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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**NOTICE OF CASES
SUPPORTING ORACLE
AMERICA, INC.'S OPPOSITION
TO PLAINTIFF'S MOTION FOR
LEAVE TO AMEND THE
COMPLAINT**

As requested by the Court during the telephonic pre-hearing conference held on November 26, 2019, Oracle submits the following cases in support of its position that Plaintiff's request for leave to amend the complaint should not be granted at this late date. This Court has noted on at least three separate occasions dating back to March 2019 that Oracle's compliance with Section 2.17 is not at issue in this case, because OFCCP did not plead such a claim. *See* 3/6/19 Order Granting Conditional Leave to File SAC at 8 (questioning whether OFCCP intended to add a "completely new and distinct claim related to the affirmative action requirements of Executive Order 11246"); 3/13/19 Order Filing Revised SAC at 2 ("I do not understand this to be a 'deficiency' claim that would require examining the substantive merits of the Affirmative Action Program."); 6/19/19 Order Granting in Part and Denying in Part Motion to Compel Deposition of Oracle at 12-13 (holding that inquiry into "whether the AAP that was developed and maintained was adequate or compliant" is not relevant and if OFCCP wished to seek discovery on those points it should have contested the Court's March 13 interpretation of its

NOTICE OF CASES SUPPORTING ORACLE'S OPPOSITION TO LEAVE TO AMEND

SAC). Oracle has relied on the Court's findings with respect to a substantive AAP claim, and has sought no discovery from OFCCP regarding such a claim. The law supports denying OFCCP's request for amendment because OFCCP unduly delayed in seeking the amendment, because the amendment would unduly prejudice Oracle (trial is literally scheduled to begin next week), and because OFCCP has known the facts that form the basis for its proposed amendment since the inception of this case, and certainly since the orders cited above (and *certainly* since Oracle's October 3, 2019 Position Statement).

The cases attached include:

- *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 736-39 (9th Cir. 2013) (affirming denial of leave to amend to state a new claim where plaintiffs had known of claim's basis for over two years, and waited to request amendment until nine months after court issued its scheduling order; affirming denial of leave to amend to add new damages claim where plaintiffs sought leave to amend following denial of summary judgment, the legal basis for the amendment was known for over five months, and plaintiffs had previously requested leave to amend another aspect of the complaint).
- *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016-17 (9th Cir. 1999) (affirming denial of leave to amend complaint where amendment was an attempt to develop new theories based on facts known to plaintiff at the lawsuit's inception, plaintiff had already twice amended complaint, and court had already ruled on summary judgment).
- *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (affirming denial of leave to amend because "parties have engaged in voluminous and protracted discovery . . . Expense, delay, and wear and tear on individuals and companies count towards prejudice," trial was two months away, discovery was completed, complaint had already been amended twice, and factual basis for complaint had been known since beginning of the litigation), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017).
- *Villanueva v. United States*, 662 F.3d 124, 127-28 (1st Cir. 2011) (per curiam) (affirming denial of leave to amend where plaintiff waited four months from filing complaint before requesting leave to amend, despite knowing facts underlying proposed claim and where new claim would prejudice defendant).
- *Thompson-El v. Jones*, 876 F.2d 66, 67-68 (8th Cir. 1989) (affirming denial of leave to amend where plaintiff sought amendment two weeks before start of trial, case had been

NOTICE OF CASES SUPPORTING ORACLE'S OPPOSITION TO LEAVE TO AMEND

pending for eighteen months, discovery had closed, deadline for summary judgment motions had passed, and proposed amendment would necessitate additional discovery and further delay).

- *Tiernan v. Bluth, Eastman, Dillon & Co.*, 719 F.2d 1, 4-5 (1st Cir. 1983) (affirming denial of leave to amend where amendment was requested a month-and-a-half before trial, and although plaintiff claimed no additional discovery was required, “additional claims may well have affected defendants’ planned trial strategy and tactics” and thus required additional time to prepare for trial).

November 27, 2019

Respectfully submitted,

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cause “[a]dministrative closure is not a matter of statute or regulation,” but rather “is merely an administrative convenience,” we cannot review denials of administrative closure because we “lack . . . a meaningful standard upon which to review the decision.” *Hernandez v. Holder*, 606 F.3d 900, 904 (8th Cir.2010) (internal quotation marks omitted). Moreover, Diallo had no due process right to pursue discretionary relief through other agency avenues because “we have repeatedly held that there is no constitutionally protected liberty interest in discretionary relief from removal.” *See Ibrahimi v. Holder*, 566 F.3d 758, 766 (8th Cir.2009) (internal quotation marks omitted). Consequently, Diallo has not stated a colorable legal or constitutional challenge relating to the denial of administrative closure, and section 1252(a)(2)(B)(i) bars our review of this claim.¹ *See id.* at 767.

Diallo next argues the BIA erred by affirming the IJ’s adverse credibility findings. “Because his adverse credibility challenge raises a fact question, this court lacks jurisdiction to review [his] claim.” *Nadeem v. Holder*, 599 F.3d 869, 872 (8th Cir.2010).

Finally, Diallo argues the IJ and the BIA erred in finding he was statutorily barred from adjustment of status because Diallo testified he did not knowingly provide material support to a terrorist organization. This argument is a repackaged challenge to the IJ’s adverse credibility findings, and we consequently lack jurisdiction to review it. *See id.* Even if we were to interpret it as a legal challenge, however, “[i]t is . . . immaterial whether [Diallo] was statutorily ineligible for ad-

justment of status, because the IJ separately denied adjustment as a matter of discretion. . . .” *See Toby v. Holder*, 618 F.3d 963, 967–68 (8th Cir.2010). For the reasons explained above, this discretionary denial of relief is not reviewable, and it serves as an independent, dispositive basis for the BIA’s decision. *See id.*

III.

Accordingly, we deny Diallo’s petition for review.



In re WESTERN STATES WHOLE-SALE NATURAL GAS ANTI-TRUST LITIGATION,

Learjet, Inc.; Topeka Unified School District 501, Plaintiffs–Appellants,

v.

ONEOK, Inc.; ONEOK Energy Marketing & Trading Co., L.P.; The Williams Companies, Inc.; Williams Merchant Services Company, Inc.; Williams Energy Marketing & Trading Company; American Electric Power Company, Inc.; AEP Energy Services, Inc.; Duke Energy Corporation; Duke Energy Trading and Marketing, LLC; Dynegy Marketing and Trade; El Paso Corporation; El Paso Merchant Energy, L.P.; CMS Energy Corporation; CMS Marketing Services &

1. Diallo separately faults the BIA for not explicitly addressing his argument that the IJ’s failure to administratively close his case violated his due process rights. The BIA did, however, explain why the IJ’s denial of ad-

ministrative closure was proper, and “an alien has no constitutional right to a full-blown written opinion on every issue.” *See Doe v. Holder*, 651 F.3d 824, 831 (8th Cir. 2011).

Trading Company; CMS Field Services; Reliant Energy, Inc.; Reliant Energy Services, Inc.; Coral Energy Resources, L.P.; Xcel Energy, Inc.; e prime, Inc., Defendants–Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Heartland Regional Medical Center;
Prime Tanning Corp.; Northwest Mis-
souri State University, Plaintiffs–Ap-
pellants,

v.

ONEOK, Inc.; ONEOK Energy Market-
ing & Trading Co., L.P.; The Williams
Companies, Inc.; Williams Merchant
Services Company, Inc.; Williams En-
ergy Marketing & Trading Company;
American Electric Power Company,
Inc.; AEP Energy Services, Inc.;
Duke Energy Corporation; Duke En-
ergy Trading and Marketing, LLC;
Dynegy Marketing and Trade; El
Paso Corporation; El Paso Merchant
Energy, L.P.; CMS Energy Corpora-
tion; CMS Marketing Services &
Trading Company; CMS Field Ser-
vices; Reliant Energy, Inc.; Reliant
Energy Services, Inc.; Coral Energy
Resources, L.P.; Xcel Energy, Inc.; e
prime, Inc., Defendants–Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Breckenridge Brewery of Colorado,
LLC; BBD Acquisition Co.,
Plaintiffs–Appellants,

v.

Xcel Energy, Inc.; e prime, Inc.,
Defendants–Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Reorganized FLI, Inc., Plaintiff–
Appellant,

v.

ONEOK, Inc.; ONEOK Energy Market-
ing & Trading Co., L.P.; The Williams
Companies, Inc.; Williams Merchant
Services Company, Inc.; Williams En-
ergy Marketing & Trading Company;
American Electric Power Company,
Inc.; AEP Energy Services, Inc.;
Duke Energy Corporation; Duke En-
ergy Trading and Marketing, LLC;
Dynegy Marketing and Trade; El
Paso Corporation; El Paso Merchant
Energy, L.P.; CMS Energy Corpora-
tion; CMS Marketing Services &
Trading Company; CMS Field Ser-
vices; Reliant Energy, Inc.; Reliant
Energy Services, Inc.; Coral Energy
Resources, L.P.; Xcel Energy, Inc.; e
prime, Inc., Defendants–Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Sinclair Oil Corporation,
Plaintiff–Appellant,

v.

ONEOK Energy Services Company,
L.P., Defendant–Appellee.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Sinclair Oil Corporation,
Plaintiff–Appellant,

v.

e prime, Inc.; Xcel Energy, Inc.,
Defendants–Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Arandell Corporation; Merrick's Inc.;
Sargento Foods Inc.; Ladish Co., Inc.;
Carthage College; Briggs & Stratton
Corporation, Plaintiffs–Appellants,

v.

Xcel Energy, Inc.; Northern States
Power Company; e prime, Inc.; Amer-
ican Electric Power Company, Inc.;
AEP Energy Services, Inc.; CMS En-
ergy Corporation; CMS Field Ser-
vices; CMS Marketing Services &
Trading Company; Coral Energy Re-
sources, L.P.; Duke Energy Carolinas,
LLC; Duke Energy Trading and Mar-
keting LLC; Dynegy Illinois Inc.;
DMT G.P. L.L.C.; Dynegy GP Inc.; El
Paso Corporation; El Paso Merchant
Energy, L.P.; ONEOK, Inc.; ONEOK
Energy Marketing & Trading Co.,
L.P.; RRI Energy, Inc., fka Reliant
Energy, Inc.; RRI Energy Services,
Inc., fka Reliant Energy Services, Inc.;
The Williams Companies, Inc.;
Williams Power Company, Inc.;
Williams Energy Marketing & Trad-
ing Company; Williams Merchant
Services Company, Inc., Defendants–
Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Newpage Wisconsin System, Inc.,
Plaintiff–Appellant,

v.

CMS Energy Corporation; CMS Mar-
keting Services & Trading Company;
CMS Field Services; Xcel Energy,
Inc.; Northern States Power Compa-
ny; e prime, Inc.; Coral Energy Re-
sources, L.P.; Duke Energy Trading

and Marketing LLC; Dynegy Illinois
Inc.; DMT G.P. L.L.C.; Dynegy GP
Inc.; Dynegy Marketing and Trade;
El Paso Corporation; El Paso Mer-
chant Energy, L.P.; ONEOK, Inc.;
ONEOK Energy Marketing & Trading
Co., L.P.; RRI Energy Services, Inc.,
fka Reliant Energy Services, Inc.; The
Williams Companies, Inc.; Williams
Power Company, Inc.; Williams Ener-
gy Marketing & Trading Company;
Williams Merchant Services Compa-
ny, Inc., Defendants–Appellees.

In re Western States Wholesale
Natural Gas Antitrust
Litigation,

Arandell Corporation; Merrick's Inc.;
Sargento Foods Inc.; Ladish Co., Inc.;
Carthage College; Briggs & Stratton
Corporation, Plaintiffs–Appellants,

v.

CMS Energy Corporation; CMS Mar-
keting Services & Trading Company;
CMS Field Services, Defendants–Ap-
pellees.

Nos. 11–16786, 11–16798, 11–16799, 11–
16802, 11–16818, 11–16821, 11–16869,
11–16876, 11–16880.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 19, 2012.

Filed April 10, 2013.

Background: In several suits consolidated into multidistrict litigation (MDL) proceedings, retail buyers of natural gas has alleged that natural gas traders manipulated natural gas prices by reporting false information to price indices published by trade publications and engaging in wash sales, in violation of state law and Natural Gas Act. The United States District Court for the District of Nevada, Philip M. Pro, J., 2011

WL 2912910, granted traders' summary judgment motion in large part.

Holdings: The Court of Appeals, Bea, Circuit Judge, held that:

- (1) Florida-law antitrust claims were not preempted by Natural Gas Act;
- (2) code of conduct promulgated by Federal Energy Regulatory Commission (FERC) did not demonstrate FERC's jurisdiction over traders' alleged manipulation of rates;
- (3) buyers were not entitled to amend complaints to add claims under Sherman Act or under Colorado law;
- (4) district court had personal jurisdiction over traders in relation to Wisconsin- and Missouri-law antitrust claims; and
- (5) corporate buyers were barred from recovery under contracts voided under Wisconsin Antitrust Act.

Reversed in part and affirmed in part.

1. Commerce ⇌62.2

Gas ⇌2

Natural Gas Act does not apply to retail sales, but rather applies only to (1) transportation of natural gas in interstate commerce, (2) natural gas sales in interstate commerce for resale, i.e., wholesale sales, and (3) natural gas companies engaged in such transportation or sale. Natural Gas Act, § 1(b), 15 U.S.C.A. § 717(b).

2. Gas ⇌2

Sales by pipelines, local distribution companies, and their affiliates cannot be first sales under the Natural Gas Act, unless these entities are selling gas of their own production. Natural Gas Policy Act of 1978, § 2(21), 15 U.S.C.A. § 3301(21); Natural Gas Act, § 3(b), 15 U.S.C.A. § 717b(b).

