defendants"). Compl., ¶¶ 13, 29-38.

B. An Overview of and Changes to Elanco's Business Prior to the Offering

i. The Bayer Acquisition

21. On August 20, 2019, Elanco acquired Bayer Aktiengesellschaft's ("Bayer") animal health business for $7.5 billion. Compl., ¶¶ 3, 49, 54.

22. The acquisition was "expected to create the second largest animal health company based on 2018 revenue," and "approximately double [Elanco's] companion animal business based on 2018 revenue." Defendants' Ex. 4, Offering Documents at S-5 and S-6.

23. The successful completion of Elanco's upcoming public offering ("Offering") was necessary for Elanco to complete the acquisition. Compl., ¶¶ 3, 49, 54.

24. Elanco intended to use the net proceeds generated from the Offering to pay a portion of the $7.5 billion acquisition price. Compl., ¶ 54.

ii. Companion Animal Segment

25. Elanco's business has two primary segments: a companion animal segment ("Companion Animal

Segment" or "Companion Animal") and a food animal segment. Compl., ¶ 46.

26. Elanco's Companion Animal Segment derived its revenue primarily from the sales of Companion Animal products to third-party wholesale distributors ("Distributors") who then sold those products to end-customers. Compl., ¶ 47.

27. Elanco has relied on its Distributors to drive sales for its products, as the Distributors buy Elanco products to fill their inventory in order to meet the varying demand levels among end-customers. Compl., ¶ 47.

28. The Companion Animal Segment accounted for approximately 37% of Elanco's total revenue in 2019. Compl., ¶ 47.

29. Elanco had maintained relationships with eight Distributors in the United States. Compl., ¶ 48.

30. The largest Distributor accounted for 13% of Elanco's total revenue in 2019. Compl., ¶ 48.

iii. Distribution Changes

31. Prior to the Offering on January 21, 2020, Elanco was planning to change the manner in which it conducted the sales, distribution, and delivery processes of its Companion Animal Segment ("Distribution Changes"). Compl., ¶¶ 4, 1, 52.

32. Rather than primarily relying on the Distributors, Elanco was planning to transition to a primarily company-driven model for product demand creation. As a part of this plan, Elanco reduced the inventory level of the Distributors and reduced the number of Distributors from eight to four at the beginning of 2020 prior to the Offering. Compl., ¶¶ 4, 72.

33. Specifically, Elanco retained its "big four" Distributors and cut out its relationships only with smaller, regional Distributors. Compl., ¶ 96.

34. The specifics of the Distribution Changes were unknown to investors and analysts. Compl., ¶ 4.

35. On January 10, 2020, eleven days before the Offering, Elanco issued a press release with its initial financial guidance for the 2020 fiscal year and an accompanying quote from Simmons, stating, "the Bayer transaction . . . is developing even better than originally expected back in August." Thereafter, the price of Elanco common stock increased from a price of $28.73 per share on January 10, 2020, to a price of $30.62 per share on January 21, 2020. Compl., ¶ 50.

36. On a January 10, 2020 earnings call regarding Elanco's financial guidance for the 2020 fiscal year, Simmons stated, in part, that "the biggest change going into 2020 is our holistic approach, looking at channels, both in the clinic and retail. Again, we have a retail group looking at how we're going to utilize distribution in a more targeted way, value-based way, certain portfolio against certain segments." Compl., ¶ 51.

C. Elanco's Offering

37. On January 21, 2020, Elanco initiated the Offering by filing a registration statement ("Registration Statement") and accompany prospectus supplements ("Prospectuses") (collectively, "Offering Documents") with the SEC. Compl. ¶¶ 1, 52.

38. The Registration Statement is nearly 500 pages in length. Defendants' Ex. 4, Offering Documents.

39. As a part of the Offering, Elanco offered nearly 25 million shares of common stock at $32.00 per share and 11 million tangible equity units at $50.00 per unit. Compl., ¶¶ 1, 53.

40. Pursuant to the Offering, the Underwriter Defendants received discounts and commissions totaling to $1.16 per share of common stock sold and $1.8125 per equity unit sold. Compl., ¶ 53.

41. On January 27, 2020, the Offering closed. Compl., ¶¶ 1, 55.

42. Pursuant to the Offering, Elanco sold all shares of common stock and equity units, generating net proceeds of approximately $1.3 billion. Compl., ¶ 55.

D. Disclosures Within the Offering Documents

43. The Offering Documents include various business information of Elanco, including business

disclosures and risk factors, for the purpose of properly informing prospective investors. Defendants' Ex. 4, Offering Documents.

44. Elanco's recent acquisition of Bayer's animal health business was a main focus of and was frequently highlighted by Elanco as one of the biggest risks to its business.

45. The Offering Documents stated that Elanco's "deep customer relationships" allowed it to "develop a deep understanding of customer needs" and "facilitate strong impactful relationships." Further, "[r]epresentatives and consultants frequently partner with customers through product support and analytics, driving additional value for the customer." Compl., ¶ 59.

46. The Offering Documents stated that Elanco contracted with Distributors who "provide logistics and sales and marketing support for [Elanco's] products" and that "direct relationships with customers allow [Elanco] to understand their needs." Compl., ¶ 60.

47. The Offering Documents list, among other things, "full channel coverage," "a local sales force presence," and "third-party distributor relationships" as Elanco's competitive strengths." Compl., ¶ 62.

48. The Offering Documents stated that Elanco "targeted value generating strategies," and was "well positioned to grow faster than the market" and "drive additional growth through continued . . . sales channel

expansion" in connection with its Companion Animal products. Further, Elanco intended to utilize its "strong customers relationships and ***strategic*** distributor partnerships to efficiently grow demand for [its] products." Compl., ¶ 63 (emphasis added).

49. The Offering Documents identified Elanco's largest Distributor and provided the proportion of total revenue attributable to two of the eight Distributors:

> "We primarily sell our companion animal products to third-party distributors, as well as directly to veterinarians that typically then sell our products to pet owners. We are also expanding into retail channels in order to meet pet owners where they want to purchase. Our largest customer, an affiliate of AmerisourceBergen Corp., is a third-party veterinary distributor and represented approximately 12% of our revenue for the year [ending] December 31, 2018. Our next largest customer represented approximately 7% of our revenue for the year [ending] December 31, 2018 and no other customer represented more than 5% of our revenue for the same period."

Compl., ¶ 65.

50. The Offering Documents contained a "Risk Factors" section which acknowledged that the "consolidation of [Elanco's] customers and distributors" within the animal health industry was a risk factor of Elanco:

> "Consolidation of our customers and distributors could negatively affect the pricing of our products. Third-party distributors, veterinarians and food animal producers are our primary customers. In recent years, there has been a trend towards the concentration of veterinarians in large clinics and hospitals. In addition, food animal producers, particularly swine and poultry producers, and our distributors have seen recent consolidation in their industries. Furthermore, we have seen the expansion of larger cross border corporate customers and an increase in the consolidation of buying groups (cooperatives of veterinary practices that leverage volume to pursue discounts from manufacturers). The pace of consolidation and structure of markets varies greatly across geographies. If these trends towards consolidation continue, our customers could attempt to improve their profitability by leveraging their buying power to obtain favorable pricing. The resulting decrease in our prices could have a material adverse effect on our business, financial condition and results of operations."

Compl., ¶ 66.

51. The Offering Documents stated that "[f]or [Elanco's] companion animal products, ***increased*** use of alternative distribution channels, or changes within existing distribution channels, could negatively impact

[Elanco's] market share, margins and distribution of [Elanco's] products":

> "In addition, if one or more of our companion animal distributors discontinues or modifies their relationship with us, our business, financial condition and results of operations may be materially adversely affected. For example, in 2017, a change in our U.S. inventory management practices resulted in a revenue lag as existing inventory was sold down."

Compl., ¶ 68 (emphasis added).

52. The Offering Documents acknowledged that "the impact of increased or decreased sales to [Elanco's third-party] channel distributors resulting in higher or lower inventory levels held by them . . . could lead to variations in quarterly revenue results":

> "Increased or decreased inventory levels at our channel distributors lead to fluctuations in our revenues and variations in payment terms extended to our distributors can impact our cash flows. In addition to selling our products directly to veterinarians, we sell to distributors who, in turn, sell our products to third parties. Inventory levels at our distributors may increase or decrease as a result of various factors, including end customer demand, new customer contracts, heightened and generic competition, required

> minimum inventory levels, our ability to renew distribution contracts with expected terms, our ability to implement commercial strategies, regulatory restrictions, unexpected customer behavior, and procedures and environmental factors beyond our control, including weather conditions or an outbreak of infectious disease carried by food animals, such as African Swine Fever. These increases and decreases can lead to variations in our quarterly and annual revenues. In addition, like all companies that manufacture and sell products, we have policies that govern the payment terms that we extend to our customers. Due to consolidation amongst our distributors, as well as changes in the buying habits of end customers or the need for certain inventory levels at our distributors to avoid supply disruptions, from time to time, our distributors have requested exceptions to the payment term policies that we extend to them. Extensions of customer payment terms can impact our cash flows, liquidity and results of operations."

Compl., ¶ 69.