3. Federal Courts ⇌776

Court of Appeals reviews a district court's grant of summary judgment de novo.

4. Federal Courts ⇌776

Court of Appeals reviews a district court's decisions regarding preemption de novo.

5. States ⇌18.13

In preemption cases, courts should start with the assumption that the historic police powers of the states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress.

6. Antitrust and Trade Regulation

⇌531

States ⇌18.84

Florida-law antitrust claims asserted by retail buyers of natural gas, alleging that natural gas traders manipulated natural gas prices, were not preempted by portion of Natural Gas Act that provided Federal Energy Regulatory Commission (FERC) with jurisdiction over any "practice" affecting jurisdictional rates; reading portion of Act expansively to preempt those claims conflicted with Congress's express intent, as stated in Act, to limit federal jurisdiction over natural gas to sales in interstate commerce for resale purposes, and Congress subsequently removed certain transactions from FERC's jurisdiction in context of state and federal antitrust law that complemented Congress's intent to move to less-regulated market. Natural Gas Act, §§ 1(b), 5(a), 15 U.S.C.A. §§ 717(b), 717d(a).

7. Statutes ⇌1152

Statutory provisions should not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part.

8. Statutes ⇨1159

Statutory construction canon of *noscitur a sociis*, meaning that a word is known by the company it keeps, is applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to the statute.

9. Gas ⇨14.3(2)

Code of conduct promulgated by Federal Energy Regulatory Commission (FERC) did not demonstrate that FERC had jurisdiction over natural gas traders' alleged manipulation of rates; two years after FERC promulgated that code, Congress enacted Energy Policy Act, and, under canon of statutory construction counseling against reading acts of Congress to be superfluous, Congress enacted Act provision prohibiting natural gas market manipulation and authorizing FERC to promulgate rules and regulations to protect natural gas ratepayers, because FERC did not already have such authority. Natural Gas Act, §§ 1(b), 4A, 15 U.S.C.A. §§ 717(b), 717c-1.

10. Gas ⇨14.3(2)

Even if Federal Energy Regulatory Commission (FERC) had statutory authority to promulgate its code of conduct and to make it applicable to "first sales" of natural gas and other non-jurisdictional sales under Natural Gas Act, code did not confer jurisdiction to FERC over natural gas traders' alleged manipulation of rates that was subject of retail buyers' claims under Act and under Florida antitrust law; close reading of code revealed that FERC limited its application to sales within its jurisdiction, and FERC acknowledged that, because of congressional acts deregulating first sales of natural gas, such sales were outside scope of its jurisdiction. Natural Gas Act, § 1(b), 15 U.S.C.A. § 717(b).

11. Federal Civil Procedure ⇨840, 1935.1

Retail buyers of natural gas failed to demonstrate good cause, as required to show that they were diligent in seeking to amend their complaints to add federal antitrust claims against natural gas traders in relation to alleged manipulation of rates; although buyers were aware of facts and theories for those claims, they waited to seek leave to amend until after expiration of pretrial scheduling order's deadline for amending pleadings. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Fed.Rules Civ.Proc.Rule 16(b)(4), 28 U.S.C.A.

12. Federal Civil Procedure ⇨840, 843

District court appropriately denied motion to amend filed by retail buyers of natural gas failed, seeking to add treble damages claims, under Colorado antitrust statute, in suit against natural gas traders in relation to manipulation of rates, where buyers had previously sought to amend to add additional defendant, but, despite having knowledge of relevant facts at that time, buyers did not seek to add treble damages claim. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

13. Federal Civil Procedure ⇨834, 840, 851

On a motion to amend a pleading, the court considers five factors in its analysis: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

14. Federal Courts ⇨776

Court of Appeals reviews de novo a district court's determination that it does not have personal jurisdiction over a defendant.

15. Federal Courts ⇨96

When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction, although the plaintiff must only make a prima facie showing of jurisdictional facts to withstand the motion. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

16. Federal Courts ⇨96

For the purposes of deciding whether the plaintiff has made a prima facie showing of personal jurisdiction, as required to withstand a motion to dismiss on those grounds, the court resolves all disputed facts in favor of the plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

17. Constitutional Law ⇨3964**Federal Courts** ⇨76.1, 417

Personal jurisdiction over a nonresident defendant is proper if permitted by a state's long-arm statute and if the exercise of that jurisdiction does not violate federal due process. U.S.C.A. Const.Amend. 14.

18. Constitutional Law ⇨3964

For the exercise of personal jurisdiction to satisfy due process, a nonresident defendant, if not present in the forum, must have minimum contacts with the forum such that the assertion of jurisdiction does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

19. Federal Courts ⇨76.5

To establish general personal jurisdiction over a nonresident defendant, the plaintiff must demonstrate that the defendant has sufficient contacts to constitute the kind of continuous and systematic general business contacts that approximate physical presence.

20. Courts ⇨13.2

Wisconsin's long-arm statute allows for the exercise of jurisdiction to the full extent allowed by the due process clause. U.S.C.A. Const.Amend. 14; W.S.A. 801.05.

21. Constitutional Law ⇨3964**Courts** ⇨13.2

Applying Missouri's long-arm statute requires two separate inquiries: one inquiry to establish if a defendant's conduct was covered by the long-arm statute, and a second inquiry to analyze whether the exercise of jurisdiction comports with due process requirements. U.S.C.A. Const.Amend. 14; V.A.M.S. § 506.500.

22. Constitutional Law ⇨3964

Court applies a three-part test to determine whether a nonresident defendant's "minimum contacts" meet the due process standard for the exercise of specific personal jurisdiction: (1) the defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice. U.S.C.A. Const.Amend. 14.

23. Constitutional Law ⇨3964

Defendant's single purposeful forum state contact can satisfy due process standard for exercising specific personal jurisdiction if the cause of action arises out of that particular contact of the defendant with the forum state. U.S.C.A. Const.Amend. 14.

24. Constitutional Law ⇨3964

Under the but for test for determining whether a claim arises or relates to a

nonresident defendant's forum-related activities, as required to satisfy due process standard for exercising specific personal jurisdiction, the suit arises out of the defendant's contacts with the forum if a direct nexus exists between those contacts and the cause of action. U.S.C.A. Const. Amend. 14.

25. Antitrust and Trade Regulation ⌘969

District court had personal jurisdiction over natural gas traders in relation to Wisconsin- and Missouri-law antitrust claims asserted by retail buyers of natural gas, arising from traders' alleged manipulation of rates; claims arose from or related to traders' forum-related activities of selling natural gas, buyers alleged that traders engaged in intentional acts of wash sales and manipulating market indices through reporting of false trading information, that such acts had substantial and reasonably foreseeable effect on commerce in Wisconsin and Missouri, that traders' officers and directors made agreements tending to advance of control market prices, and that traders knew that harm was likely to be suffered in those states.

26. Constitutional Law ⌘3964

To find that a nonresident defendant purposefully directed his activities to the forum, as required to satisfy due process standard for exercising specific personal jurisdiction over defendant, requires that the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. U.S.C.A. Const. Amend. 14.

27. Constitutional Law ⌘1039, 3964

Once the plaintiff shows that the exercise of personal jurisdiction satisfies the purposeful availment and arising from or related to prongs of the test to determine

whether a nonresident defendant's "minimum contacts" meet the due process standard for the exercise of specific personal jurisdiction, the burden shifts to the defendant to make a compelling case that the exercise of jurisdiction would be unreasonable. U.S.C.A. Const. Amend. 14.

28. Federal Courts ⌘776

Court of Appeals reviews de novo a district court's interpretation of state law.

29. Federal Courts ⌘386

When interpreting a state statute, a federal court applies the relevant state's rules of statutory construction.

30. Statutes ⌘1092, 1153

To determine the meaning of a statutory provision under Wisconsin law, courts begin with the statute's plain language, taking into consideration the context in which the provision under consideration is used, and statutory language is given its common, ordinary, and accepted meaning.

31. Antitrust and Trade Regulation ⌘967

Corporate purchasers of natural gas were not direct purchasers under contracts rendered void by Wisconsin Antitrust Act, precluding purchasers' claim to recover damages under those contracts from natural gas traders that allegedly engaged in conspiracy to manipulate rates; Act unambiguously made illegal every contract, combination, or conspiracy in restraint of trade or commerce, expressly provided for recovery by parties to voided contracts for any payments made thereunder, but made no provision authorizing recovery by indirect purchasers or other non-parties to voided contracts. W.S.A. 133.03(1), 133.14.

Jennifer Gille Bacon (argued), William E. Quirk, and Gregory M. Bentz, Polsinelli

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Michael John Miguel, K & L Gates LLP, Los Angeles, CA, for Defendants–Appellees Xcel Energy, Inc., e prime, Inc., e prime Energy Marketing, Inc., and Northern States Power Company.

Appeal from the United States District Court for the District of Nevada, Philip M. Pro, District Judge, Presiding. D.C. Nos. 2:03–cv–01431–PMP–PAL, 2:06–cv–00233–PMP–PAL, 2:07–cv–00987–PMP–PAL, 2:06–cv–01351–PMP–PAL, 2:05–cv–01331–PMP–PAL, 2:06–cv–00282–PMP–PAL, 2:06–cv–00267–PMP–PAL, 2:07–cv–01019–PMP–PAL, 2:09–cv–00915–PMP–PAL, 2:09–cv–01103–PMP–PAL.

Before: CARLOS T. BEA and PAUL J. WATFORD, Circuit Judges, and WILLIAM K. SESSIONS, District Judge.*

* The Honorable William K. Sessions, III, District Judge for the U.S. District Court for the

District of Vermont, sitting by designation.

OPINION

BEA, Circuit Judge:

These cases arise out of the energy crisis of 2000–2002. Plaintiffs (retail buyers of natural gas) allege that Defendants (natural gas traders) manipulated the price of natural gas by reporting false information to price indices published by trade publications and engaging in wash sales.¹ Plaintiffs brought various claims in state and federal court beginning in 2005, and all cases were eventually consolidated into the underlying multidistrict litigation proceeding. In July 2011, the district court entered summary judgment against Plaintiffs in most of the cases,² finding that their state law antitrust claims were preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (“NGA”). Plaintiffs appeal the district court’s order granting summary judgment, as well as orders denying as untimely Plaintiffs’ motions to amend their complaints, orders dismissing the AEP Defendants from two cases for lack of personal jurisdiction, and an order granting partial summary judgment to Defendant Duke Energy Trading and Marketing, LLC.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse the district court’s order granting summary judgment to the Defendants, reverse in part the district court’s orders dismissing the AEP Defendants from the Wisconsin *Arandell* and Missouri *Heartland* suits, and affirm all of the other orders at issue in this appeal. We remand to the district court

1. Wash sales are prearranged sales in which traders execute a trade on an electronic trading platform, and then immediately offset that trade by executing an equal and opposite trade.
2. The district court’s judgment is final in all cases except *Sinclair v. EPrime*, No. 11–16821, and *Sinclair v. Oneok*, No. 11–16818. The Plaintiffs’ complaints in the *Sinclair* cases contain federal claims that were not preempt-

ed, but the District Court declared that there was “no just reason for delay,” making the preemption rulings in *Sinclair v. E-Prime* and *Sinclair v. Oneok* final and appealable pursuant to Federal Rule of Civil Procedure 54(b).

I. Facts and Regulatory Framework

A. Energy Crisis of 2000–2002

A brief recitation of the background of this litigation, as well as a description of the regulatory framework governing this case, is useful to set the stage for our holding. These cases arise out of claims that the Defendants violated antitrust laws by manipulating the natural gas market and selling natural gas at artificially inflated prices, leading to the energy crisis of 2000–2002. The Federal Energy Regulatory Commission (“FERC”) conducted a fact-finding investigation of the energy crisis, and concluded that “[s]pot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market.” This market distortion stemmed in part from efforts of energy trading companies to manipulate price indices compiled by trade publications.

The natural gas industry relied on two trade publications, *Gas Daily* and *Inside FERC*, which published the most widely-used price indices. *Gas Daily* published a daily gas price index, while *Inside FERC* published a monthly gas price index. *Gas Daily* relied on telephone interviews with natural gas market participants (traders, end users,³ and producers) to collect pricing data. *Inside FERC* collected pricing data through standardized spreadsheets, which traders filled out and emailed to

- ed, but the District Court declared that there was “no just reason for delay,” making the preemption rulings in *Sinclair v. E-Prime* and *Sinclair v. Oneok* final and appealable pursuant to Federal Rule of Civil Procedure 54(b).
3. The term “end users” refers to industrial, commercial, and residential consumers of gas, such as the Plaintiffs in this case.

Inside FERC. Buyers and sellers relied on these indices as reference points to determine the market price for natural gas transactions. In short, the prices for actual transactions were pegged to price indices that were subject to manipulation by energy traders.

After the energy crisis of 2000–2002, a number of energy trading companies admitted that their employees provided false pricing data to *Gas Daily* and *Inside FERC*. Government investigations revealed that the companies had few, if any, internal controls in place to ensure the accuracy of the data reported to the trade publications. A 2003 FERC report described the process as follows:

Traders from all companies describe a typical trading day as hectic, pressure packed, and frenetic. One of their many tasks was to report trading data to the Trade Press; this was viewed as bothersome but necessary. Often it was a job given to the newest employee. Many companies report passing around a form and using a spreadsheet on a shared drive. . . . There was nothing to stop a trader from changing the numbers someone else had entered. In other cases, traders took an oral “survey” to get a sense of where the market was trading. Sometimes they represented it to the Trade Press as an actual survey, but in other cases they made up trades to average out to a number that was consistent with this “survey.”

In addition to reporting false data to the price indices, traders also manipulated the market by engaging in “wash sales,” or prearranged sales in which traders “agreed to execute a buy or a sell on an electronic trading platform . . . and then to immediately reverse or offset the first trade by bilaterally executing over the telephone an equal and opposite buy or sell.”

B. Overview of Natural Gas Regulation

Whether Plaintiffs’ state law antitrust claims are cognizable depends, for one thing, on whether the field of natural gas regulation has been preempted by federal regulation. This court’s preemption analysis is governed by the framework of natural gas regulation, and more importantly, the distinction between categories of sales that fall within FERC’s jurisdiction (“jurisdictional sales”) and the categories of sales that fall outside of FERC’s jurisdiction (“non jurisdictional sales”).

[1] Individual states were originally responsible for the regulation of the production, sale, and transportation of natural gas. However, as the volume of gas sold and transported along interstate pipelines increased, state regulations became regarded by Congress as ineffective. *See Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 515, 68 S.Ct. 190, 92 L.Ed. 128 (1947). In 1938, Congress enacted the Natural Gas Act (“NGA”) in response to the demand for federal regulation and to curb the market power of interstate pipelines. *Id.* at 516, 68 S.Ct. 190; *see also E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1036 (9th Cir.2007). FERC is the agency charged with the administration of the NGA, and its jurisdiction is laid out in Section 1(b) of the Act as follows:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importa-

tion or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b). Put simply, the NGA applies to: (1) transportation of natural gas in interstate commerce, (2) natural gas sales in interstate commerce for resale (i.e., wholesale sales), and (3) natural gas companies⁴ engaged in such transportation or sale. The NGA does *not* apply to retail sales (i.e., direct sales for consumptive use). See *Panhandle Eastern Pipe Line Co.*, 332 U.S. at 517, 68 S.Ct. 190 (“The line of the statute [is] thus clear and complete. It cut[s] sharply and cleanly between sales for resale and direct sales for consumptive uses.”).

[2] Since the passage of the NGA, Congress has removed other categories of sales from the scope of FERC’s jurisdiction as part of a general effort to reduce federal regulation of the natural gas industry. In 1989, Congress passed the Natural Gas Wellhead Decontrol Act of 1989,

Pub.L. No. 101–60, which removed “first sales”⁵ from FERC’s jurisdiction, therefore completely eliminating FERC’s authority to set prices at the wellhead. In 1992, to give effect to the North American Free Trade Agreement, Congress amended the NGA to provide that all natural gas sales from Canadian and Mexican sellers to buyers in the United States are also first sales, and therefore not subject to FERC’s jurisdiction. See Energy Policy Act of 1992, Pub.L. No. 102–486 (codified at 15 U.S.C. § 717b(b)).

The final aspect of the natural gas regulatory scheme relevant to this appeal is FERC’s practice of issuing “blanket marketing certificates.”⁶ Following congressional efforts to reduce federal regulation of the industry, FERC began its own deregulation process. In 1992, FERC promulgated Order 636, which “required all interstate pipelines to ‘unbundle’⁷ their transportation from their own natural gas sales.” *General Motors Corp. v. Tracy*, 519 U.S. 278, 284, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997); Pipeline Service Obligations and Revisions to Regulations Gov-

4. A “natural-gas company” is defined as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” 15 U.S.C. § 717a(6).

5. The statutory definition of “first sales” is quite complex, see 15 U.S.C. § 3301(21), but as this court stated in *Gallo*, “first sales are, in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company, or retail customer. In other words, sales by pipelines, local distribution companies, and their affiliates cannot be first sales unless these entities are selling gas of their own production.” *Gallo*, 503 F.3d at 1037.

6. Under blanket certificates issued pursuant to Section 7(c) of the NGA, “a natural gas company may undertake a restricted array of routine activities without the need to obtain a case-specific certificate for each individual project.” See BLANKET CERTIFICATES, FEDERAL

ENERGY REGULATORY COMMISSION (last visited on March 25, 2013), <http://www.ferc.gov/industries/gas/indus-act/blank-cert.asp>. A company with a blanket certificate may “construct, modify, acquire, operate, and abandon a limited set of natural gas facilities, and offer a limited set of services, provided each activity complies with constraints on costs and environmental impacts set forth in the Commission’s regulations.” *Id.*

7. “Prior to the early 1980s, most natural gas was sold at or near the wellhead to the intrastate or interstate pipeline in the field. . . . The pipeline purchasers typically provided a bundled service which included the gathering, processing, storage and transmission of the gas to market.” Judith M. Matlock, *Federal Oil and Gas Pipeline Regulation: An Overview*, ROCKY MOUNTAIN MINERAL LAW FOUND. Paper No. 4 (Feb. 23–24, 2011).

erning Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (Apr. 16, 1992). FERC also issued blanket sale certificates to interstate pipelines that allowed them to offer “unbundled” natural gas at market-based rates, rather than at rates filed with FERC. See 57 Fed.Reg. at 13,270. FERC continued its own deregulation process by issuing blanket sales certificates for all other resales of natural gas. See Regulations Governing Blanket Marketer Sales Certificates, 57 Fed.Reg. 57,952; 57,957–58 (Dec. 8, 1992). These blanket certificates had the effect of allowing all natural gas companies subject to FERC’s jurisdiction to charge market-based rates, as opposed to rates filed with and approved by FERC.

II. Procedural History

Beginning in 2001, a series of class action lawsuits were filed around the country and were eventually consolidated into a multi-district litigation in the District of Nevada. Two of the earliest cases, *Texas–Ohio Energy, Inc. v. AEP Energy Services, Inc., et al.* (“*Texas–Ohio*”) and *Abelman v. AEP Energy Services, Inc., et al.* (“*Abelman*”) alleged both Sherman Act and parallel state antitrust claims. See *In re Western States Wholesale Natural Gas Antitrust Litig.*, 368 F.Supp.2d 1110 (D.Nev.2005); *In re Western States Wholesale Natural Gas Antitrust Litig.*, 408

F.Supp.2d 1055 (D.Nev.2005). The core allegations in *Texas–Ohio* and *Abelman*—that the defendant energy companies conspired to manipulate the price indices—were similar to the allegations in the present case.

The defendants in *Texas–Ohio* and *Abelman* moved to dismiss the complaints in those cases on the grounds that all claims were barred by the filed-rate doctrine⁸ and that the state-law claims were preempted by the NGA. In 2005, four months before the first of the present cases was filed, the District Court granted summary judgment to the *Texas–Ohio* and *Abelman* defendants. It held that because the plaintiffs asked for actual damages, any judgment by the court would necessarily decide whether the privately-published price indices (which the court concluded were effectively FERC-approved rates) were reasonable. Since the price indices used to set the rates were FERC-approved, the federal and state law claims were barred by the filed-rate doctrine. *Texas–Ohio*, 368 F.Supp.2d at 1116; *Abelman*, 408 F.Supp.2d at 1069.

Shortly after the judgments in *Texas–Ohio* and *Abelman*, plaintiffs in *Farm-land*,⁹ *Learjet*, *Breckenridge*, *Arandell*, and *Heartland* began filing suits alleging state antitrust claims in Colorado, Kansas, Missouri, and Wisconsin state courts. Plaintiffs in *Sinclair v. E–Prime* and *Sinclair v. Oneok* brought suit in federal

8. The filed-rate doctrine “is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for specified utilities” and bars “challenges under state law and federal antitrust laws to rates set by federal agencies.” *E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1033 (9th Cir.2007). See also *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (stating that because the Natural Gas Act required sellers of natural

gas in interstate commerce to file their rates with FERC for FERC’s approval, “[n]o court may substitute its own judgment on reasonableness for the judgment of the Commission”).

9. As a result of bankruptcy proceedings, the name of the Plaintiff in this case has changed to “Reorganized FLI, Inc.” For the sake of simplicity we refer to this Plaintiff as “Farm-land” in this opinion.

court, alleging various state and federal causes of action. The state cases were removed to federal court on grounds of diversity of citizenship and all cases were consolidated into the present multidistrict litigation.

Defendants in the present case filed a number of motions for summary judgment, alleging that the Plaintiffs' claims were barred by the filed-rate doctrine, or that their state claims were preempted by the NGA. In 2006, the District Court granted the Defendants' motion to dismiss in *Farmland*, finding that the NGA preempted the Plaintiffs' claims under Kansas antitrust statutes. The District Court reasoned that because the Defendants possessed blanket marketing certificates that subjected Defendants and their conduct to FERC's jurisdiction under the NGA, FERC had exclusive jurisdiction over the alleged anti-competitive misconduct at issue. In July 2007, the District Court reconsidered and vacated its prior ruling granting Defendants' motion to dismiss after Plaintiffs clarified that they did not concede the factual question of whether Defendants possessed blanket marketing certificates.

In September 2007, this court issued its decision in *E. & J. Gallo Winery v. Encana Corp.*, holding that the filed-rate doctrine does not bar state or federal antitrust claims arising out of manipulation of the price indices because the challenged price indices were compiled using transactions outside of FERC's jurisdiction as well as transactions within FERC's jurisdiction. 503 F.3d at 1048.

In November 2007, Defendants filed a new motion for summary judgment in all of the present cases, arguing that Plaintiffs' state claims were preempted by the NGA. In May 2008, the District Court denied the motion, relying in part on this court's decision in *Gallo*.

In July 2008, Defendants filed a motion for reconsideration of the District Court's May 2008 order, arguing that FERC had jurisdiction during the relevant time period to regulate "any practice" affecting a rate subject to the jurisdiction of the Commission (i.e., a "jurisdictional rate"). In November 2009, the District Court held that because the same price indices are used to set the prices in transactions falling within and outside FERC's jurisdiction, any manipulation of these indices falls within FERC's exclusive jurisdiction under Section 5(a) of the NGA. Section 5(a) provides:

[Whenever FERC finds] that *any* rate, charge, or classification . . . [or] *rule, regulation, practice, or contract affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed or in force, and shall fix the same by order.

15 U.S.C. § 717d (emphases added). The District Court reasoned that pursuant to Section 5(a) of the NGA, FERC has jurisdiction to regulate any "practice" by a jurisdictional seller that affects a jurisdictional rate. The court ordered Defendants to re-file their motion for summary judgment, and in July 2011, the court granted the Defendants' motion for summary judgment as applied to all Plaintiffs. This appeal followed.

III. The Natural Gas Act and Preemption

A. Standard of Review

[3,4] This court reviews a district court's grant of summary judgment *de novo*. See *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir.2004). Summary judgment is

appropriate only where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1075 (9th Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c)). “Viewing the evidence in the light most favorable to the non-moving party,” this court “must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir.2001). This court also reviews a district court’s decisions regarding preemption *de novo*. See *Whistler Investments, Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1163 (9th Cir.2008).

B. Preemption

[5] The “touchstone in every pre-emption case” is expressed congressional intent. *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). The Supreme Court recently emphasized that in preemption cases, courts should “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.* In the present case, the presumption against preemption applies with particular force in light of Congress’s deliberate efforts to preserve traditional areas of state regulation of the natural gas industry.

[6] The question presented by this appeal is as follows: does Section 5(a) of the NGA, which provides FERC with jurisdiction over any “practice” affecting jurisdictional rates, preempt state antitrust claims

arising out of price manipulation associated with transactions falling outside of FERC’s jurisdiction? We conclude that such an expansive reading of Section 5(a) conflicts with Congress’s express intent to delineate carefully the scope of federal jurisdiction through the express jurisdictional provisions of Section 1(b) of the Act. Our analysis is guided by several circuit court decisions counseling in favor of a narrow reading of Section 5(a). As a result, we hold that the NGA does not preempt the Plaintiffs’ state antitrust claims, and reverse the district court’s order granting summary judgment to the Defendants.

1. When Congress enacted the NGA in 1938, it expressly limited federal jurisdiction over natural gas to “the sale in interstate commerce of natural gas for resale.” 15 U.S.C. § 717(b). An early Supreme Court case interpreting the scope of the NGA described Congress’s intent as follows:

The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act “shall not apply to any other . . . sale.”

Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm’n of Ind., 332 U.S. 507, 516, 68 S.Ct. 190, 92 L.Ed. 128 (1947). A later Supreme Court decision further emphasized Congress’s intent to limit the reach of the NGA:

When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It did not envisage federal regulation of the entire natural gas field to the limit of constitutional power. Rather it contem-

plated the exercise of federal power as specified in the Act.

Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 510, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). Since the passage of the NGA, Congress has further demonstrated its intent to limit the scope of federal regulation by enacting statutes removing first sales from FERC's jurisdiction. See Natural Gas Wellhead Decontrol Act of 1989, Pub.L. No. 101-60, 103 Stat. 157.¹⁰

2. This court's decision in *Gallo* provides further support for our holding that the NGA does not preempt all state antitrust claims. The claims in *Gallo* were essentially the same as the Plaintiffs' claims in the present case. E. & J. Gallo Winery alleged that Encana Corp., a natural gas supplier, conspired to inflate the price of natural gas by manipulating the prices reported to private indices published by natural gas trade publications and the execution of wash trades. *Gallo*, 503 F.3d at 1030-32. Gallo's complaint consisted of federal and state antitrust actions, as well as state-law damages claims. *Id.* at 1032. Encana Corp. moved for summary judgment, claiming that the filed-rate doctrine barred all of Gallo's federal claims, and federal preemption principles barred Gallo's state claims. *Id.* at 1032. The district court denied Encana's summary judgment motion, and this court affirmed the district court. *Id.* at 1030.

We noted in *Gallo* that although FERC did not set the rates charged by the natural gas companies, it did engage in market oversight by granting blanket market certificates after determining that the seller lacked market power. *Id.* at 1041. As a result of FERC's market oversight, the

court found "that the market-based rate for natural gas transactions *under FERC's jurisdiction* are FERC-authorized rates, and cannot be the basis of a federal antitrust or state damage action" because of the filed-rate doctrine. *Id.* at 1043 (emphasis added).