E. Elanco's Financial Results Post-Offering

i. Earnings Call on February 19, 2020

53. On February 19, 2020, less than one month after the Offering, Elanco issued its financial results for the

fourth quarter of 2019, ending December 31, 2019. On Elanco's earnings call that day, Simmons revealed that as of the beginning of 2020, prior to the Offering, Elanco had "cut [its] distribution down to four major distributors" to achieve a "targeted approach that [Elanco] set up for this year." Simmons' statements were in response to an analyst who "notic[ed] there were some changes in [Elanco's] distribution strategy with small distributors" and who specifically inquired whether it was "kind of a signal of maybe future strategy around distribution." In response, Simmons stated that "a lot of analysis was done in putting this strategy together" and that Elanco would monitor the results of the change "month-to-month as we go through the quarter." Compl., ¶ 72.

54. Also during the February 19, 2020 earnings call, Simmons stated that Elanco will "be monitoring this month-to-month as we look at it. But we feel very good about [Elanco's] distribution strategy. Distributors are key and again, a very value-based approach as we move forward." Compl., ¶ 72.

55. Following Simmons' statement that Elanco had decreased its Distributors from eight to four, the markets did not react negatively and Elanco's common stock price remained steady. Compl., ¶ 73.

ii. Earnings Call on May 7, 2020

56. On May 7, 2020, Elanco issued its financial results for the first quarter of 2020, ending March 31, 2020. Elanco reported a 9% decline in quarterly revenue in its Companion Animal Segment. Compl., ¶ 75.

57. In an accompanying press release, Simmons attributed Elanco's disappointing quarter to, among other things, "distributor performance," and stated that Elanco had "made initial progress to meaningfully reduce channel inventory" of its Distributors. Simmons also acknowledged that the sudden reduction in Distributor inventory was for the purpose of "tighten[ing] [Elanco's] approach across . . . [its] distributor relationships" and to "drive demand for [Elanco's] products over the long term." Compl., ¶¶ 7, 75.

58. During the May 7, 2020 earnings call, Simmons discussed the Distribution Changes, stating, in part:

> "Consequently, in Q1, we reduced the amount of product and distributor inventory by approximately $60 million, mainly in the U.S. companion animal space. And we expect to further reduce an additional $80 million to $100 million, mainly in the second quarter, as we apply these new tactics across our business and geographies. The evaluation of our distributors was a priority, as I took primary responsibility for our U.S. operations last December. With the insights gained into distributors' capabilities and broader actions that drive demand as well as the upcoming close on the Bayer acquisition, I'm excited by the changes in Elanco's commercial leadership, and I'm confident we'll continue to create industry-leading execution in demand creation, product launches and full utilization of the omnichannel.

> This is an important modification in our tactics. And the COVID pandemic was a trigger that accelerated this change at the end of March and into Q2. We've gained important insight where our own capabilities are superior, and we're adjusting our investments accordingly."

Compl., ¶ 76.

59. During the May 7, 2020 earnings call, Simmons stated, among numerous other things, "[r]ecall at the start of 2020, we consolidated our U.S. Companion Animal distributors from 8 to 4, and we instituted specific targets for them to generate end-customer demand." Simmons also stated that he was part of the "evaluation of distributor performance across [Elanco's] business" and confirmed that "a critical conclusion is that our distributor's ability to generate demand is much less effective than our own, especially in generating new clinic placements for our products." Compl., ¶ 77.

60. The price of Elanco's common stock closed at a price as low as $18.94 per share on May 21, 2020—compared to $32.00 per share at the Offering. The price of Elanco's equity units closed at a price as low as $35.11 per unit on May 22, 2020—compared to $50.00 per unit at the Offering. Compl., ¶¶ 8, 78-79.

F. COVID-19

i. Early Effects of COVID-19

61. Although patients experienced COVID-19 symptoms beginning in December of 2019 in Wuhan, China, the first case of COVID-19 in the United States was confirmed on January 20, 2020. Compl., ¶ 80.

62. On February 19, 2020, Simmons expressed little concern about the effect of the COVID-19 pandemic on Elanco's business, stating, among other things, that "China is approximately 2% of our total sales." Further, Simmons stated that Elanco had "not seen a material impact" on "local logistics and the ability to move products throughout China," and that Elanco's "product flow into the market has not been interrupted in any significant way, as we have safety stock throughout our supply chain, that enables us to minimize impacts from short-term supply disruptions." Compl., ¶ 81.

63. On February 24, 2020, Young, Elanco's CFO, similarly expressed little concern about the effect of COVID-19 on Elanco's business while emphasizing Elanco's available inventory:

> "[Elanco] carr[ies] a lot of inventory . . . And so with that, we have no issues with respect to supply chain or API in 2020. Obviously, if it became a much longer [term], then we'd have to think about what that means. We've got, I think somewhere in the 8 to 9 contract manufacturers

> in China. So of the 90 contract manufacturers we have, a small part's in China and they don't dedicate themselves 100% to us by any stretch. It may be that we're set up to have our run of product in August. Okay, well, if that gets pushed to December, it's probably not going to be the end of the world. It gets pushed to August of 2021, all right, then we have to think about it. But overall, we don't think there's an impact on us from a supply chain perspective."

Compl., ¶ 82.

64. As the COVID-19 pandemic increased in severity in March of 2020, Simmons, when asked about the pandemic, stated:

> "We're monitoring, as everybody else. Our focus is, of course, [that] our employees are safe. We have a supply chain that we feel is very secure. . . And of course, we're monitoring and managing by market, by country, virtual selling if necessary and going the appropriate things and again, monitoring this—that situation. . ."

Compl., ¶¶ 83-84.

65. On March 11, 2020, the World Health Organization declared COVID-19 to be a pandemic. Defendants' Motion to Dismiss, p. 9.

66. In mid-March, many states around the country began to implement lockdown orders. Compl., ¶ 86.

67. In its Annual Report for the 2019 fiscal year issued on February 28, 2020, Elanco warned that COVID-19 posed risks to its business, stating:

> "**A general outbreak of infectious disease or viruses or an outbreak of infectious disease carried by food animals could negatively affect the demand for, and sale and production of, our food animal products**.
>
> Our global operations expose us to risks associated with public health crises, such as pandemics and epidemics, which could harm our business and have an adverse effect on our results of operations. For example, in December 2019, an outbreak of a new strain of coronavirus in Wuhan, China, has resulted in travel disruption globally and has affected certain companies' operations in China and other countries including companies with which we do business. At this point, the extent to which the coronavirus may impact our results is uncertain."

Defendant's Motion to Dismiss, p. 9 (emphasis in original).

68. On February 28, 2020, stock markets worldwide reported the largest single-week decline since the 2008 financial crisis. Defendants' Motion to Dismiss, p. 9.

69. On March 24, 2020, Elanco issued a press release to provide a business update. Therein, Elanco

withdrew its 2020 revenue guidance and noted that it was “closely monitoring distribution logistics” and that health authorities’ stay-at-home guidance “increases the importance of . . . direct shipment and alternative [distribution] channels.” Elanco also advised that it “continue[d] to assess the best strategy to strengthen its long-term competitive commercial position and go-to-market mix, with the goal of reaching pet owners where they wish to shop.” Defendants’ Ex. 6, Elanco Current Report.

70. In its May 7, 2020 quarterly report, Elanco stated that “[COVID-19] has affected the operations of our company, vendors and suppliers, supply of and demand for our products, and our liquidity.” Defendants’ Ex. 7, Elanco Quarterly Report.

71. Elanco further stated that the pandemic had “created near-term uncertainty for [Elanco’s] channel distribution partners with respect to end customer demand and working capital. Based on these factors, in addition to a shift in tactics for demand generation with our distributors, we reduced the amount of inventory held in the [Distributor] channel.” Defendants’ Ex. 7, Elanco Quarterly Report.

72. Elanco’s decision to reduce the amount of Distributors’ inventory was in part due to Elanco’s analysis that “our internal demand generation efforts are superior to distributors and higher inventory levels are not driving demand as it had in the past.” Defendants’ Ex. 8, Elanco Current Report.

73. Further, Elanco explained in the May 7, 2020 earnings call that the pandemic "was a trigger that accelerated" the reduction in Distributor inventory. Elanco explained that the reduction amounted to approximately $60 million "of product and distributor inventory" and that it "expect[ed] to further reduce an additional $80 million to $100 million, mainly in the second quarter, as [it applied] these new tactics across our business and geographies." Edited Transcript, Q1 2020 Elanco Animal Health Inc Earnings Call (May 7, 2020) at 3.

74. During the May 7, 2020 earnings call, Simmons stated that COVID-19 did not begin to impact Elanco until the second quarter of 2020 and that the impact only affected Elanco's food animal segment, not the Companion Animal Segment, stating:

> "The majority of our efforts are in the Companion Animal categories, where we've made adjustments in the Food Animal space as well. The Q1 decreases in the reported sales in our Companion Animal disease prevention and Companion Animal therapeutic categories are the direct result of these channel inventory adjustments. We expect second quarter decreases in our Food Animal business, as COVID began impacting this portion of our business more in Q2, as the processing plants across the U.S. began closing. These changes will strengthen our position, optimize our promotional approach and enable us to direct investment in the commercial activities that

> drive demand for our products over the long run. These actions fit directly into our broader price and productivity priorities and our innovation, portfolio and productivity strategy. This change in tactics with our distribution partners and resulting onetime negative impact will largely occur in the first half of 2020 but have immediate positive impact on our commercial competitiveness."