Although this court found that the filed-rate doctrine barred claims based on FERC-authorized rates, it distinguished claims based on FERC-authorized rates from claims based on the rates reported in the price indices. *Id.* at 1045. It stated that the record reflected that "the indices potentially include transactions that are under FERC's jurisdiction as well as transactions outside FERC's jurisdiction." *Id.* There were two relevant categories of non-FERC-authorized rates included in the challenged price indices:

First, there is evidence in the record some index pricing inputs were misreported or wholly fictitious. Misreported rates and rates reported for fictitious transactions are not FERC-approved rates, and barring claims that such fictitious transactions damaged purchasers in the natural gas market would not further the purpose of the filed rate doctrine.

Moreover, as part of its investigation of the indices, FERC concluded that it "has jurisdiction over *most* of the transactions that form the basis for the indices." . . . This language indicates that at least some of the transactions included in the indices are not subject to FERC's jurisdiction, and thus would be subject to challenge by Gallo.

Id. at 1045 (internal citations omitted). The non-jurisdictional transactions includ-

¹⁰ In 1978 Congress enacted the Natural Gas Policy Act ("NGPA"), Pub.L. No. 95-621, 92 Stat. 3352, which eliminated the low price ceilings on wellhead sales. However, the

Natural Gas Wellhead Decontrol Act of 1989 ("WDA") completely eliminated FERC's authority to set prices at the wellhead.

ed in the price indices included first sales at the wellhead or via imports from Canada or Mexico. *Id.*

We explained in depth why the removal of certain transactions from FERC's jurisdiction meant that claims arising out of those transactions were not preempted by the NGA. *Id.* at 1046. Most importantly, we assumed that Congress was aware of the existing context of state and federal antitrust law when it enacted the Wellhead Decontrol Act and other statutes limiting FERC's jurisdiction. *Id.* State and federal antitrust laws complement Congress's intent to move to a less regulated market, because such laws support fair competition. *Id.* ("By enabling private parties to combat market manipulation and other anti-competitive actions, the laws under which Gallo brought its claim support Congress's determination that the supply, the demand, and the price of high-cost first sale gas be determined by market forces.") (internal quotations omitted). For these reasons, we concluded that "Congress did not preclude plaintiffs from basing damage claims on rates associated with first sales." *Id.* Our reasoning in *Gallo* applies with equal force to the question presented by this case: federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction.

C. The NGA's Jurisdictional Limitations

The district court in the present case acknowledged this court's holding in *Gallo*, but distinguished that case on the grounds that "*Gallo* did not address whether FERC's exclusive jurisdiction over natural gas companies *and their practices which affect jurisdictional rates* preempts state jurisdiction over the same subject matter." It reasoned that Defendants' status as FERC-regulated entities, combined with FERC's authority under Section 5(a) of

the NGA to regulate "any rule, regulation, practice, or contract" affecting a jurisdictional rate, conferred exclusive jurisdiction on FERC to regulate the conduct at issue in this case.

[7] The district court read the word "practices" in Section 5(a) of the NGA to preempt impliedly the application of state laws to the same transactions (first sales and retail sales) that Congress expressly exempted from the scope of FERC's jurisdiction in Section 1(b) of the Act. However, this reading runs afoul of the canon of statutory construction that statutory provisions should not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part. *See, e.g., Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir.2007) ("When interpreting statutes . . . each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole."). The district court's reading is also inconsistent with case law interpreting the provisions of Section 5(a) of the NGA narrowly to comport with the jurisdictional limitations established by Section 1(b) of the Act. While the Ninth Circuit has not had the opportunity to define the scope of Section 5(a), the Supreme Court and other circuits have read Section 5(a) narrowly to define the scope of FERC's jurisdiction within the limitations imposed by Section 1(b).

1. In *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, the Supreme Court relied on the jurisdictional limitations established in Section 1(b) of the NGA to uphold a state regulation on the production of gas. 489 U.S. 493, 496, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). The State Corporate Commission of Kansas (KCC) had adopted a regulation governing the timing of natural gas pro-

duction from the Kansas–Hugoton field. *Id.* The regulation provided that the right to extract assigned amounts of gas from the field would be lost if pipelines delayed production for too long. *Id.* at 497, 109 S.Ct. 1262. Northwest Central Pipeline Corporation challenged the regulation, arguing that it was preempted by federal regulation of the interstate gas industry because the regulation exerted pressure on pipelines to increase their purchases from the Hugoton field and therefore affected the pipelines’ cost structures. *Id.* at 497, 507, 109 S.Ct. 1262 (noting that Northwest Central argued that “the federal regulatory scheme pre-empts state regulations that may have either a direct or indirect effect on matters within federal control”).

The Supreme Court rejected Northwest Central’s argument, relying on the fact that Section 1(b) of the NGA “expressly carve[d] out a regulatory role for the States” and provided that states would retain jurisdiction over the production of natural gas. *Id.* at 507, 109 S.Ct. 1262. It also rejected the pipeline’s claim that federal regulations preempted all state regulations that may affect rates within federal control, stating:

To find field pre-emption of Kansas’ regulation merely because purchasers’ costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental affect on the costs of purchasers in some market and contractual situation.

Id. at 514, 109 S.Ct. 1262.

In *American Gas Association v. Federal Energy Regulatory Commission*, the D.C.

Circuit examined FERC’s refusal to use its authority under Section 5 of the NGA to modify “take-or-pay” contracts¹¹ between natural gas producers and pipelines. 912 F.2d 1496, 1503 (D.C.Cir.1990). A “major premise” of FERC’s refusal to act was its conclusion that its Section 5 power did not reach nonjurisdictional contracts. *Id.* at 1505. The court concluded, “As we read the Natural Gas Act, the Commission was absolutely right: Congress clearly limited its § 5 powers to jurisdictional contracts.” *Id.*

The petitioners in *American Gas Association* had offered an argument similar to the one offered by the Defendants in the present case: they isolated the phrase “contract affecting such rates” and argued that FERC had jurisdiction to assess the justness and reasonableness of the provisions of *any* contract that would likely influence a pipeline’s end-of-pipelines prices. *Id.* FERC, on the other hand, interpreted “contract affecting such rates” as being limited to contracts involving a jurisdictional seller and directly governing the rate in a jurisdictional sale. *Id.* at 1506. The D.C. Circuit agreed with FERC, stating that “petitioners’ theory is, more generally, an oxymoron—Commission jurisdiction over nonjurisdictional contracts.” *Id.* The court also noted that the petitioners’ expansive reading of Section 5 had no “conceptual core” because under their interpretation, Section 5 would reach “pipelines’ contracts for every other possible factor of production—even legal services.” *Id.* at 1507.

We find the analysis of these cases persuasive, and apply them here. Interpreting the jurisdictional provision in Section 5(a) broadly to find FERC jurisdiction

11. Certain contracts entered into by producers and pipelines between 1977–1982 contained “take-or-pay” clauses requiring the pipelines either to purchase a specified per-

centage of the producer’s deliverable gas or to make “pre-payments” for that percentage. See *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1021 (D.C.Cir.1987).

over price manipulation associated with nonjurisdictional sales would risk nullifying the jurisdictional provisions of Section 1(b), which reserve to the states regulatory authority over nonjurisdictional sales, such as first sales at the wellhead or from sellers in Canada and Mexico. Under the broad reading of Section 5(a) that Defendants propose, there is no “conceptual core” delineating transactions falling within FERC’s jurisdiction and transactions outside of FERC’s jurisdiction. There would be nothing stopping a future court from finding that first sales themselves (which are exempted from FERC’s jurisdiction pursuant to Section 1(b) of the Act) are “practices” affecting jurisdictional rates that fall within the jurisdictional provision in Section 5(a). We reject this broad reading and hold that the district court erred in concluding that FERC had jurisdiction over the reporting practices associated with nonjurisdictional sales under Section 5(a).

2. Another D.C. Circuit case, *California Independent System Operator Corporation v. Federal Energy Regulatory Commission*, does not address the interplay between the jurisdictional limits outlined in Section 1(b) and the jurisdictional provision in Section 5(a), but it does provide further support for a narrow interpretation of the word “practices” in Section 5(a). 372 F.3d 395 (D.C.Cir.2004). The California Independent System Operator Corporation (CAISO) was a non-profit entity created by the state of California to oper-

ate electric grid facilities in California. *Id.* at 397. By statute, CAISO was obligated to follow certain procedures for selecting a board of directors composed exclusively of California residents. *Id.* After the energy crisis of 2000, FERC directed CAISO to utilize a different selection method for its board of directors. *Id.* at 397–98. FERC claimed that it had authority to issue such a directive under Section 206 of the Federal Power Act,¹² which provided, “Whenever the Commission [shall find] that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential,” the Commission shall determine the just and reasonable practice to be observed thereafter. *Id.* at 399 (quoting 16 U.S.C. § 824e(a)). Specifically, FERC claimed that the composition and method of selection of a utility company’s governing board was a “practice . . . affecting [a] rate,” and that because FERC had found that CAISO’s selection method was discriminatory, FERC had authority to determine a just and reasonable practice. *Id.*

[8] The D.C. Circuit began its analysis with the “plain language” of the statutory text. *Id.* at 400. It found that the word “practices” is a word of sufficiently diverse meanings that the proper method for determining Congressional intent was to apply the canon of statutory construction “*noscitur a sociis*.”¹³ The court looked at the word “practices” in context, finding

12. The language at issue from the Federal Power Act in *CAISO* is identical to the language at issue from the NGA in the present case. The Supreme Court noted in *Arkansas Louisiana Gas Company v. Hall* that the relevant provisions of the Federal Power Act and the Natural Gas Act “are in all material respects substantially identical,” and therefore the Court’s established practice is to “cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes.” 453

U.S. 571, 577 n. 7, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (internal quotations omitted).

13. *Noscitur a sociis* means that “a word is known by the company it keeps,” and this canon is applied “where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961).

that Section 5(a) comes into play only after the Commission has a hearing and determines that a “rate, charge, or classification” employed by a regulated utility in a jurisdictional transaction is unjust or unreasonable. *Id.* Therefore, the court found that by using the word “practice,” Congress had intended to empower FERC to “effect a reformation of some ‘practice’ in a more traditional sense of actions habitually being taken by a utility in connection with a rate found to be unjust or unreasonable.” *Id.* The court noted that the implications of a broader reading of the word “practices” would be “staggering” because FERC would have jurisdiction over a plethora of activities, such as the methods of contracting for services, labor, or office space, as long as FERC found that such “practices” affected the jurisdictional rates. We agree with the D.C. Circuit’s approach to reading the word “practices” narrowly as to not expand unduly the scope of FERC’s jurisdiction.

3. Defendants rely on *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (“*MP & L*”) for the proposition that “FERC’s jurisdiction over a practice or contract affecting a jurisdictional rate preempts state law from being used to regulate that practice or contract.” *Mississippi Power & Light* involved a FERC order requiring four utility companies to purchase a particular share of a nuclear power plant’s output at rates FERC determined to be just and reasonable. *Mississippi Power & Light Co.*, 487 U.S. at 364, 108 S.Ct. 2428. One of the utility companies, Mississippi Power & Light, filed an application with the Mississippi Public Service Commission (“MPSC”) seeking a substantial increase in its retail rates to recoup the costs of purchasing a portion of the nuclear power plant’s output. *Id.* at 365, 108 S.Ct. 2428. The Mississippi Supreme Court eventually

ruled that the MPSC was required, in accordance with state law, to review the prudence of incurring costs associated with purchasing the nuclear power plant’s output. *Id.* at 367, 108 S.Ct. 2428.

The Supreme Court reversed. The Court stated that FERC’s exclusive jurisdiction over wholesale rates also encompassed “power allocations that affect wholesale rates.” *Id.* at 371, 108 S.Ct. 2428. Because the “prudence inquiry” mandated by the Mississippi Supreme Court required the state commission to review the prudence of the FERC order determining the allocation of costs associated with the nuclear power plant, the inquiry was preempted by FERC’s exclusive jurisdiction. *Id.* The Court concluded, “FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates.” *Id.* at 371, 108 S.Ct. 2428.

We do not find Defendants’ reliance on *Mississippi Power & Light Co.* to be persuasive. *Mississippi Power & Light Co.* stands for the proposition that states cannot use their jurisdiction over retail rates to second-guess or review FERC-authorized rates that may affect retail rates. *See Gallo*, 503 F.3d at 1044 (relying on *Mississippi Power & Light Co.* to “support EnCana’s position that wholesale sellers such as EnCana may raise the filed rate doctrine as a defense to actions putatively attacking retail rates, but having the effect of disallowing FERC-approved wholesale rates.”). However, *Mississippi Power & Light Co.* does not support Defendants’ broad reading of the phrase “practice . . . affecting [jurisdictional] rates.” In *Mississippi Power & Light Co.*, FERC had used its jurisdiction over practices affecting wholesale rates to determine an equitable allocation of nuclear power costs. Defendants attempt to analogize the power

allocations at issue in *Mississippi Power & Light Co.* with the market manipulation associated with nonjurisdictional transactions at issue in the present case. However, that analogy cannot be squared with the *Gallo* court's holding that the NGA does not preempt state antitrust challenges to rates and practices associated with such nonjurisdictional sales.

D. FERC's Regulatory Authority

One final issue dividing the parties in this appeal is the extent to which FERC had authority to regulate the market manipulation that gave rise to the energy crisis in 2000–2001. The Defendants point to the Code of Conduct promulgated by FERC in 2003 as evidence that FERC had regulatory authority over the anticompetitive conduct at issue, including the false price reporting and wash sales. FERC promulgated the Code of Conduct by amending the blanket market certificates governing jurisdictional sellers. *See* Amendments to Blanket Sales Certificates, 68 Fed.Reg. 66,323 (Nov. 26, 2003). The Commission stated that the need for the Code of Conduct “was informed by the types of behavior that occurred in the Western markets during 2000 and 2001.” *Id.* ¶ 2. The Code prohibited *jurisdictional* sellers¹⁴ “from engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion.” *Id.* ¶ 4. The Code further provides that jurisdictional sellers are re-

quired to provide complete and accurate transactional information to publishers of gas price indices. *Id.* ¶ 5.

[9] While Defendants rely on the promulgation of the Code of Conduct as evidence that FERC had jurisdiction over the market manipulation at issue, there are two significant flaws in their argument. First, two years after the promulgation of the Code, Congress enacted the Energy Policy Act of 2005 (“EPA”),¹⁵ which prohibits market manipulation and authorizes FERC to promulgate rules and regulations to protect natural gas ratepayers. There is a canon of statutory interpretation that counsels against reading acts of Congress to be superfluous. *See American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992). This canon suggests that Congress enacted the relevant provision of the EPA *because* FERC did not already have regulatory authority over the anticompetitive conduct at issue.

[10] The second flaw in Defendants' argument is more relevant to our jurisdictional analysis. Even if FERC did have the statutory authority to promulgate the 2003 Code of Conduct and to make it applicable to “first sales” and other nonjurisdictional sales, a close reading of the Code reveals that FERC limited the application of the Code to sales within its jurisdiction. FERC acknowledged that because of acts deregulating first sales of natural gas, such sales were outside the

14. Section III.A of the Commission's final order is titled “Application of Code of Conduct to Jurisdictional Sellers,” and paragraphs 14–22 discuss the scope of FERC's jurisdiction over the natural gas industry.

15. The EPA provides, in relevant part: It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation

services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.

Pub.L. No. 109–58 tit. III, § 315 (codified at 15 U.S.C. § 717c–1).

scope of FERC's jurisdiction. Amendments to Blanket Sales Certificates, 68 Fed.Reg. 66,323 ¶ 14 (Nov. 26, 2003). FERC further noted that some commenters had raised "concerns regarding the potential adverse effect of imposing the proposed code of conduct only on the portion of the natural gas market under the Commission's jurisdiction," *id.* ¶ 16, and responded by stating, "The fact that the Commission does not regulate the entire natural gas market does not compel the Commission to refrain from exercising its authority over that portion of the gas market which is within its jurisdiction to prevent the manipulation of prices." *Id.* ¶ 21. The discussion of jurisdictional limitations within the Code of Conduct itself suggests that the Code does *not* support the Defendants' argument that FERC had jurisdiction over the anticompetitive behavior related to nonjurisdictional sales. For these reasons, the 2003 enactment of the Code of Conduct does not affect our conclusion that the NGA does not grant FERC jurisdiction over claims arising out of false price reporting and other anticompetitive behavior associated with nonjurisdictional sales.

IV. The District Court's Orders Denying Plaintiffs Leave to Amend

The *Farmland, Breckenridge, Learjet*, and *Heartland* Plaintiffs appeal the district court's October 29, 2010, order denying them leave to amend their complaints to add federal antitrust claims. Their motions for leave to amend their complaints were filed nine months after the March 2, 2009, scheduling deadline to amend pleadings. The *Breckenridge* Plaintiffs also appeal the district court's April 21, 2008, order denying them leave to amend their complaint to add a state law treble damages remedy.

We review a district court's decision denying leave to amend pleadings for abuse of discretion. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir.1992). We hold that in the present case, the district court did not abuse its discretion in denying either of the two motions for leave to amend complaints, and therefore affirm both the October 29, 2010, order denying the *Farmland, Breckenridge, Learjet*, and *Heartland* Plaintiffs leave to amend their complaints to add federal antitrust claims, as well as the April 21, 2008, order denying the *Breckenridge* Plaintiffs leave to amend their complaint to add a state law treble damages claim.

A. October 29, 2010, Order

We summarize briefly the procedural history of this case to provide context for our decision to affirm the district court's October 29, 2010, order.

On April 8, 2005, the district court granted summary judgment to the defendants in the *Texas-Ohio* and *Abelman* cases on the ground that the plaintiffs' claims in those cases were barred by the filed-rate doctrine. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 368 F.Supp.2d 1110 (D.Nev.2005), *rev'd by* 243 Fed.Appx. 328 (9th Cir.2007) and *In re Western States Wholesale Natural Gas Antitrust Litig.*, 408 F.Supp.2d 1055 (D.Nev.2005), *rev'd by* 248 Fed.Appx. 821 (9th Cir.2007). Four months later, the first of these present actions was filed. In September 2007, this court issued its decision in *Gallo* and simultaneously reversed *Texas-Ohio* and *Abelman*, holding that the filed-rate doctrine does not bar state or federal antitrust claims arising out of the allegations that energy traders manipulated the price index. *See E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027 (9th Cir.2007); *In re Western States*

Wholesale Natural Gas Antitrust Litig., 243 Fed.Appx. 328 (9th Cir.2007) (reversing *Texas–Ohio*); *In re Western States Wholesale Natural Gas Antitrust Litig.*, 248 Fed.Appx. 821 (9th Cir.2007) (reversing *Abelman*). In November 2007, Defendants in the present case filed a new motion for summary judgment, and in May 2008, the District Court denied the motion, relying in part on *Gallo*. In July 2008, Defendants asked the District Court to reconsider its May 2008 order denying their preemption-based motion for summary judgment. Finally, in November 2009 the District Court agreed to reconsider its May 2008 order.

[11] The deadline to amend pleadings in this case was March 2, 2009. On December 15, 2009 (approximately one month after the District Court agreed to reconsider its May 2008 order denying summary judgment), Plaintiffs filed motions to modify the scheduling order and for leave to amend their complaints to add claims under the federal Sherman Antitrust Act.

The district court denied the Plaintiffs' motions to amend their pleadings, noting that when a party seeks to amend a pleading after the pretrial scheduling order's deadline for amending the pleadings has expired, the moving party must satisfy the "good cause" standard of Federal Rule of Civil Procedure 16(b)(4), which provides that "[a] schedule may be modified only for good cause and with the judge's consent," rather than the liberal standard of Federal Rule of Civil Procedure 15(a).¹⁶ "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily

considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. While a court may take into account any prejudice to the party opposing modification of the scheduling order, "the focus of the [Rule 16(b)] inquiry is upon the moving party's reasons for seeking modification . . . [i]f that party was not diligent, the inquiry should end." *Id.*

The district court in the present case noted, "The good cause standard typically will not be met where the party seeking to modify the scheduling order has been aware of the facts and theories supporting amendment since the inception of the action." The district court found that Plaintiffs were not diligent in seeking the amendment to add federal Sherman Antitrust Act claims, because they had known since 2007 (after this court held in *Gallo* that federal antitrust claims were not barred by the filed-rate doctrine) that federal antitrust claims may be viable.

We hold that the district court did not abuse its discretion in concluding that the Plaintiffs were not diligent in seeking to amend their complaints to add federal antitrust claims. Our analysis is guided by this court's decision in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.1992). In *Johnson*, Dairl Johnson was injured while skiing at Mammoth Mountain ski resort. *Id.* at 606. He filed a diversity action against the ski lift manufacturer and Mammoth Recreations, Inc., a holding company that owned a majority of the stock in Mammoth Mountain Ski Area, Inc., the entity that actually owned and operated the ski resort. *Id.* The district court filed a scheduling order which established a cut-off date of October 17, 1989, for joining additional parties. *Id.* Four

16. Fed.R.Civ.P. 15(a) provides that a party may amend its pleadings once as a matter of course within certain deadlines, and that in "all other cases, a party may amend its plead-

ing only with the opposing party's written consent or the court's leave. *The court should freely give leave when justice so requires.*" (emphasis added).

months after this deadline passed, Johnson moved to join Mammoth Mountain Ski Area, Inc., claiming that he was unaware of the existence of Mammoth Mountain Ski Area, Inc., and its corporate relationship with Mammoth Recreations, Inc. *Id.* at 607. The court found that Johnson had failed to demonstrate good cause for his belated motion to amend, since “Mammoth Recreation’s answer to the complaint and response to interrogatories amply indicated that Mammoth Recreations did not own and operate the ski resort, and thus any theory of liability predicated upon that fact would fail.” *Id.* at 609. As in *Johnson*, the Plaintiffs here have failed to demonstrate good cause for their untimely motion to amend, and thus, the district court did not abuse its discretion in denying that motion. We therefore affirm the district court’s October 29, 2010, order denying Plaintiffs leave to amend their complaints to add federal antitrust claims.

B. April 21, 2008, Order

[12] On March 4, 2008, the *Heartland* Plaintiffs filed a motion for leave to amend their complaint to add a treble damages claim under the Colorado state antitrust statute. Previously, their complaint had sought only a full refund. The district court denied the motion, stating, “Plaintiffs have been aware of the availability of an actual damages claim under the Colorado antitrust statutes since the inception of the case, but chose to plead under the full refund provision only.” The district court found that Plaintiffs’ failure to seek leave to add an actual damages claim was explicable during the time between the district court’s 2005 ruling in *Texas–Ohio* and *Abelman* that such claims were barred by the filed-rate doctrine and this court’s decision in *Gallo* holding that such claims were *not* barred. However, this court decided *Gallo* in September 2007, and Plaintiffs did not move to amend their com-

plaint to add an actual damages claim until March 4, 2008.

The district court considered it relevant that Plaintiffs had requested leave to amend to add an additional defendant on October 12, 2007, but did not make a request to add the treble damages claim at that time. The court denied the Plaintiffs’ March 4, 2008, motion for leave to amend to add a treble damages claims, finding that Plaintiffs unduly delayed amendment by waiting “until after this Court granted summary judgment on the full consideration claim, several months after *Gallo*, to seek leave to amend to add a new theory of liability of which Plaintiffs have been aware since the inception of this suit.”

[13] Although Federal Rule of Civil Procedure 15(a) provides that leave to amend “shall be freely given when justice so requires,” it “is not to be granted automatically.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.1990). This court considers the following five factors to assess whether to grant leave to amend: “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint.” *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.1990).

The district court in the present case relied heavily on the fifth factor. It noted that a “district court’s discretion [whether to grant leave to amend] is ‘particularly broad’ in deciding subsequent motions to amend where the court previously granted leave to amend.” This court’s decision in *Royal Insurance Company of America v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999) is instructive. Royal Insurance Company sued Southwest for breach of contract, breach of warranty, and negligence after Southwest allegedly caused \$900,000 of damage to a boat insured by Royal Insurance. *Id.* at 1013. Royal Insurance amended its complaint twice—

once to correct minor deficiencies in the original complaint, and once to assert additional claims against Southwest. *Id.* at 1013 n. 1. However, the district court denied Royal Insurance's motion for leave to file a third amended complaint to assert further claims against Southwest, which Royal filed after the district court granted summary judgment in favor of Southwest. *Id.* at 1013.

On appeal, this court stated, "Late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Id.* at 1016–17 (internal quotation marks omitted). We relied on the fact that Royal Insurance had knowledge of the relevant facts from the inception of the lawsuit, and also the fact that Royal had twice before amended its complaint, to hold that the district court did not abuse its discretion by denying Royal's motion for leave to file a third amended complaint. *Id.* at 1017 ("Considering that Royal had twice before amended its complaint and moved to amend a third time only after the district court dismissed its claims on summary judgment, the district court did not abuse its discretion by denying Royal's motion to amend.").

In the present case, we find that the district court did not abuse its discretion in denying the *Heartland* Plaintiffs' motion for leave to amend to add a treble damages state law claim. We therefore affirm the district court's order denying that motion.

V. Dismissal of the AEP Defendants from the *Arandell* and *Heartland* Lawsuits

[14] The district court entered separate orders dismissing the AEP Defen-

dants¹⁷ from the *Arandell* suit filed in Wisconsin state court and dismissing the AEP Defendants from the *Heartland* suit filed in Missouri state court prompted by the AEP Defendants' motions to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). This court reviews *de novo* a district court's determination that it does not have personal jurisdiction over a defendant. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.2004).

A. Facts

The operative facts alleged in each case are substantially similar. The *Arandell* Plaintiffs filed a class action in Wisconsin pursuant to the Wisconsin Antitrust Act, Wisconsin Statutes ch. 133, brought by and on behalf of a class consisting of all Wisconsin industrial and commercial purchasers of natural gas for consumption in Wisconsin between January 1, 2000 and October 21, 2002. Their complaint alleged that during the relevant time period, the Defendants conspired to restrain trade or commerce relating to natural gas.

The *Heartland* Plaintiffs filed a class action in Missouri pursuant to the Missouri Antitrust Laws, Missouri Statutes § 416.010 *et seq.*, brought by and on behalf of a class consisting of all Missouri industrial and commercial purchasers of natural gas for consumption in Missouri between January 1, 2000 and October 21, 2002. Their complaint alleged that during the relevant time period, the Defendants conspired to restrain trade or commerce relating to natural gas.

None of the following basic facts about AEP's corporate structure are in dispute.

17. The "AEP Defendants" are American Electric Power Company ("AEP") and its subsid-

iary, AEP Energy Services, Inc ("AEPES").