Compl., ¶ 90.

III. Standard of Review

A. Motion to Dismiss

In revieing motions to dismiss, the Court "need not accept as true conclusory, nonfactual assertions or legal conclusions." *Lei Shi v. Cecilia Yi*, 921 N.E.2d 31, 37 (Ind. Ct. App. 2010). Motions to dismiss under Trial Rule 12(B)(6) are disfavored "because such motions undermine the policy of deciding causes of action on their merits." *Wertz v. Asset Acceptance, LLC*, 5 N.E.3d 1175, 1178 (Ind. Ct. App. 2014) (citations omitted). A motion to dismiss under Trial Rule 12(B)(6) tests the legal sufficiency of a complaint; specifically, "whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief." *Veolia Water Indianapolis, LLC v. Nat 'l Trust Ins. Co.*, 3 N.E.3d 1, 4 (Ind. 2014). Thus, the sufficiency of the facts alleged in the complaint are tested "with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred." *Trail*, 845 N.E.2d at 134. "When ruling on a T.R. 12(B)(6) motion, the court should consider all of the allegations in the complaint to be true." *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1023 (Ind. Ct. App. 2005). And, if "the complaint states a set of facts that, even if true, would not support the relief requested therein," the Court should dismiss the complaint. *Id.*

B. Securities Act of 1933

To avoid dismissal, Plaintiffs must properly allege that each of the eight Disclosures, as defined below, "contain[s] an untrue statement of material fact or omit[s] to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a) and 77l(a)(2). Further, a plaintiff bringing claims under Section 11 must allege that the defendant omitted facts that "would have been material to a reasonable investor" and that the "omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 194, 196 (2015). Further, the allegedly false or misleading statement, or the allegedly omitted information, must have been material, which may be determined as a matter of law. *See Bennett v. CrownLife Ins. Co.*, 776 N.E.2d 1264, 1270 (Ind. Ct. App. 2002) and *Pippenger v. McQuik's Oilube, Inc.*, 854 F. Supp. 1411, 1417 (S.D. Ind. 1994). Information is "material" only if there is "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns v. Skolnik*, 666 N.E.2d 1236, 1249 n.8 (Ind. Ct. App. 1996) (alterations in original) (emphasis added) (quoting *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

Additionally, because Plaintiffs claim that Defendants omitted certain material information, Plaintiffs must plead facts showing that Defendants had a duty to disclose such information in the Offering Documents. The Southern District of Indiana has explained that the "federal securities laws do not create an affirmative duty to disclose any and all material information; and disclosure is not required simply because [information] may be relevant or of interest to a reasonable investor." *Vallabhaneni v. Endocyte, Inc.*, No. 1:14-cv-01048-TWP-MJD, 2016 WL 51260, at *11 (S.D. Ind. Jan. 4, 2016) (citing *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 527 (S.D.N.Y. 2015)). "[F]irms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose." *Gallagher v. Abbott Lab'ys.*, 269 F.3d 806, 808 (7th Cir. 2001). "The 1933 Act requires firms to reveal information only when they issue securities, and the duty is owed only to persons who buy from the issuer or an underwriter distributing on its behalf . . . ." *Id.* at 809. A duty to disclose arises when information that is omitted from disclosures renders the publicly stated information materially misleading. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993).

IV. Discussion

A. Applicability of the Federal Action

The Court first notes the parties' competing assertions as to whether Judge Barker's reasoning in the Federal Action is applicable to this matter. Although there are some similarities between the allegations in the Federal Action and the allegations here, there are also many fundamental differences. *See Hunter v. Elanco Animal Health Inc.*, No. 1:20-cv-01460-SEB-MG, 2022 WL 3445173 (S.D. Ind. Aug. 17, 2022). While not binding, Judge Barker's sound and in-depth reasoning is certainly persuasive, especially when considering that some of the documents examined by the court contained many of the same statements at issue in this matter. Specifically, Judge Barker rejected the plaintiffs' attempt to allege that Elanco's statements were false and misleading in violation of the federal securities laws based on the alleged omission of information about Elanco's "consolidation of distributors from a total of eight to four." *Id.* at *14-17. Nonetheless, the Court reiterates that the Federal Action is only persuasive to its holding, not binding.

B. Parties' Arguments

i. Plaintiffs' Claims and Arguments

Plaintiffs allege that due to Defendants' materially false, misleading, and incomplete statements made in connection with the Offering, Defendants violated (1) Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, (2) Item 303 SEC Regulation S-K, and (3) Item 105 of SEC

Regulation S-K. Plaintiffs asserts that Elanco is subject to liability as an issuer, seller, and control person, that Individual Defendants are subject to liability for signing the Offering Documents, and that the Underwriter Defendants are subject to liability in their roles as underwriters of the Offering.

Specifically, Plaintiffs allege that the following eight statements in the Offering Documents, five Business Disclosures and three Risk Disclosures, were false or misleading:

(1) Business Disclosure:

> “**Deep customer relationships**. Direct customer models allow animal health sales representatives and veterinary consultants to develop a deep understanding of customer needs, which often facilitate strong and impactful relationships. Representatives and consultants frequently partner with customers through product support and analytics, driving additional value for the customer.”

(“Disclosure #1”). Compl., ¶ 59; Defendants’ Ex 4, Offering Documents at S-4 (emphasis in original).

(2) Business Disclosure:

> “**Sales and Marketing**
>
> Our sales organization includes sales representatives, veterinary consultants and

other value added specialists. In markets where we do not have a direct commercial presence, we generally contract with distributors that provide logistics and sales and marketing support for our products.

Our sales representatives visit our customers, including consultants, veterinarians, food animal producers, and resellers, to inform, promote and sell our products and to support customers. Our veterinary consultants provide scientific consulting focused on disease management and herd management, training and education on diverse topics, including responsible product use, and generally have advanced degrees in veterinary medicine, veterinary nutrition or other agriculture-related fields. These direct relationships with customers allow us to understand their needs. Additionally, our sales representatives and veterinary consultants focus on collaborating with our customers to educate and support them on topics such as local disease awareness and to help them adopt new and more sophisticated animal health solutions, including through the use of our products. As a result of these relationships, our sales and consulting visits provide us with access to customer decision makers. In addition, our sales and marketing organization provides enhanced value by providing support to food animal producers to help maximize their yields and reduce costs. Our analytics help

> customers analyze large amounts of health and production data. As of September 30, 2019, we had approximately 1,400 sales representatives."

("Disclosure #2"). Compl., ¶¶ 60-61; Defendants' Ex 4, Offering Documents at S-129 and S-130 (emphasis in original).

> (3) Business Disclosure:
>
> "**Our Competitive Strengths**
>
> We believe the following strengths create sustainable competitive advantages that will enable us to continue to grow as a leader in the animal health industry.
>
> **Established leader with a global presence, diversified product portfolio and full channel coverage**. We are the fourth largest animal health company in the world, with over $3 billion in revenue for the year ended December 31, 2018. Globally, we are #1 in medicinal feed additives, #2 in poultry, and #3 in other pharmaceuticals, which are mainly companion animal therapeutics, measured by 2018 revenue, according to Vetnosis. We also have one of the broadest portfolios of pet parasiticides in the companion animal sector, based on indications, species and formulations. We have a comprehensive and diversified product portfolio, with more than

125 brands sold in more than 90 countries. In 2018, our top 10 products accounted for 42% of our revenue, with our top selling product accounting for approximately 11% of our revenue. Our global footprint includes a local sales force presence in 43 countries and third-party distribution relationships serving other relevant markets. . . .”

(“Disclosure #3”). Compl., ¶ 62; Defendants’ Ex. 4, Offering Documents at S-5 (emphasis in original).

(4) Business Disclosure:

“**Our Targeted Value-Generating Strategies**

We intend to continue to grow our business and create value for our shareholders through a targeted value-generating strategy with three key pillars: a Portfolio Strategy for our marketed products, an Innovation Strategy for our R&D pipeline and a Productivity Strategy for our margin expansion initiatives. The acquisition of the Bayer Animal Health Business is expected to further strengthen and accelerate our value-generating strategy.

Portfolio Strategy

Invest in categories with the greatest potential for growth. We are focusing the majority of our resources, including more than 75% of our R&D funding, on our three targeted growth categories: CA Disease Prevention, CA Therapeutics and FA Future Protein & Health, where we believe we are well positioned to grow faster than the market. These categories represented 59% of our revenue in 2018.

CA Disease Prevention — Parasiticides and vaccines are fundamental to preventing disease in companion animals. We have a strong vaccines portfolio as well as products that protect pets from a broad spectrum of parasites, such as fleas, ticks, heartworms, roundworms, hookworms, whipworms and tapeworms. We believe we are well positioned to drive additional growth through continued product innovation and sales channel expansion.

CA Therapeutics — Pets are living longer and owners increasingly seek treatments for chronic diseases in their pets. To capitalize on these trends, we are focused on driving growth in our CA Therapeutics category by building on our broad base of pain and osteoarthritis products."

("Disclosure #4"). Compl., ¶ 63; Defendants' Ex 4, Offering Documents at S-8 and S-9 (emphasis in original).