AEP is a New York corporation with its principal place of business in Columbus, Ohio. During the relevant time period in each case, AEP wholly owned and controlled its subsidiary, AEP Energy Services, Inc. (AEPES), an Ohio corporation with a principal place of business in Columbus, Ohio. AEP is a holding company that derives its income from dividends on its subsidiaries' stocks; the AEP Defendants have no office, bank accounts, property, or employees in either Wisconsin or Missouri; the AEP Defendants have not qualified to do business in either Wisconsin or Missouri and have not appointed a registered agent for service of process in either of those states; the AEP Defendants have not paid taxes, manufactured products, or performed services in either Wisconsin or Missouri; and the AEP Defendants have not directed advertising specifically at Wisconsin or Missouri residents.

In the *Arandell* case, the Plaintiffs claim specific personal jurisdiction¹⁸ over the AEP Defendants because their actions pursuant to the alleged conspiracy “were intended to have, and did have, a direct, substantial, and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period.” Plaintiffs alleged that personal jurisdiction existed over AEP based on the activities of its corporate affiliates, namely AEPES, which entered into a long-term “natural gas supply agreement with Wisconsin Electric Power Company during the Relevant Time Period, and sold natural gas to Wisconsin Electric Power Company pursuant to that agreement.”

The district court found that from 1998–2003, AEPES entered into natural gas

supply agreements with various Wisconsin companies, and that trade confirmations evince numerous sales made to companies with Wisconsin addresses throughout 2001–2003. AEP acted as a guarantor for AEPES during the relevant time period to facilitate AEPES's business, including issuing guarantees on AEPES's behalf to several Wisconsin-based entities. However, AEPES has never entered into a contract or delivered gas to any of the named plaintiffs in the case.

The *Heartland* case presents substantially similar facts. The *Heartland* Plaintiffs claim specific personal jurisdiction¹⁹ over the AEP Defendants because their actions pursuant to the alleged conspiracy “were intended to have, and did have, a direct, substantial, and reasonably foreseeable effect on commerce in Missouri during the Relevant Time Period.” Plaintiffs allege that personal jurisdiction existed over AEP based on the activities of its corporate affiliates, namely AEPES, which sold natural gas to Missouri entities during the relevant time period. The Plaintiffs also allege that one of the primary Missouri entities that AEP traded with, Aquila Merchant Services, was “an active member of the conspiracy to manipulate natural gas prices.”

The district court found that from 1997–2001, AEPES entered into natural gas supply agreements with various Missouri companies. From 2000–2002, AEPES sold billions of dollars worth of natural gas to Missouri-based entities. AEP acted as a guarantor for AEPES during the relevant time period to facilitate AEP Energy Services's business, including issuing guarantees on AEPES's behalf to several Missouri-based entities. However, AEPES

18. The *Arandell* Plaintiffs do not argue that the district court could exercise general personal jurisdiction over AEP or AEPES.

19. The *Heartland* Plaintiffs do not argue that the district court could exercise general personal jurisdiction over AEP or AEPES.

has never entered into a contract with either of the named Plaintiffs in this case.

B. Analysis

[15, 16] When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128–29 (9th Cir.2003). However, the plaintiff must make “only a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.2001). For the purposes of deciding whether a prima facie showing has been made, “the court resolves all disputed facts in favor of the plaintiff.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir.2006).

[17–21] Personal jurisdiction over a nonresident defendant is proper if permitted by a state’s long-arm statute²⁰ and if the exercise of that jurisdiction does not violate federal due process. *Fireman’s Fund Ins. Co. v. Nat’l Bank of Coops.*, 103 F.3d 888, 893 (9th Cir.1996). For the exercise of jurisdiction to satisfy due process, a nonresident defendant, if not present in the forum, must have “minimum contacts” with the forum such that the assertion of jurisdiction “does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310,

20. The Wisconsin Supreme Court has held that Wisconsin’s long-arm statute, Wis. Stat. § 801.05, allows for the exercise of jurisdiction to the full extent allowed by the due process clause. See *Rasmussen v. General Motors Corp.*, 335 Wis.2d 1, 803 N.W.2d 623, 630 (2011) (stating that “§ 801.05 was intended to provide for the exercise of jurisdiction over nonresident defendants to the full extent consistent with the requisites of due process of law”) (internal citations omitted). The “jurisdictional inquiries under state law and federal due process merge into one analysis” when, as here, the state’s long-arm statute is

316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (internal quotation marks omitted). A federal district court may exercise either general or specific personal jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). To establish general jurisdiction, the plaintiff must demonstrate that the defendant has sufficient contacts to “constitute the kind of continuous and systematic general business contacts that approximate physical presence.” *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124 (9th Cir.2002) (internal quotation marks omitted). However, because the Plaintiffs do not claim that the district court could exercise general jurisdiction in either Wisconsin or Missouri over the AEP Defendants in this case, the only relevant question on appeal is whether the district court could exercise specific personal jurisdiction over the AEP Defendants.

[22–24] This court uses the following three-part test to analyze whether a party’s “minimum contacts” meet the due process standard for the exercise of specific personal jurisdiction:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting

“coextensive with federal due process requirements.” *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir.1991). In Missouri, however, the Missouri Supreme Court has held that there are two separate inquiries: “one inquiry to establish if a defendant’s conduct was covered by the long-arm statute, and a second inquiry to analyze whether the exercise of jurisdiction comports with due process requirements.” *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 909 (8th Cir.2012) (citing *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo.2010)).

activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable

Schwarzenegger, 374 F.3d at 802. "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir.1995). While all three requirements must be met, this court has stated that in its consideration of the first two prongs, "[a] strong showing on one axis will permit a lesser showing on the other." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1210 (9th Cir.2006) (en banc). That means that a single forum state contact can support jurisdiction if the cause of action arises out of that particular purposeful contact of the defendant with the forum state. *Id.* (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987)). The district court in the *Arandell* and *Heartland* cases focused its analysis on the allegations that AEPES made sales to Wisconsin- and Missouri-based entities and found that the Plaintiffs had not met their burden of proving the second requirement for specific jurisdiction.²¹ This court has referred to the second prong of the specific jurisdiction test as a "but for" test. *See*

21. The district court assumed, without expressly deciding, that AEPES's sales to Wisconsin- and Missouri-based entities and delivery of natural gas to the forum were sufficient to satisfy the "purposeful availment" prong of the specific jurisdiction inquiry. Because it found that Plaintiffs failed to show that their claims arose out of AEPES's contacts with Wisconsin and Missouri, it did not address the third prong of the specific jurisdiction inquiry (whether the exercise of jurisdiction would be reasonable).

Shute v. Carnival Cruise Lines, 897 F.2d 377, 385 (9th Cir.1990), *rev'd on other grounds, Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).²² Under the "but for" test, "a lawsuit arises out of a defendant's contacts with the forum state if a direct nexus exists between those contacts and the cause of action." *Fireman's Fund Ins. Co.*, 103 F.3d at 894. The district court found that there was no causal nexus between AEP Defendants' activities in the forum states (selling natural gas to non-Plaintiff third parties) and the harm allegedly suffered by the Plaintiffs (buying gas at inflated prices from third party sellers).

[25] We need not decide whether personal jurisdiction could be grounded on the AEP Defendants' sales of natural gas in the forum states to third parties. The *Arandell* and *Heartland* Plaintiffs also predicated their antitrust claims on the AEP Defendants' manipulation of the price indices pursuant to a conspiracy to inflate natural gas prices. The district court conducted the personal jurisdiction analysis based on the natural gas sales only. We find that the district court erred in failing to analyze whether Plaintiffs' allegations of anticompetitive behavior directed at the forum states are sufficient to support the exercise of specific personal jurisdiction.

There is no question that the Plaintiffs' state antitrust claims arise out of the AEP Defendants' collusive manipulation of the gas price indices.²³ In other words, their

22. *See Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1051 n. 7 (9th Cir.1997) (noting that even after the Supreme Court's decision in *Shute*, "the 'but for' test is still employed in determining whether a plaintiff's injuries arose out of the defendant's forum-related activities.").

23. For example, the *Arandell* Plaintiffs allege, "The actions of the defendants resulted in the plaintiffs paying inflated prices for natural gas during the Relevant Time Period. During the

claims “arise[] out of or relate[] to” the Defendants’ alleged forum-related activities. *Schwarzenegger*, 374 F.3d at 802. The second prong of the test for specific personal jurisdiction is therefore satisfied. The key issue in this analysis is therefore whether the AEP Defendants’ price manipulation satisfies the *first* prong of the specific personal jurisdiction inquiry, i.e., whether “[t]he non-resident defendant . . . purposefully direct[ed] his activities or consummat[ed] some transaction with the forum or resident thereof; or perform[ed] some act by which he purposefully avail[ed] himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.” *Id.* This first prong is satisfied by showing either purposeful availment or purposeful direction, which are two distinct concepts. See *Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 672 (9th Cir.2012).

[26] “Purposeful direction” requires that the defendant allegedly must have “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is like-

Relevant Time Period, natural gas prices in Wisconsin more than doubled. The plaintiffs paid higher prices for natural gas than they otherwise would have paid if the defendants’ conspiracy had not existed.”

24. The plaintiff in *Calder* was an entertainer who lived and worked in California. 465 U.S. at 785, 104 S.Ct. 1482. She brought suit in California state court against the National Enquirer after the tabloid published a story alleging that the plaintiff had an alcohol problem. *Id.* at 784, 788 n. 9, 104 S.Ct. 1482. The article was written in Florida, and the National Enquirer was published in Florida with a large circulation in California. *Id.* at 785, 104 S.Ct. 1482. The California courts “concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to [the plaintiff] in California.” *Id.* at 787, 104 S.Ct. 1482. The Supreme Court affirmed,

ly to be suffered in the forum state.” *Washington Shoe*, 704 F.3d at 673 (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir.2011)). This test for “purposeful direction” is based on the Supreme Court’s test in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).²⁴

The facts alleged in these causes of action present a compelling case for finding that the AEP Defendants “purposefully directed” their anticompetitive behavior at the forum states. The first two prongs of the “purposeful direction” test ask whether there was an “intentional act”²⁵ that was “expressly aimed at the forum state.”²⁶ Here, the pleadings contain allegations of “intentional acts” in the form of anticompetitive behavior expressly aimed at the forum states. The Wisconsin *Arandell* Plaintiffs alleged, for example, that AEP “either directly or indirectly through one of its controlled affiliates, engaged in the practice of wash sales, and manipulated market indices through the reporting of false trading information,” actions which were “intended to have, and did have, a direct, substantial and reasonably foresee-

holding that jurisdiction in California was proper because the defendants’ intentional conduct in Florida was calculated to cause injury to the plaintiff in California. *Id.* at 791, 104 S.Ct. 1482.

25. This court has recently defined “intentional act” as “an external manifestation of the actor’s intent to perform an actual, physical act in the real world, not including any of its actual or intended results.” *Washington Shoe*, 704 F.3d at 674.

26. “We have repeatedly stated that the ‘express aiming’ requirement is satisfied, and specific jurisdiction exists, when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Washington Shoe*, 704 F.3d at 675 (internal quotation marks omitted).

able effect on commerce in Wisconsin.” By alleging acts “intended to have” an effect in Wisconsin, the Plaintiffs went beyond alleging acts with a “mere foreseeable effect” in the forum. *See Pebble Beach*, 453 F.3d at 1156 (citing *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir.2000)). They alleged intentional acts by the AEP Defendants that were “directed at the forum state” itself. *Id.* at 1158.

The *Arandell* Plaintiffs further alleged that AEP’s officers or directors made agreements “which tended to advance or control the market prices of natural gas that its affiliates sold in the United States or in Wisconsin” and that these officers or directors made “strategic marketing policies and decisions” to report prices to natural gas price indices “that affected the market prices of natural gas.” The policies and decisions, alleged the *Arandell* Plaintiffs, were “implemented on an operational level by affiliates, such as [AEPES].” The *Arandell* Plaintiffs also claimed that all Defendants (including the AEP Defendants) “worked together to fraudulently increase the retail price of natural gas paid by commercial entities in Wisconsin.” This conspiracy was allegedly carried out through unlawful acts that were “ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of defendants’ business or affairs.” For example, the Plaintiffs alleged that “American Electric Power Company and AEP Energy Services, Inc. traders were instructed by their superiors to adjust the prices and volumes of trades they had made and, in some cases, to report trades that never occurred.” The “purpose and effect” of this was to “collusively and artificially inflate the price of natural gas paid by commercial entities in Wisconsin.” These alleged facts, taken as true, estab-

lish that the AEP Defendants’ price manipulation was “expressly aimed” at Wisconsin, because the AEP Defendants knew and intended that the consequences of their price manipulation would be felt in Wisconsin. *Ibrahim v. Dep’t of Homeland Sec.*, 538 F.3d 1250, 1258 (9th Cir.2008).

The third prong of the “purposeful direction” test asks whether the intentional acts caused harm that the defendant knows is likely to be suffered in the forum state. In the present case, the *Arandell* Plaintiffs further alleged that each defendant “committed one or more acts or omissions outside of Wisconsin, which caused an injury to person or property within Wisconsin.” Such injury included increases in the price of gas, which was specifically alleged in the complaint—for example, the Plaintiffs alleged that the city gate price for natural gas in Wisconsin nearly quadrupled in the span of a year, while the price for commercial consumers more than doubled. The harm was magnified by increased price volatility, which “caused commercial entities in Wisconsin to incur greater expenses associated with hedging natural gas costs,” further injuring the Plaintiffs by “depriving them of the right and ability to make risk management, resource allocation and other financial decisions relating to natural gas, in a full and free competitive market.”

In this case, the amount of harm in Wisconsin, and the specificity with which it was alleged, is sufficient to satisfy the third prong of the “purposeful direction” test. Our case law does not require that the “brunt” of the harm be suffered in the forum state; as long as “a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.” *La Ligue*, 433 F.3d at 1207. For these reasons, we find that the *Arandell* Plaintiffs have alleged sufficient

facts to support the exercise of specific personal jurisdiction over the AEP Defendants on the theory that the AEP Defendants “purposefully directed” their anti-competitive conduct at the forum state of Wisconsin.

[27] The district court did not address the third prong of the personal jurisdiction inquiry, whether the exercise of jurisdiction would “comport with fair play and substantial justice”—in other words, whether the exercise of jurisdiction would be reasonable. *Schwarzenegger*, 374 F.3d at 802. Once the Plaintiffs have shown that the exercise of personal jurisdiction satisfies the first two prongs of the personal jurisdiction test, the burden shifts to the defendant to make a “compelling case” that the exercise of jurisdiction would be unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). This court considers the following seven factors in determining whether the exercise of jurisdiction would be reasonable:

- (1) the extent of the defendant’s purposeful interjection into the forum state,
- (2) the burden on the defendant in defending in the forum,
- (3) the extent of the conflict with the sovereignty of the defendant’s state,
- (4) the forum state’s interest in adjudicating the dispute,
- (5) the most efficient judicial resolution of the controversy,
- (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief, and
- (7) the existence of an alternative forum.

27. The *Heartland* Plaintiffs’ opening brief states, “the *Heartland* plaintiffs are appealing the District Court’s dismissal of one defendant—AEP Energy Services, Inc.—from that case for lack of personal jurisdiction.”

28. The Plaintiffs have filed a Motion to Certify Question of Wisconsin State Law to the Wisconsin Supreme Court. Because we find that

Bancroft, 223 F.3d at 1088. We find that the AEP Defendants have not made a “compelling case” based upon any of these factors that the exercise of personal jurisdiction in Wisconsin would be unreasonable.

For these reasons, we reverse the district court’s order dismissing the AEP Defendants from the Wisconsin *Arandell* case for lack of personal jurisdiction. The Missouri *Heartland* Plaintiffs alleged similar facts as the Wisconsin *Arandell* Plaintiffs, and therefore our analysis applies with equal force to the *Heartland* case. We note, however, that the *Heartland* Plaintiffs appeal the district court’s dismissal of AEPES for lack of personal jurisdiction, but do not challenge the district court’s dismissal of AEP, the parent company.²⁷ The *Heartland* Plaintiffs thus appear to have waived any argument for personal jurisdiction over AEP and we reverse the district court’s order in *Heartland* dismissing the AEP Defendants for lack of jurisdiction in *Heartland* as to AEPES only.

VI. Order Granting Duke Energy Trading and Marketing’s Motion for Partial Summary Judgment

[28] Several Plaintiffs in *Arandell Corp. v. Xcel Energy, Inc.* appeal the district court’s order granting Defendant Duke Energy Trading and Marketing, LLC’s (“DETM”) motion for partial summary judgment based on the district court’s interpretation of Wisconsin Statutes § 133.14.²⁸ This court reviews *de novo* a district court’s interpretation of state law. *See Hawk v. J.P. Morgan*

the plain text of Wisconsin Statutes § 133.14 is clear, we do not believe that certification is necessary as a “means to obtain authoritative answers to unclear questions of state law,” and we therefore deny the motion. *Toner v. Lederle Labs., Div. of Amer. Cyanamid Co.*, 779 F.2d 1429, 1432 (9th Cir.1986).

Chase Bank USA, 552 F.3d 1114, 1118 (9th Cir.2009).

Several Wisconsin corporations (Aran-dell Corp., Merrick's, Inc., Safety-Kleen Systems, Inc., and Sargento Foods) brought suit against natural gas sellers in Wisconsin state court, alleging two causes of action under Wisconsin state law. Count One arose under Wisconsin Statutes § 133.14, which voids contracts to which an antitrust conspirator is a party and allows recovery of payments made pursuant to such a contract. Count Two sought treble damages under Wisconsin Statutes § 133.18, which provides that "any person" injured, directly or indirectly, by a violation of the Wisconsin Antitrust Act may recover treble damages.

[29, 30] All but one of the named Defendants moved to dismiss or for summary judgment on Count One of Plaintiffs' Amended Complaint. They argued that the Plaintiffs lacked standing to assert a claim against them under Wisconsin Statutes § 133.14 because none of the named Plaintiffs purchased natural gas directly from any of the moving defendants. Wisconsin Statutes § 133.14 provides:

All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by [§] 133.03, and which contract or agreement is founded upon, is the result of, grows out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. *Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered*

from any person who received or benefited from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party.

Wis. Stat. § 133.14 (emphasis added). In interpreting a state statute, a federal court applies the relevant state's rules of statutory construction. *See In re Lieberman*, 245 F.3d 1090, 1092 (9th Cir.2001). In Wisconsin, to determine the meaning of a statutory provision, courts begin with the statute's plain language, "taking into consideration the context in which the provision under consideration is used," and furthermore, "[s]tatutory language is given its common, ordinary, and accepted meaning." *Burbank Grease Servs., LLC v. Sokolowski*, 294 Wis.2d 274, 717 N.W.2d 781, 788 (2006).

[31] We agree with the district court's conclusion that the statutory text at issue is unambiguous. Section 133.03 makes illegal every contract, combination, or conspiracy in restraint of trade or commerce. *See* Wis. Stat. § 133.03(1). The first sentence of Section 133.14 therefore provides that any contract made by a member of an antitrust conspiracy is void, and no conspirator who is a party to that contract may recover or benefit therefrom. The second sentence of Section 133.14 permits the party making a payment "upon, under or pursuant to such contract" to recover those payments. There is no provision authorizing recovery by indirect purchasers or other non-parties to the voided contract.²⁹

Plaintiffs argue that the Wisconsin legislature intended for the Wisconsin Antitrust Act to be interpreted as broadly as possi-

29. This is in contrast to Section 133.18, which does permit indirect purchasers to recover treble damages. *See* Wis. Stat. § 133.18 (providing, in relevant part, that "any person injured, directly or indirectly, by

reason of anything prohibited buy this chapter may sue therefor and shall recover threefold the damages sustained by the person") (emphasis added).

ble. For example, they quote Wisconsin Statutes § 133.01, which provides, “It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition.” However, evidence that the legislature intended the Act to be applied broadly cannot overcome the plain text of Section 133.14, which does not provide for recovery for indirect purchasers or other non-parties to the contract.

After the district court held on February 19, 2008, that “the party seeking the recovery [under Section 133.14] must have been a party to the void contract, or at least have made payments based on the contractual obligation set forth in the conspirator’s contract,” Plaintiffs Sargento, Merrick’s, and Ladish admitted that they had no direct purchase agreements with DETM. Therefore, the district court concluded, “No genuine issue of material fact remains that Sargento, Merrick’s, and Ladish did not purchase natural gas directly or through an agent from DETM,” and granted summary judgment on Count One of Plaintiffs’ Amended Complaint as to these three Plaintiffs. Because we agree with the district court’s conclusion that the plain text of Wisconsin Statutes § 133.14 allows recovery only by plaintiffs who were direct purchasers under the voided contract, we affirm the district court’s order granting partial summary judgment to DETM.

VII. Conclusion

We **REVERSE** the district court’s order granting summary judgment to Defendants on preemption grounds, **REVERSE** in part the district court’s orders dismissing the AEP Defendants from the Wisconsin *Arandell* and Missouri *Heartland* suits, and **AFFIRM** all other orders at issue in this appeal. We **REMAND** to the district

court for further proceedings consistent with this opinion.³⁰

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.



In re COMPLAINT OF JUDICIAL MISCONDUCT.

No. 11–90099.

United States Court of Appeals,
Ninth Circuit.

May 6, 2013.

Background: Pro se litigant who suffers from a communications disability brought a judicial misconduct action against a district judge.

Holdings: The Court of Appeals, Kozinski, Chief Judge, held that:

- (1) judge’s denial of litigant’s request that his caretaker represent him was not judicial misconduct;
- (2) judge’s decision to rule on complainant’s case on the pleadings and remove case from motion calendar was not judicial misconduct;
- (3) transmission to opposing party of an order denying complainant’s accommodation request was not judicial misconduct;
- (4) requirement that complainant resubmit his accommodation request by way of a properly filed motion was not an abuse of power; and
- (5) posting of complainant’s private, medical related documents on judicial rec-

³⁰ The parties shall bear their own costs on

appeal.

and may be subject to harmless error review). The trial court still instructed the jury to find, beyond a reasonable doubt, that the sexual intercourse had occurred by “forcible compulsion.” Further, as the district court noted, Spicer’s conviction rested solely on the jury’s assessment of who was more credible, Spicer or S.M.; and extensive evidence, such as bruising on S.M.’s arm and wrists, duct tape found in S.M.’s bedroom, residue on S.M.’s wrists, and witnesses’ testimony of S.M.’s emotional state after the rape, corroborated S.M.’s story. Thus, although the trial court did not instruct the jury that it was the prosecution’s burden to prove nonconsent beyond a reasonable doubt, we do not believe that the jury would have come to a different verdict even if the court had given a proper instruction.

We affirm the district court’s denial of habeas relief, on the grounds that even if the state trial court had given the jury a constitutionally defective instruction, that error was harmless.

AFFIRMED.

McKEOWN, Circuit Judge, concurring:

Although I concur in the result reached by the majority, I am not entirely convinced that *Neder v. United States*, — U.S. —, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), answers the question here, *i.e.*, whether harmless error review applies to a claim that the jury instructions inappropriately shifted the burden to the defendant to disprove an element of the offense. I do not believe, however, that this case requires further analysis of the review standard because the denial of Spicer’s habeas petition can be affirmed on the ground that the state court decisions at issue are not “contrary to” or “an unreasonable application of” “clearly established Federal law.” 28 U.S.C. § 2254(d)(1). Although “forcible compulsion” and “consent” have some conceptual overlap, lack

of consent is not an element of second degree rape, and requiring the defendant to prove consent in this context does not run afoul of due process. See *Martin v. Ohio*, 480 U.S. 228, 234, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Leland v. Oregon*, 343 U.S. 790, 794, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *State v. Camara*, 113 Wash.2d 631, 781 P.2d 483 (1989).



ROYAL INSURANCE COMPANY OF AMERICA, a business entity, Plaintiff–Appellant,

v.

SOUTHWEST MARINE, a business entity, dba South Bay Boat Yard; Does 1 through 5, Defendants–Appellees.

Royal Insurance Company of America, a business entity, Plaintiff–Appellant,

v.

Southwest Marine, a business entity, dba South Bay Boat Yard; Does 1 through 5, Defendants–Appellees,

v.

American Rigging Company, Inc., a corporation; MacWhyte Company, a Division of Amsted Industries, Inc.; Accredited Certified Associates, Third-party–Defendants–Appellees.

**Royal Insurance Company of America,
a business entity, Plaintiff-
Appellant,**

v.

David M. Garthwaite, aka David Garthwaite, Jr.; David Garthwaite, Sr., aka David Garthwaite, Counter-Claimants-Appellees,

v.

**Southwest Marine, a business entity,
dba South Bay Boat Yard; Does 1
through 5, Defendants-Appellees,**

v.

American Rigging Company, Inc., a corporation; MacWhyte Company, a Division of Amsted Industries, Inc.; Accredited Certified Associates, Third-party-Defendants-Appellees.

Nos. 97-55692, 97-56236 and 98-55407.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 5, 1999.

Filed Oct. 14, 1999.

After yacht was damaged as a result of collapse of boat yard's crane, yacht's insurer, as subrogee, sued boat yard for breach of contract, breach of warranty, negligence, and negligent and intentional misrepresentation. Third-party complaints were filed against crane repairer and inspector. The United States District Court for the Southern District of California, Jeffrey T. Miller, J., granted summary judgment for boat yard, denied insurer's motion to file a third amended complaint, and granted judgment on the pleadings in favor of the third-party defendants. Insurer appealed. The Court of Appeals, Browning, Circuit Judge, held that: (1) exculpatory clause in contract for rental of space in boat yard was not invalid for overreaching; (2) except in towing contracts, exculpatory clauses in ship repair contracts are enforceable even when they completely absolve parties from liability for negligence;

(3) there was triable issue of fact as to whether boat yard was grossly negligent; (4) exculpatory clauses did not shield boat yard from liability for gross negligence or intentional misrepresentation; (5) there was no abuse of discretion in denying leave to amend complaint a third time; (6) language in third-party complaints was sufficient as demands that action proceed as if plaintiff had commenced it directly against third-party defendants; and (7) plaintiff was not required to amend its complaint to assert specific claims against third-party defendants.

Affirmed in part, reversed in part, and remanded.

1. Admiralty ⇌103

Order granting boat yard's motion for summary judgment in action arising from damage to yacht, though interlocutory, was appealable because a partial summary judgment order which finally determines one party's claims as to another party is appealable under admiralty exception to final judgment rule. 28 U.S.C.A. § 1292(a)(3).

2. Admiralty ⇌103

Order denying leave to amend to assert additional causes of action, though interlocutory, was appealable in action arising from damage to yacht because it effectively dismissed those claims. 28 U.S.C.A. § 1292(a)(3).

3. Contracts ⇌114

Absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced.

4. Contracts ⇌114

Even if yacht owner objected to an exculpatory provision during negotiations for contract to rent space in boat yard, where he ultimately assented without complaint, boat yard's conduct could not be characterized as "overreaching," despite contention that boat yard deliberately bypassed owner's attorney, inserted the ex-

culpatory language, and extracted owner's signature without counsel.

See publication Words and Phrases for other judicial constructions and definitions.

5. Contracts ⇌114

Except in towing contracts, exculpatory clauses in ship repair contracts are enforceable even when they completely absolve parties from liability for negligence.

6. Admiralty ⇌1.15

Where the court's jurisdiction is grounded in admiralty, the court looks to the common law in considering maritime torts.