(5) Business Disclosure:

"**Customers**

We primarily sell our food animal products to third-party distributors and directly to a

> diverse set of food animal producers, including beef and dairy farmers as well as pork, poultry and aquaculture operations. We primarily sell our companion animal products to third-party distributors, as well as directly to veterinarians that typically then sell our products to pet owners. We are also expanding into retail channels in order to meet pet owners where they want to purchase. Our largest customers, an affiliate of AmerisourceBergen Corp., is a third-party veterinary distributor and represented approximately 12% of our revenue for the year ended December 31, 2018. Our next largest customer represented approximately 7% of our revenue for the year ended December 31, 2018 and no other customer represented more than 5% of our revenue for the same period."

("Disclosure #5") (Disclosures #1, #2, #3, #4, and #5 collectively "Business Disclosures"). Compl., ¶ 65; Defendants' Ex. 4, Offering Documents at S-130 (emphasis in original).

(6) Risk Disclosure:

> "**Consolidation of our customers and distributors could negatively affect the pricing of our products**.
>
> Third-party distributors, veterinarians and food animal producers are our primary customers.

> In recent years, there has been a trend towards the concentration of veterinarians in large clinics and hospitals. In addition, food animal producers, particularly swine and poultry producers, and our distributors have seen recent consolidation in their industries. Furthermore, we have seen the expansion of larger cross-border corporate customers and an increase in the consolidation of buying groups (cooperatives of veterinary practices that leverage volume to pursue discounts from manufacturers). The pace of consolidation and structure of markets varies greatly across geographies. If these trends towards consolidation continue, our customers could attempt to improve their profitability by leveraging their buying power to obtain favorable pricing. The resulting decrease in our prices could have a material adverse effect on our business, financial condition and results of operations."

("Disclosure #6"). Compl., ¶ 66; Defendants' Ex. 4, Offering Documents at S-28 (emphasis in original).

(7) Risk Disclosure:

> "**For our companion animal products, increased use of alternative distribution channels, or changes within existing distribution channels, could negatively impact our market share, margins and distribution of our products**.

> In most markets, pet owners typically purchase their animal health products directly from veterinarians. However, pet owners increasingly have the option to purchase animal health products from sources other than veterinarians, such as online retailers, "big-box" retail stores or other over-the-counter distribution channels. This trend has been demonstrated by the significant shift away from the veterinarian distribution channel in the sale of flea and tick products in recent years. . . . In addition, if one or more of our companion animal distributors discontinues or modifies their relationship with us, our business, financial condition and results of operations may be materially adversely affected. For example, in 2017, a change in our U.S. inventory management practices resulted in a revenue lag as existing inventory was sold down."

("Disclosure #7"). Compl., ¶ 68; Defendants' Ex. 4, Offering Documents at S-32 and S-33 (emphasis in original).

(8) Risk Disclosure:

> "**Increased or decreased inventory levels at our channel distributors lead to fluctuations in our revenues and variations in payment terms extended to our distributors can impact our cash flows**.

> In addition to selling our products directly to veterinarians, we sell to distributors who, in turn, sell our products to third parties. Inventory levels at our distributors may increase or decrease as a result of various factors, including end customer demand, new customer contracts, heightened and generic competition, required minimum inventory levels, our ability to renew distribution contracts with expected terms, our ability to implement commercial strategies, regulatory restrictions, unexpected customer behavior, and procedures and environmental factors beyond our control, including weather conditions or an outbreak of infectious disease carried by food animals, such as African Swine Fever. These increases and decreases can lead to variations in our quarterly and annual revenues. In addition, like all companies that manufacture and sell products, we have policies that govern the payment terms that we extend to our customers. Due to consolidation amongst our distributors, as well as changes in the buying habits of end customers or the need for certain inventory levels at our distributors to avoid supply disruptions, from time to time, our distributors have requested exceptions to the payment term policies that we extend to them. Extensions of customer payment terms can impact our cash flows, liquidity and results of operations."

("Disclosure #8") (Disclosures #6, #7, and #8 collectively, "Risk Disclosures") (all eight disclosures collectively, "Disclosures"). Compl., ¶ 69; Defendants' Ex. 4, Offering Documents at S-34 (emphasis in original).

Plaintiffs assert that the Disclosures were materially false or misleading because they failed to include facts that would have made the Disclosure not misleading. Compl., ¶ 74. Specifically, that:

> "(i) prior to the Offering Elanco had initiated a plan to have Elanco internally drive the demand creation of its Companion Animal segment; (ii) as part of that plan, Elanco decided to bring down distributor inventory of Companion Animal products; (iii) the reduction of Distributors from eight to four was part of the plan to make these Distribution Changes; (iv) these Distribution Changes created a material risk that Elanco's Companion Animal segment would have substantially reduced sales and that segment's earnings, at a minimum, would be substantially reduced during 1Q 2020; and (v) as a result, Elanco's financial results were likely to be materially adversely impacted."

Compl., ¶¶ 64, 70, 74. Plaintiffs assert that the Offering Documents "led investors to believe that it was continuing with its stable distribution relationships, while, in fact, it was overhauling the entire distribution process." Compl., ¶¶ 5, 58. Further, Plaintiffs assert that the Risk Disclosures contained various information on risks that may occur and that if they did occur, could result in a material adverse effect on Elanco's business. Compl., ¶ 71. Plaintiffs assert that the Risk Disclosures "involved facts that the Offering Documents postured as mere possibilities when in fact the matters were then already occurring as of the Offering, — i.e., the risks had already materialized and were not mere possibilities." Compl., ¶ 71.

ii. Defendants' Arguments

In response, Defendants argue that Plaintiffs' claims are not premised on any alleged false or misleading statements made in the Offering Documents but are instead premised on losses Plaintiffs allegedly incurred as part of a market-wide downturn following the COVID-19 pandemic. Defendants argue that they had no duty to disclose the Distributor Changes because the function of the Offering Documents is not to disclose routine business decisions. Further, Defendants argue there is no liability-by-hindsight for such decisions that do not successfully pan out. Defendants assert that Plaintiffs incorrectly portray Elanco as a company that depended on a certain scale or particular number of Distributors, which is at odds with what Elanco disclosed in the Offering Documents—namely, its own internal sales efforts and its deep bench of sales representatives.

C. Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, Item 303, and Item 105

i. Sections 11, 12(a)(2), and 15 of the Securities Act of 1933

Sections 11 and 12(a)(2) of the Securities Act of 1933 provide, respectively, that certain specified categories of persons may be held liable if a registration statement or prospectus filed and used in connection with a public offering of securities (1) "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading" or (2) "includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. . ." 15 U.S.C. §§ 77k(a) and 77l(a)(2). Section 15 of the Securities Act of 1933 extends liability to any person who controls any person liable under Section 11 or 12(a)(2) "unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U.S.C. § 77o(a).

A plaintiff bringing claims under Section 11 must allege that the defendant omitted facts that "would have been material to a reasonable investor" and that the "omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Omnicare*, 575 U.S. at 194, 196. Further, the allegedly false or misleading statement, or the allegedly omitted information, must have been material. Materiality may be determined as a matter of law. *See Bennett*, 776 N.E.2d at 1270 and *Pippenger*, 854 F. Supp. at 1417. Information is "material" only if there is "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at

1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449). "[A] complaint may not be properly dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000).

Additionally, because Plaintiffs claim that Defendants omitted certain material information, Plaintiffs must plead facts showing that Defendants had a duty to disclose such information in the Offering Documents. The Southern District of Indiana has explained that the "federal securities laws do not create an affirmative duty to disclose any and all material information; and disclosure is not required simply because [information] may be relevant or of interest to a reasonable investor." *Vallabhaneni*, No. 1:14-cv-01048-TWP-MJD, 2016 WL 51260, at *11 (citing *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d at 527). "[F]irms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose." *Gallagher*, 269 F.3d at 808. "The 1933 Act requires firms to reveal information only when they issue securities, and the duty is owed only to persons who buy from the issuer or an underwriter distributing on its behalf . . . ." *Id.* at 809. A duty to disclose arises when information that is omitted from disclosures renders the publicly stated information materially misleading. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268.

ii. Items 303 and 105

Item 303 of SEC Regulation S-K imposes an independent duty requiring the Offering Documents to disclose "any known trends or uncertainties that have had or that [Elanco] reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R § 229.303(a)(3)(ii). Item 303 also requires disclosure of "unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of [Elanco's] reported income from continuing operations[.]" Item 303, § 229.303(a)(3)(i). Item 303 instructs that these disclosures "focus specifically on . . . matters that would have an impact on [Elanco's] future operations[.]" Item 303, § 229.303(a)(3). Item 303 requires disclosure of "forward-looking information" that would allow investors "to look at [Elanco] through the eyes of management by providing both a short and long-term analysis of the business [.]" Management's Discussion & Analysis of Fin. Condition & Results of Operations, SEC Release No. 6835 (May 18, 1989). Item 303 requires disclosure where a trend or uncertainty is "[1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial conditions or results of operations." *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013) (alterations in original) (emphasis added) (citations omitted); *Willard v. UP Fintech Holding Ltd.*, 527 F. Supp. 3d 609, 619 (S.D.N.Y. 2021) ("The 'reasonably likely' standard suggests that there must [be] a fairly substantial probability that the known risk at issue will materialize and have a material impact—if not a more-likely-than-not standard, then something not too much below that." (alteration in original) (internal quotation marks omitted) (citation omitted)).

Item 105 of SEC Regulation S-K requires disclosure of "all known material risks that are specific to the particular company and its operations." 17 C.F.R. § 229.105. Item 105 also requires the inclusion of discrete "risk factors" with the most significant factors that make a public offering speculative or risky. *Id.* Item 105 is intended "to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities." Sec. Offering Reform, SEC Release No. 8501 (Nov. 3, 2004). Item 105 requires registrants to disclose, "'[w]here appropriate,' a discussion of the most significant risk factors." *Howard v. Arconic Inc.*, 395 F. Supp. 3d 516, 571 (W.D. Pa. 2019) (alteration in original) (quoting 17 C.F.R. § 229.105). "Item [105] disclosure is reserved for the 'most significant factors that make the offering speculative or risky,' not any and all risks, or any information that an investor might wish to know." *Id.*

D. Plaintiffs' Allegations do not Establish a Set of Circumstances Under Which Plaintiffs Would be Entitled to Relief Under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, Under Item 303, or Under Item 105

To avoid dismissal, Plaintiffs must properly allege that the Disclosures "contain an untrue statement of material fact or omit to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a) and 77l(a)(2). The Court will now use this standard to analyze each Disclosure in turn, beginning with the Disclosures most favorable to Plaintiffs.

i. Disclosure #7

Disclosure #7, a Risk Disclosure, disclosed information relating to Elanco's Companion Animal Segment's products and distribution channels. In part, Elanco disclosed that "[f]or our companion animal products, ***increased*** use of alternative distribution channels, or changes within existing distribution channels, could negatively impact our market share, margins and distribution of our products. . . ." Compl., ¶ 68; Defendants' Ex. 4, Offering Documents at S-32 and S-33 (emphasis added). The use of the word "increased" implies that the Distribution Changes have already been made and that Elanco believes the Distribution Changes are strategic and effective changes, but that a further increase could carry risk. Further, Elanco's third-party Distributors are hardly a major focus of Disclosure #7. Rather, the primary focus is Elanco's end-customers' decreased reliance on veterinarians for animal health products. Additionally, Plaintiffs cannot allege that the Distribution Changes were material information, the omission of which rendered Disclosure #7 misleading. Prior to 2020, Elanco had never disclosed details surrounding its Distributors, including the number of Distributors or contract terms. For instance, Elanco never specified that having a particular number of Distributors was key to its success, nor had it disclosed the relative performance of its Distributors in terms of generating revenue for Elanco. Further, Elanco never stated that it would not make any changes to its Distributors.

Plaintiffs have not adequately alleged that Defendants omitted information in Disclosure #7 that "would have been material to a reasonable investor." *Omnicare*, 575 U.S. at 194, 196. Further, Plaintiffs have not adequately alleged that the omitted information in Disclosure #7 was material. Plaintiffs have not alleged that there was "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at 1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449). Defendants had no duty to disclose the Distribution Changes in Disclosure #7 because the information in Disclosure #7 was not rendered materially misleading by its absence. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268.

ii. Disclosure #8

Disclosure #8, a Risk Disclosure, disclosed in part that "[i]ncreased or decreased inventory levels at our channel distributors lead to fluctuations in our revenues and variations in payment terms extended to our distributors can impact our cash flows. . . ." Defendants' Ex. 4, Offering Documents at S-34. At the time Disclosure #8 was made, the Distribution Changes, including the reduction in Distributors' inventory levels, had already occurred. At most, Disclosure #8 is a generic disclosure regarding Distributors' inventory levels and is forwardfacing as to risks associated with Elanco's then-business plan. At the time Disclosure #8 was made, Elanco had not yet experienced any adverse business effects due to the Distribution Changes. Plaintiffs allege that Disclosure #8 is misleading because Elanco had already implemented the Distribution Changes, but that is not what Disclosure #8 warns of. Rather, Disclosure #8 simply warns that fluctuations in revenue and impacts on cash flows may occur due to increased or decreased inventory levels of Distributors. Disclosure #8 does not warn that there could be changes to channel distribution itself. In fact, Disclosure #8 warned of a risk that ultimately manifested during the first quarter of 2020. Adding more details about Elanco's distribution structure would not have changed the disclosure of the risk or rendered it more accurate when the relevant risk only involves potential fluctuations in revenue and impacts on cash flows. *See Lyu v. Ruhnn Holdings Ltd.*, 137 N.Y.S.3d 322, 323 (N.Y. Sup. Ct., N.Y. Cnty. 2020) (noting in a Securities Act case that additional, granular details would not have made the disclosure more accurate). Plaintiffs allege that Elanco knew at the time of the Offering that the Distribution Changes created a material risk to Elanco's revenues and financial results. Regarding the increased or decreased inventory levels of Elanco's Distributors, this is exactly what Disclosure #8 warns of—that changes in inventory levels may impact Elanco's financial results.

Plaintiffs have not adequately alleged that Defendants omitted information in Disclosure #8 that "would have been material to a reasonable investor." *Omnicare*, 575 U.S. at 194, 196. Further, Plaintiffs have not adequately alleged that the omitted information in Disclosure #8 was material. In other words, Plaintiffs have not alleged that there was "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at 1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449). Defendants had no duty to disclose the Distribution Changes in Disclosure #8 because the information in Disclosure #8 was not rendered materially misleading by its absence. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268.

iii. Disclosure #5

Disclosure #5, a Business Disclosure, disclosed in part that Elanco "primarily sell[s] [its] companion animal products to third-party distributors, as well as directly to veterinarians that typically then sell [its] products to pet owners," and that Elanco is "expanding into retail channels in order to meet pet owners where they want to purchase." Compl., ¶ 65; Defendants' Ex. 4, Offering Documents at S-130. Disclosure #5 also disclosed that Elanco's largest Distributor accounted for "approximately 12% of [its] revenue for the year ended December 31, 2018," that its next largest Distributor accounted for "approximately 7% of [its] revenue for the [same period]," and that no other Distributor accounted for "more than 5% of [its] revenue for the same period." *Id.* These statements are simply historical facts about Elanco's Distributors and revenues in the 2018 fiscal year. *See McDonald v. KinderMorgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) (accurate statements about past performance are "not actionable as a matter of law"). The statements in Disclosure #5 are not rendered misleading due to the omission of the Distribution Changes which occurred one year after the 2018 fiscal year. Further, that no other Distributor accounted for "more than 5% of [Elanco's] revenue for the same period" suggests that none of the terminated Distributors were likely to be material to Elanco's future business prospects. Compl., ¶ 65; Defendants' Ex. 4, Offering Documents at S-130. Disclosing that various Distributors brought in differing percentages of revenue for Elanco during the 2018 fiscal year but omitting the Distribution Changes does not render Disclosure #5 false or misleading. Plaintiffs would have the Court rely on the decrease in Distributors from "eight to four" as material in that it suggests a fifty percent decrease in the number of Distributors. However, that in and of itself is misleading. Elanco chose to concentrate on its biggest Distributors by percentage of market share—it was not a fifty percent reduction in terms of market share. This aspect of the Distribution Changes was a business decision to effectuate a different strategy that Elanco believed would ultimately be more effective and cost-saving.

Plaintiffs have not adequately alleged that Defendants omitted information in Disclosure #5 that "would have been material to a reasonable investor." *Omnicare*, 575 U.S. at 194, 196. Further, Plaintiffs have not adequately alleged that the omitted information in Disclosure #5 was material. In other words, Plaintiffs have not alleged that there was "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at 1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449). Defendants had no duty to disclose the Distribution Changes in Disclosure #5 because the information in Disclosure #5 was not rendered materially misleading by its absence. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268.

iv. Disclosure #6

Disclosure #6, a Risk Disclosure, disclosed in part that "[c]onsolidation of [Elanco's] customers and distributors could negatively affect the pricing of [Elanco's] products. . . ." Compl., ¶ 66; Defendants' Ex. 4, Offering Documents at S-28. Specifically, that "[i]f [the consolidation trends] continue, [Elanco's] customers could attempt to improve their profitability by leveraging their buying power to obtain favorable pricing. The resulting decrease in [Elanco's] prices could have a material adverse effect on [Elanco's] business, financial condition and results of operations." *Id.* Plaintiffs allege that Disclosure #6 is rendered misleading due to the omission of the Distribution Changes, namely the reduction in Distributors from eight to four. However, informing investors about the Distribution Changes in the context of warning investors about consolidation of customers and Distributors has no connection. Further, Plaintiffs fail to acknowledge that the risk disclosed in Disclosure

#6 is not specific to the Companion Animal Segment. And most notably of all, the risk being addressed is the consolidation among Distributors themselves—the risk that Elanco's Distributors would join forces and attempt to exert leverage over Elanco—a completely different subject than Elanco's decision to cease doing business with four of its eight Distributors.

Plaintiffs have not adequately alleged that Defendants omitted information in Disclosure #6 that "would have been material to a reasonable investor." *Omnicare*, 575 U.S. at 194, 196. Further, Plaintiffs have not adequately alleged that the omitted information in Disclosure #6 was material. In other words, Plaintiffs have not alleged that there was "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at 1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449). Defendants had no duty to disclose the Distribution Changes in Disclosure #6 because the information in Disclosure #6 was not rendered materially misleading by its absence. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268.

v. Disclosures #1, #2, #3, and #4

Disclosures #1 through #4 are all Business Disclosures which disclose information relating to Elanco's customer relationships, sales and marketing strategies, internal sales force, distribution relationships, and growth strategies. Compl., ¶¶ 59-63; Defendants' Ex. 4, Offering Documents at S-4, S-5, S-8, S-9, S-129, and S-130. Upon an examination of each Disclosure, it becomes apparent that the information therein is not rendered misleading due to the omission of the Distribution Changes. In each Disclosure, Elanco does not tout its strong reliance on its Distributors. In fact, Elanco does the opposite, disclosing the value of its internal sales force. And when Elanco does tout the value of its Distributors, it mentions its own sales representatives as well: "Our global footprint includes a local sales force presence in 43 countries and third-party distribution relationships serving other relevant markets. . . ." Compl., ¶ 62; Defendants' Ex. 4, Offering Documents at S-5. Disclosure #4, in which Elanco discloses its forward-looking "Targeted Value-Generating Strategies," notably does not mention the use of Distributors, but rather only states, "[w]e believe we are well positioned to drive additional growth through continued product innovation and sales channel expansion." Compl., ¶ 63; Defendants' Ex 4, Offering Documents at S-8 and S-9.

Plaintiffs' assertion that the omission of the Distribution Changes rendered Disclosures #1 through #4 misleading rests on an assumption that the number of Distributors for Elanco's Companion Animal Segment, along with their contract terms, remained a fixed aspect of Elanco's sales and marketing strategies such that any change to that aspect carried material risk. But prior to 2020, Elanco had never disclosed such details. In fact, Elanco had never disclosed that having a specific number of Distributors was key to its success, nor had it disclosed the performance of its Distributors in terms of generating revenue for Elanco. And at the time the decision regarding the Distribution Changes was made, no one had any reason to believe that pivoting away from smaller, regional Distributors would negatively impact Elanco in future reporting.

Plaintiffs have not adequately alleged that Defendants omitted information in Disclosures #1 through #4 that "would have been material to a reasonable investor." *Omnicare*, 575 U.S. at 194, 196. Further, Plaintiffs have not adequately alleged that the omitted information in Disclosures #1 through #4 were material. In other words, Plaintiffs have not alleged that there was "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at 1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449). Defendants had no duty to disclose the Distribution Changes in Disclosures #1 through #4 because the information in such Disclosures was not rendered materially misleading by its absence. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268.

vi. Items 303 and 105

Plaintiffs assert that the Offering Documents did not comply with Items 303 and 105 because Defendants failed to disclose material facts concerning materially adverse trends and uncertainties, significant factors that made the Offering speculative or risky, and material information that was necessary to make statements in the Offering Documents not misleading.

Plaintiffs have failed to adequately plead that the Distribution Changes constituted "trends" or "uncertainties" under Item 303. "[A] 'trend' is defined as '[a] general tendency or course of events.'" *S.E.C. v. BankAtlantic Bancorp, Inc.*, 285 F.R.D. 661, 667 (S.D. Fla. 2012) (second alteration in original) (quoting American Heritage Dictionary 1851 (5th ed. 2011)). Determining the existence of a trend under Item 303 requires an assessment of whether an "observed pattern accurately reflects persistent conditions of the particular registrant's business environment. It may be that a particular pattern is, for example, of such short duration that it will not support any conclusions about the registrant's business environment." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1191 (11th Cir. 2002) (dismissing Section 11 claims under Item 303). Additionally, courts have "suggested that a pattern was not a trend unless it spanned multiple quarters." *City of Livonia Retiree Health & Disability Benefits Plan v. Pitney Bowes, Inc.*, No. X08CV186038160S, 2020 Conn. Super. LEXIS 1406, at *7 (Conn. Super. Ct. Oct. 24, 2020) (citation omitted). "Furthermore, events occurring within a two month period of time do not establish a 'trend' for purposes of the discloses required by Item 303. *See Blackmoss Invs. Inc. v. ACA Cap. Holdings, Inc.*, No. 07 Civ. 10528, 2010 WL 148617 at *9 (S.D.N.Y. Jan. 14, 2010) ('As a matter of law, a two month period of time does not establish a 'trend' for purposes of the disclosures required by Item 303.'); *In re Turkcell Iletisim Hizmetler*, A.S. Sec. Litig., 202 F.

Supp. 2d 8, 13 (S.D.N.Y. 2001) (single quarter decline in operating income need not be disclosed pursuant to Item 303); *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 218 (5th Cir. 2004) (a five-month 'decline in natural gas prices [did not yet constitute] a trend' requiring disclosure) . . ." *Nguyen v. MaxPoint Interactive, Inc.*, 234 F. Supp. 3d 540, 546 (S.D.N.Y. 2017).

"Item 303 does not require companies to disclose isolated occurrences that affect their financial performance." *In re Noah Educ. Holdings, Ltd.* Sec. Litig., No. 08 Civ. 9203(RJS), 2010 WL 1372709, at *6 (S.D.N.Y. Mar. 31, 2010) (citations omitted). Plaintiffs assert that the Distribution Changes, which were implemented just one month before the Offering, were "trends" or "uncertainties" required to be disclosed pursuant to Item 303. This cannot be. A business entity cannot be held liable under Item 303 for a routine, strategic business decision—which does not constitute a "trend" or "pattern"—made only a month before a public offering. Defendants, contrary to Plaintiffs' allegations, had no reason to believe that the Distribution Changes were such a "trend" or "uncertainty" required to be disclosed.

Plaintiffs have also failed to adequately plead that the Distribution Changes were among the "most significant risk factors" required to be disclosed by Elanco in compliance with Item 105. The reason for the Offering, and by far the most significant risk to Elanco's business, was the Bayer acquisition. The Bayer acquisition was frequently discussed and disclosed. On the other hand, the Distribution Changes were not one of the most significant risks to Elanco and were not required to be disclosed. Any potential negative effects of the Distribution Changes paled in comparison to all other significant risks identified in the Registration Statement, including the Bayer acquisition. Plaintiffs cannot allege that at the time the Distribution Changes were made, those changes posed a significant risk to Elanco. Item 105 is intended "to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities," and the Distribution Changes are not such a material risk. Sec. Offering Reform, SEC Release No. 8501 (Nov. 3, 2004).

E. Safe Harbor

The Private Securities Litigation Reform Act "created a 'safe harbor' from liability for certain forward-looking statements contained in a registration statement." *Firefighters Pension & Relief Fund of the City of New Orleans v. Bulmahn*, 53 F. Supp. 3d 882, 910 (E.D. La. 2014). The "safe harbor has two independent prongs: one focusing on the defendant's cautionary statements and the other on the defendant's state of mind." *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 371 (5th Cir. 2004). "Under the first prong, there is no liability if, and to the extent that," the forward-looking statements are identified as such and are accompanied by meaningful cautionary language. *Id.* (citing 15 U.S.C. § 77z-2(c)(1)(A)). "Under the second prong, there is no liability if the plaintiff fails to prove that" the person who made the statement had "actual knowledge . . . that the statement was false or misleading." *Id.* (citing 15 U.S.C. § 77z2(c)(1)(B)). "Because the provision is disjunctive, [the first prong and second prong] must be considered separately." *Bulmahn*, 53 F. Supp. 3d at 910.

The first prong of the safe harbor applies to Disclosures #4, #6, #7, and #8 because each Disclosure was explicitly identified as a forward-looking statement:

> Disclosure #4: "We ***intend*** to continue to grow our business and create value for our shareholders through a targeted value-generating strategy with three key pillars" and "[w]e ***believe*** we are well-positioned to grow faster than that market . . ."

Compl., ¶ 63; Defendants' Ex 4, Offering Documents at S-8 and S-9 (emphasis added).

> Disclosure #6: "Consolidation of our customers and distributors ***could*** negatively affect the pricing of our products" and "[i]f these trends towards consolidation continue, our customers ***could*** attempt to improve their profitability by leveraging their buying power to obtain favorable pricing." Compl., ¶ 66; Defendants' Ex. 4, Offering Documents at S-28 (emphasis added).

> Disclosure #7: "[I]ncreased use of alternative distribution channels, or changes within existing distribution channels, ***could*** negatively impact our market share, margins, and distribution of our products," and "if one or

> more of our companion animal distributors discontinues or modifies their relationship with us, our business, financial condition and results of operations ***may*** be materially adversely affected." Compl., ¶ 68; Defendants' Ex. 4, Offering Documents at S-32 and S-33 (emphasis added).
>
> Disclosure #8: "[Increases and decreases in inventory levels of Distributors] ***can*** lead to variations in our quarterly and annual revenues," and "[e]xtensions of customer payment terms ***can*** impact our cash flows, liquidity and results of operations."

Compl., ¶ 69; Defendants' Ex. 4, Offering Documents at S-34 (emphasis added).

Forward-looking statements include "statement[s] of the plans and objectives of management for future operations," "statement[s] of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management," and "statement[s] of the assumptions underlying or relating to [the foregoing statements]." 15 U.S.C. § 77z-2(i)(1)(B)—(D). *See Slayton v. Am. Express Co.*, 604 F.3d 758, 769 (2d Cir. 2010) (agreeing that "linguistic cues like 'we expect' or 'we believe,' when combined with an explanatory description of the company's intention to thereby designate a statement as forward-looking, generally should be sufficient to put the reader on notice that the company is making a forward-looking statement."). Further, Disclosures

#4, #6, #7, and #8 were accompanied by cautionary statements identifying important factors that could cause results to differ from those in the forward-looking statement. See Defendants' Ex. 4, Offering Documents at 3-4 ("Important factors that could cause actual results to differ materially from those in the forward-looking statements include regional, national, or global political, economic, business, competitive, market, and regulatory conditions and the following . . . [bullet point list of 18 additional factors omitted].").

Next, the second prong of the safe harbor also applies because Plaintiffs have not pleaded, with respect to any of the Disclosures, that the Disclosures were made by someone with "actual knowledge . . . that the statement was false or misleading." 15 U.S.C. § 77z-2(c)(1)(B)(ii). Pursuant to the second prong, a plaintiff "must plead facts indicating that the defendant actually knew the statement was either false or misleading." *Bulmahn*, 53 F. Supp. 3d at 910-11 (citing *In re Newell Rubbermaid Inc. Sec. Litig.*, No. 99 C 6853, 2000 WL 36 1705279, at *10-11 (N.D. Ill. Nov. 14, 2000) ("[A] claim under the Securities Act involving forward-looking statements now appears to require, for all practical purposes, proof of scienter.")); *W. Palm Beach Firefighters' Pension Fund v. Conagra Brands, Inc.*, 495 F. Supp. 3d 622, 667 (N.D. Ill. 2020) (same). The SAC does not contain any such allegation—that Defendants had actual knowledge that the Disclosures were false or misleading. The Disclosures, along with the Registration Statement generally, repeatedly warned investors with cautionary statements, identifying Disclosures #4, #6, #7, #8 as forward-looking statements entitled to safe harbor protection. "[A] projection is not rendered false when the world turns out otherwise." *Gallagher*, 269 F.3d at 810.

And while the safe harbor "does not protect material omissions," the Court has already found that Defendants did not materially omit information regarding the Distribution Changes. *In re Salix Pharm., Ltd.*, 2016 WL 1629341, at *9 (S.D.N.Y. Apr. 22, 2016) (citations omitted). Because Disclosures #4, #6, #7, and #8 are protected by both prongs of the safe harbor, they cannot support Plaintiffs' claims under the Securities Act.

V. Conclusion

Plaintiffs have not shown that the Registration Statement is false or misleading due to its omission of the Distribution Changes. Rather, Plaintiffs "are able to muster only conclusory accusations, each reflecting merely the benefit of hindsight." *Hunter*, 2022 WL 3445173, at *11.

> "'It is not sufficient to allege that the investor might have considered the misrepresentation or omission important.' [*In re ProShares Trust Sec. Litig.*, 728 F.3d 96, 102 (2d Cir. 2013)]. In other words, '***plaintiffs are not allowed to plead Section 11 claims with the benefit of 20/20 hindsight***' because 'Section 11 claim[s] cannot be based on a 'backward-looking assessment' of the registration statement.' *Charter Twp. of Clinton Police & Fire Ret. Sys. v. KKR Fin. Holdings LLC*, No. 08 Civ. 7062 (PAC), 2010

U.S. Dist. LEXIS 122127, 2010 WL 4642554, at *11 (S.D.N.Y. Nov. 17, 2010) (citation omitted)."

Nguyen v. MaxPoint Interactive, Inc., 234 F. Supp. 3d 540, 545-46 (S.D.N.Y. 2017) (emphasis added). Defendants' liability for omitting the Distribution Changes from the Registration Statement cannot simply be based on a hindsight view of the ultimate effects of the Distribution Changes, especially when it is unclear whether the Distribution Changes or the COVID-19 pandemic were to blame for the decline in Elanco's stock prices. If liability could be imposed in such a scenario, business entities that experience a decline in stock price after a public offering could be subject to seemingly never-ending litigation in which they are accused of omitting certain information that plaintiffs and analysts, post-offering, believe should have been disclosed. In surviving a motion to dismiss, the Court cannot rely on the opinions of analysts, months after the Offering and with the benefit of hindsight, that Elanco should have disclosed the Distribution Changes.

Plaintiffs have not adequately alleged that Defendants omitted information in the Disclosures that "would have been material to a reasonable investor." *Omnicare*, 575 U.S. at 194, 196. Plaintiffs have also not adequately alleged that the omitted information in each Disclosure was material. In other words, Plaintiffs have not alleged that there was "a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having ***significantly altered*** the 'total mix' of the information made available." *Manns*, 666 N.E.2d at 1249 n.8 (alterations in original) (emphasis added) (quoting *TSC Indus.*, 426 U.S. at 449).

Although the Distribution Changes had already been implemented by the time of the Offering, Elanco was not required to disclose this information because the "federal securities laws do not create an affirmative duty to disclose any and all material information; and disclosure is not required simply because [information] may be relevant or of interest to a reasonable investor." *Vallabhaneni*, No. 1:14-cv-01048-TWP-MJD, 2016 WL 51260, at *11 (citing *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d at 527). In hindsight, perhaps certain investors would have preferred to be informed of the Distribution Changes due to those investors' beliefs that Elanco's business was negatively affected due to such changes. But in any public offering, a business entity is not required to disclose every detail regarding its business unless the omission of those details renders the Registration Statement false or misleading—which it does not in this case. There is no liability-by-hindsight, and the possibility that the Distribution Changes ultimately may have negatively affected Elanco's business and stock prices does not create liability. Elanco had no duty to disclose the Distribution Changes because the omission of the Distribution Changes from the Registration Statement did not render the Registration Statement ***materially*** misleading. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d at 268 (emphasis added). An examination of the Disclosures reveals that the allegedly omitted information regarding the Distributor Changes was immaterial to each Disclosure and that each Disclosure was not rendered misleading by the omission when read in context.

In reviewing motions to dismiss, the Court "need not accept as true conclusory, nonfactual assertions or legal conclusions." *Lei Shi*, 921 N.E.2d at 37 (Ind. Ct. App. 2010). Plaintiffs' bare allegations that the omission of the Distribution Changes rendered the Registration Statement false and misleading is such a conclusory, nonfactual allegation that the Court cannot accept as true.

V. ORDER

Accordingly, Defendants' Motion to Dismiss is **GRANTED**.

SO ORDERED, ADJUDGED, AND DECREED this 17th of April 2024.

DATED: 4/17/2024

/s/ Christina R. Klineman
Hon. Christina R. Klineman
Judge, Marion Superior Court, Civil 1
Indiana Commercial Court

APPENDIX D — ORDER DENYING REHEARING OF THE COURT OF APPEALS OF INDIANA, FILED SEPTEMBER 23, 2025

IN THE COURT OF APPEALS OF INDIANA

Court of Appeals Case No. 24A-CT-1164

SAFRON CAPITAL CORPORATION, *et al.*,

Appellants,

v.

ELANCO ANIMAL HEALTH CORPORATION, *et al.*,

Appellees.

Filed September 23, 2025

ORDER

The Court issued its Opinion on August 1, 2025. Appellants have now tendered a Petition for Rehearing of Appellants Safron Capital Corporation and the General Retirement System of the City of Detroit. Appellees have tendered a Brief in Response to Appellants' Petition for Rehearing.

Having reviewed the matter, the Court finds and orders as follows:

1. The Clerk of the Court is directed to file the Appellants' Petition for Rehearing of Appellants

Safron Capital Corporation and the General Retirement System of the City of Detroit and Appellees' Response to Appellants' Petition for Rehearing as of the date of this order.

2. Appellants' Petition for Rehearing of Appellants Safron Capital Corporation and the General Retirement System of the City of Detroit is denied.

3. The Clerk of the Court is directed to send this order to the parties, the trial court, and the Marion Circuit and Superior Courts Clerk.

4. The Marion Circuit and Superior Courts Clerk is directed to file this order under Cause Number 49D01-2010-CT-36760, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

Ordered: 9/23/2025

Pyle, Weissmann, Felix, JJ., concur.

For the Court,

s/________________________

Chief Judge

APPENDIX E — EXCERPTS FROM PETITION TO THE INDIANA COURT OF APPEALS

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 24A-CT-01164

INDIANA SUPREME COURT CASE NO. _____

Appeal from Marion County Superior Civil Court DO1

Trial Court Case No. 49D01-2010-CT-036760

The Honorable Christina Klineman, Judge

SAFRON CAPITAL CORPORATION AND THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants-Plaintiffs,

v.

ELANCO ANIMAL HEALTH INCORPORATED, JEFFREY N. SIMMONS, TODD S. YOUNG, JAMES M. MEER, R. DAVID HOOVER, KAPILA KAPUR ANAND, JOHN P. BILBREY, ART A. GARCIA, MICHAEL J. HARRINGTON, DEBORAH T. KOCHEVAR, LAWRENCE E. KURZIUS, KIRK MCDONALD, DENISE SCOTS-KNIGHT, GOLDMAN SACHS & CO. LLC, CITIGROUP GLOBAL MARKETS INC., J.P. MORGAN SECURITIES LLC, BOFA SECURITIES, INC., BARCLAYS CAPITAL

INC., BNP PARIBAS SECURITIES CORP., MIZUHO SECURITIES USA LLC, MUFG SECURITIES AMERICAS INC., AND STIFEL, NICOLAUS & COMPANY, INCORPORATED,

Appellees-Defendants.

Filed October 23, 2025
5:56 PM

APPELLANTS' PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

The case alleges claims brought under the federal Securities Act of 1933 which have never been addressed by the Indiana Supreme Court, are therefore a matter of first impression, and implicate Appellate Rule 57(H)(1) and (3). Did the lower courts err in dismissing the Investors'[1] claims for violations of §§11, 12(a)(2), and 15 of the Securities Act on the grounds that Offerors did not allege a material untrue statement or omission under the Securities Act and Items 105 and 303 of Regulation S-K, promulgated by the SEC thereunder, in contravention of controlling federal and state law? In particular:

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1. Capitalized terms undefined herein are defined in the Opening Brief or Reply filed with the Court of Appeals.

- Does the Opinion's[2] factual determination that there was no material omission significantly depart from Indiana's Rule 12(B)(6) motion to dismiss standard?

- Did the Court of Appeals ignore the Investors' allegations that the Offerors omitted material facts in contravention of federal law?

- Did the Opinion's finding that the Complaint failed to allege materiality as a matter of law contravene federal law, where a) the Court rejected the cited analyst reports while federal courts routinely consider such reports in addressing the materiality of alleged misrepresentations and omissions and b) reasonable minds (like the various analysts quoted) could find the alleged omissions material?

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2. The Opinion of the Court of Appeals in this case on August 1, 2025, is cited to as the "Opinion."

APPENDIX F — STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 77k. Civil liabilities on account of false registration statement

Effective: November 3, 1998

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

* * *

15 U.S.C. § 77*l*. Civil liabilities arising in connection with prospectuses and communications

Effective: December 21, 2000

(a) In general

Any person who--

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes

> an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

* * *

Appendix F

17 C.F.R. § 229.105 (Item 105) Risk factors.

Effective: November 9, 2020

(a) Where appropriate, provide under the caption "Risk Factors" a discussion of the material factors that make an investment in the registrant or offering speculative or risky. This discussion must be organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk. The presentation of risks that could apply generically to any registrant or any offering is discouraged, but to the extent generic risk factors are presented, disclose them at the end of the risk factor section under the caption "General Risk Factors."

(b) Concisely explain how each risk affects the registrant or the securities being offered. If the discussion is longer than 15 pages, include in the forepart of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky. If the risk factor discussion is included in a registration statement, it must immediately follow the summary section required by § 229.503 (Item 503 of Regulation S–K). If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on Rule 430A

(§ 230.430A of this chapter). The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

* * *

17 C.F.R. § 229.303 (Item 303)
Management's discussion and analysis of financial condition and results of operations.

Effective: February 10, 2021

(a) Objective. The objective of the discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources. The discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations. The discussion and analysis must be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of the registrant's financial condition, cash flows and other changes in financial condition and results of operations. A discussion and analysis that meets the requirements of this paragraph (a) is expected to better allow investors to view the registrant from management's perspective.

(b) Full fiscal years. The discussion of financial condition, changes in financial condition and results of operations must provide information as specified in paragraphs (b)(1) through (3) of this section and such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Where the financial statements reflect material changes from period-to-period in one or more line items, including where material changes within a line item offset one another, describe the underlying reasons for these material changes in quantitative and qualitative terms. Where in the registrant's judgment a discussion of segment information and/or of other subdivisions (e.g., geographic areas, product lines) of the registrant's business would be necessary to an understanding of such business, the discussion must focus on each relevant reportable segment and/or other subdivision of the business and on the registrant as a whole.

(1) Liquidity and capital resources. Analyze the registrant's ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in the short-term (i.e., the next 12 months from the most recent fiscal period end required to be presented) and separately in the long-term (i.e., beyond the next 12 months). The discussion should analyze material cash requirements from known contractual

and other obligations. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. As part of this analysis, provide the information in paragraphs (b)(1)(i) and (ii) of this section.

(i) Liquidity. Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(ii) Capital resources.

(A) Describe the registrant's material cash requirements, including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements and the general purpose of such requirements.

(B) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any reasonably likely material changes in the mix and relative cost of such resources. The discussion must consider changes among equity, debt, and any off-balance sheet financing arrangements.

(2) Results of operations.

(i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, would be material to an understanding of the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that are reasonably likely to cause a material change in the relationship between costs and revenues (such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship must be disclosed.

(iii) If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of goods or services being sold or to the introduction of new products or services.

(3) Critical accounting estimates. Critical accounting estimates are those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant. Provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations to the extent the information is material and reasonably available. This information should include why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period, and the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation.

Instructions to paragraph (b): 1. Generally, the discussion must cover the periods covered by the financial statements included in the filing and the registrant may use any presentation that in the registrant's judgment enhances a reader's understanding. A smaller reporting company's discussion must cover the two-year period required in §§ 210.8–01 through 210.8–08 of this chapter (Article 8 of Regulation S–X) and may use any presentation that in the registrant's judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, discussion about the earliest of the three years may be omitted if such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with § 229.303 (Item 303 of Regulation S–K), provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found. An emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b–2 of this chapter (Rule 12b–2 of the Exchange Act), may provide the discussion required in paragraph (b) of this section for its two most recent fiscal years if, pursuant to Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)), it provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of the emerging growth company's common equity securities.

2. If the reasons underlying a material change in one line item in the financial statements also relate to other line items, no repetition of such reasons in the discussion is required and a line-by-line analysis of the financial statements as a whole is neither required nor generally appropriate. Registrants need not recite the amounts of changes from period to period if they are readily computable from the financial statements. The discussion must not merely repeat numerical data contained in the financial statements.

3. Provide the analysis in a format that facilitates easy understanding and that supplements, and does not duplicate, disclosure already provided in the filing. For critical accounting estimates, this disclosure

must supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

4. For the liquidity and capital resources disclosure, discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet. Except where it is otherwise clear from the discussion, the registrant must discuss those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition.

5. Where financial statements presented or incorporated by reference in the registration statement are required by § 210.4–08(e)(3) of this chapter (Rule 4–08(e)(3) of Regulation S–X) to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity must include a discussion of the nature and extent of such restrictions and the impact such restrictions have had or are reasonably likely to have on the ability of the parent company to meet its cash obligations.

6. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See 17 CFR 230.175 [Rule 175 under the Securities Act], 17 CFR 240.3b–6 [Rule 3b–6 under the Exchange Act], and Securities Act Release No. 6084 (June 25, 1979).

7. All references to the registrant in the discussion and in this section mean the registrant and its subsidiaries consolidated.

8. Discussion of commitments or obligations, including contingent obligations, arising from arrangements with unconsolidated entities or persons that have or are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity under U.S. GAAP.

9. If the registrant is a foreign private issuer, briefly discuss any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, its operations or investments by United States nationals. The discussion must also consider the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited interim financial statements are filed. See

§ 210.3–20(c) of this chapter (Rule 3–20(c) of Regulation S–X) for a discussion of cumulative inflation rates that may trigger the requirement in this instruction 9 to this paragraph (b).

10. If the registrant is a foreign private issuer, the discussion must focus on the primary financial statements presented in the registration statement or report. The foreign private issuer must refer to the reconciliation to United States generally accepted accounting principles and discuss any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes are necessary for an understanding of the financial statements as a whole, if applicable.

11. The term statement of comprehensive income is as defined in § 210.1–02 of this chapter (Rule 1–02 of Regulation S–X).

(c) Interim periods. If interim period financial statements are included or are required to be included by 17 CFR 210.3 [Article 3 of Regulation S–X], a management's discussion and analysis of the financial condition and results of operations must be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (c)(1) and (2) of this section. The discussion and analysis must include a discussion of material changes in those items specifically listed in paragraph (b) of this section.

(1) Material changes in financial condition. Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also must be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) Material changes in results of operations.

(i) Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which a statement of comprehensive income is provided and the corresponding year-to-date period of the preceding fiscal year.

(ii) Discuss any material changes in the registrant's results of operations with respect to either the most recent quarter for which a statement of comprehensive income is provided and the corresponding quarter for the preceding fiscal year or, in the alternative, the most recent quarter for which a statement of comprehensive income is provided and the immediately preceding sequential quarter. If the latter immediately preceding sequential quarter is discussed, then provide in summary form the financial information for that immediately preceding sequential quarter that is subject of the discussion or identify the registrant's prior filings on EDGAR that present such information. If there is a change in the form of presentation from period to period that forms the basis of comparison from previous periods provided pursuant to this paragraph, the registrant must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

Instructions to paragraph (c): 1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information must be prepared pursuant to this paragraph (c) and the discussion of the full fiscal year's information must be prepared pursuant to paragraph (b) of this section. Such discussions may be combined. Instructions 2, 3, 4, 6, 8, and 11 to paragraph (b) of this section apply to this paragraph (c).

2. The registrant's discussion of material changes in results of operations must identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

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