7. Negligence ⇌273

"Gross negligence" is simply a point on a continuum of probability, and its presence depends on the particular circumstance of each case.

See publication Words and Phrases for other judicial constructions and definitions.

8. Federal Civil Procedure ⇌2512

Yacht owner's subrogee raised a triable issue of fact, precluding summary judgment, as to whether boat yard was grossly negligent in incident in which its crane dropped yacht and boom then fell on yacht, where the evidence would support a finding that boat yard intentionally used yacht as a test weight for the newly-repaired crane even though: (1) the crane was damaged in the first place during an attempted lift of the same yacht; (2) the crane had not been properly certified and returned to service following the repairs; (3) yacht's captain had given express instructions to boat yard not to use the yacht as the test weight; and (4) boat yard's supervisor gave the captain specific assurances that all testing of the crane would be done before the yacht was lifted.

9. Contracts ⇌114

A party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence.

10. Contracts ⇌114

Fraud ⇌36

Exculpatory clauses in ship repair contract, as well as clauses providing for a "time limit on all claims" and a "waiver of subrogation," did not shield boat yard from liability for gross negligence or intentional misconduct, including intentional misrepresentation.

11. Federal Courts ⇌817

A district court's denial of leave to amend complaint is reviewed for an abuse of discretion, keeping in mind the strong policy in favor of allowing amendment, and considering: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff previously amended the complaint.

12. Federal Civil Procedure ⇌840

Late amendments to complaint to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.

13. Federal Civil Procedure ⇌839.1

District court did not abuse its discretion in denying leave to amend complaint a third time, after claims had been dismissed on summary judgment, where third amended complaint did nothing more than reassert an old theory of liability based on facts known from the inception of the lawsuit.

14. Admiralty ⇌60

Within rule governing third-party practice in admiralty and maritime cases, third-party plaintiff has made demand for judgment against the third-party defendant in favor of the plaintiff, so that action shall proceed as if the plaintiff had commenced it against the third-party defendant, if third-party complaint prays that the third-party defendant make its defenses and answer directly to the claims of the plaintiff. Fed.Rules Civ.Proc.Rule 14(c), 28 U.S.C.A.

15. Admiralty ⇨60

The language in third-party complaints was sufficient to satisfy provision, in rule governing third-party practice in admiralty and maritime cases, for demand that action shall proceed as if plaintiff had commenced it against third-party defendants as well as third-party plaintiff, though neither of the third-party complaints contained specific language “demand[ing] judgment against the third-party defendant in favor of [plaintiff],” where both prayed that “the Third Party Defendant answer and respond to the complaint of [plaintiff] in accordance with [such rule],” and both explained how and why the third party was directly liable to plaintiff. Fed.Rules Civ.Proc.Rule 14(c), 28 U.S.C.A.

16. Admiralty ⇨60

Rule governing third-party practice in admiralty and maritime cases is to be liberally construed. Fed.Rules Civ.Proc.Rule 14(c), 28 U.S.C.A.

17. Admiralty ⇨66

Under rule governing third-party practice in admiralty and maritime cases, once third-party plaintiff had made proper demand that action proceed as if plaintiff had commenced it directly against third-party defendants, and third-party complaints explained in detail how the third-party defendants’ lack of care damaged plaintiff, plaintiff was not required to amend its complaint to assert specific claims against third-party defendants. Fed.Rules Civ.Proc.Rule 14(c), 28 U.S.C.A.

Geoffrey W. Gill, Kirlin, Campbell & Keating, Long Beach, California, for the plaintiff-appellant.

Daniel B. MacLeod, San Diego, California, for the defendant-appellee.

John R. Clifford and Lisa M. Cross, Drath, Clifford, Murphy, Wennerholm & Hagen, San Diego, California, for Accredited Certified Associates.

John F. Watkins, Watkins, Watkins & Atherton, Glendora, California, for the amicus.

Appeal from the United States District Court for the Southern District of California; Marilyn L. Huff, District Judge, Presiding. D.C. No. CV-96-00285-MLH.

Appeals from the United States District Court for the Southern District of California; Jeffrey T. Miller, District Judge, Presiding. D.C. No. CV-96-00285-JTM.

Before: HUG, Chief Judge,
BROWNING and FERGUSON, Circuit
Judges.

BROWNING, Circuit Judge:

I.

In 1993, David Garthwaite, owner of the yacht SUNAIR, entered into two agreements with Southwest Marine relating to the renovation of SUNAIR: (1) a “Do It Yourself Agreement” providing that Garthwaite would rent space at Southwest Marine’s boat yard as the site of the renovation to be completed by an outside contractor; and (2) a “Vessel Repair Order” fixing hourly rates for various services to be provided by Southwest, including crane service.

In 1994, Southwest lifted the SUNAIR from the water and placed it in a storage cradle for renovation. The lift occurred without incident. The renovation was completed in 1995 and, following sea trials, Southwest returned SUNAIR to its storage cradle for final repairs. As Southwest was lifting SUNAIR from the water, the winch drum on the crane cracked, and the yacht dropped a few inches. The SUNAIR was unharmed, but the crane suffered serious damage.

Southwest hired American Rigging Company to repair the crane. American Rigging fixed the winch drum and, together with Southwest personnel, installed a new wire rope. Southwest then hired Ac-

credited Certified Associates to inspect the crane.

Southwest attempted to relaunch SUNAIR one day after the crane was repaired. The wire rope snapped, and SUNAIR dropped several feet to the water. Moments later, the boom of the crane crashed onto SUNAIR's deck, causing more than \$900,000 in damage.

Royal Insurance Company, the insurer of SUNAIR, compensated Garthwaite for the damage to the yacht and filed suit as Garthwaite's subrogee against Southwest for breach of contract, breach of warranty, and negligence. Royal subsequently amended its complaint to assert additional claims against Southwest for negligent and intentional misrepresentation.¹ Southwest filed a third-party complaint against American Rigging. American Rigging, in turn, filed a third-party complaint against Accredited.

1. Royal actually amended its complaint twice—once to correct minor deficiencies in the original complaint, and once to assert additional claims against Southwest.
2. The orders granting Southwest's motion for summary judgment and denying Royal's motion to amend its complaint are interlocutory. Ordinarily, interlocutory orders are not appealable, but 28 U.S.C. § 1292(a)(3) "creates an exception to the final judgment rule for orders determining the rights and liabilities of the parties to admiralty cases." *Kesselring v. F/T Arctic Hero*, 30 F.3d 1123, 1125 (9th Cir.1994). The order granting summary judgment is appealable because "[a] partial summary judgment order which finally determines one party's claims as to another party is appealable under section 1292(a)(3)." *All Alaskan Seafoods, Inc. v. M/V SEA PRODUCER*, 882 F.2d 425, 427 (9th Cir.1989). The order denying leave to amend is also appealable because it effectively dismissed Royal's claims against Southwest for trespass, conversion, and bailment.
3. The rental agreement provided:
 12. *Indemnity*. Owner [Garthwaite] agrees to hold SBBY [Southwest], its affiliates, and its respective officers, agents and employees free and harmless and indemnify it from all claims, losses, damages, liabilities or expenses including reasonable attorneys' fees incurred in the defense thereof for death or

The district court granted summary judgment for Southwest based on an exculpatory clause in Garthwaite's rental agreement with Southwest, and denied Royal's motion to file an amended complaint to assert claims against Southwest for trespass, conversion, and bailment. The district court also granted judgment on the pleadings in favor of the third-party defendants, American Rigging and Accredited.

[1, 2] Royal appeals (1) summary judgment in favor of defendant Southwest Marine, (2) denial of Royal's motion to file a third amended complaint, and (3) judgment on the pleadings in favor of third-party defendants American Rigging and Accredited.² We affirm in part, reverse in part, and remand.

II.

Both agreements contain exculpatory clauses purporting to release Southwest from all liability.³ The district court sum-

injury to any person or persons including employees of Owner or damage or destruction of any property including property of Owner relating to the use and occupancy of the Designated Space and resulting directly or indirectly from the performance of this Agreement and regardless of whether such death, injury or property damages is caused in whole or in part by the negligence of SBBY, its agents or employees this indemnification shall include without limitation all court and/or arbitration costs, attorney's fees and costs of settlement or judgment. The repair order provided:

8. OWNERS ASSUMPTION OF RISK. (a) Except as provided in paragraphs 2 and 6 above [relating to warranties and exclusive remedies for breach], Owner accepts the risk of all losses hereafter occasioned by the acts or omissions of Contractor in the performance of the Work, whether in the nature of negligence, strict liability, or otherwise, and agrees to purchase, and maintain such insurance against such risks as Owner deems prudent and shall look only to said insurance for compensation or damages related to any such loss regardless of the legal or physical responsibility hereof (b) Owner accepts the risk of and Contractor shall not be liable under any circumstances for, any incidental, special or consequential damages of any nature whatsoever, . . . whether such damages be predicated upon

marily dismissed Royal's claims against Southwest, concluding they were precluded by the exculpatory clause in the rental agreement. Royal challenges that ruling.

Royal argues that the exculpatory clauses were procured by "overreaching." Specifically, Royal contends that Garthwaite's attorney objected to exculpatory language during earlier, unsuccessful negotiations with Southwest and, although aware that exculpatory language was not acceptable to Garthwaite, Southwest "deliberate[ly] bypassed" Garthwaite's attorney, inserted the exculpatory language, and "extracted Garthwaite's signature" without counsel.

[3, 4] "Clear precedent holds that, 'absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced.'" *Arcwel Marine, Inc. v. Southwest Marine, Inc.*, 816 F.2d 468, 471 (9th Cir.1987) (quoting *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1488 (9th Cir.1983)). However, we have refused to invalidate an exculpatory provision in a ship repair contract where the ship's owner "assented without complaint to the terms of the agreement." *M/V American Queen*, 708 F.2d at 1488. Even if Garthwaite objected to an exculpatory provision during contract negotiations, he ultimately "assented without complaint." Under these circumstances, Southwest's conduct cannot be characterized as overreaching. *See id.*; *see also Morton v. Zidell Explorations, Inc.*, 695 F.2d 347, 351 (9th Cir.1982) (no overreaching found where ship owners failed to object to exculpatory provision and pressure to execute agreement resulted from owners' own conduct).

an alleged breach of this Agreement, negligence by the Contractor, strict liability in tort, or upon any other basis whatsoever.

4. *See, e.g., La Esperanza De P.R., Inc. v. Perez y Cia. De Puerto Rico, Inc.*, 124 F.3d 10, 19 (1st Cir.1997) ("[C]ourts today will enforce red letter clauses that are expressed clearly in contracts entered into freely by parties of equal bargaining power, provided that the

[5] Royal argues that the exculpatory clauses are against public policy and void because they purport to absolve Southwest of *all* liability. Other circuits may adhere to that rule,⁴ but the Ninth Circuit has weighed the policy considerations, *see Morton*, 695 F.2d at 350, and concluded that, except in towing contracts,⁵ exculpatory clauses are enforceable even when they completely absolve parties from liability for negligence, *see, e.g., Arcwel Marine*, 816 F.2d at 470 (enforcing provision exculpating party from "any loss"); *M/V American Queen*, 708 F.2d at 1488 ("It is well settled that in admiralty law, the parties to a repair contract may validly stipulate that the shipowner is to assume *all* liability for damage occasioned by the negligence of the shipyard.") (emphasis added)).

Royal argues that Southwest was using SUNAIR as a test weight for the boom portion of the newly-repaired crane when the accident occurred despite assurances to SUNAIR's captain that the yacht would not be used as a test weight; that this conduct amounted to deliberate misconduct or gross negligence; and that the exculpatory clauses cannot shield Southwest from liability for such conduct.

No court of appeals has held an exculpatory clause in a maritime contract inapplicable to gross negligence. The First and Fifth Circuits have indicated that exculpatory clauses do not cover gross negligence, but concluded that such conduct had not been established in the particular cases. *See La Esperanza De P.R., Inc. v. Perez y Cia. De Puerto Rico, Inc.*, 124 F.3d 10, 19 (1st Cir.1997); *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 411 (5th Cir.1982). The issue remains unresolved in the Ninth Circuit. *See M/V American*

clause does not provide for a total absolution of liability." (emphasis added) (citing *Edward Leasing Corp. v. Uhlig & Assocs., Inc.*, 785 F.2d 877, 888-89 (11th Cir.1986)).

5. *See Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 91, 75 S.Ct. 629, 99 L.Ed. 911 (1955).

Queen, 708 F.2d at 1490 (noting but not resolving “the applicability of a limitation provision to gross negligence”).

[6, 7] The first inquiry is whether Royal raised a triable issue as to Southwest’s gross negligence. *See id.* Because the court’s jurisdiction is grounded in admiralty, the court “look[s] to the common law in considering maritime torts.” *Su v. M/V SOUTHERN ASTER*, 978 F.2d 462, 472 (9th Cir.1992) (looking to Washington law for elements of fraud in admiralty case originating in that state). California law defines “gross negligence” as “the want of even scant care or an extreme departure from the ordinary standard of conduct.” *Kearl v. Board of Med. Quality Assurance*, 189 Cal.App.3d 1040, 236 Cal.Rptr. 526, 534 (Cal.Ct.App.1986) (internal quotations and citations omitted). Black’s Law Dictionary defines “gross negligence” as “[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.” *Black’s Law Dictionary* 1185 (4th ed.1968); accord *La Esperanza*, 124 F.3d at 19 (defining gross negligence as “harm wilfully inflicted or caused by gross or wanton negligence”). Case law from this circuit indicates “gross negligence” is simply a “point[] on a continuum of probability,” *Vision Air Flight Serv. Inc. v. M/V Nat’l Pride*, 155 F.3d 1165, 1176 n. 13 (9th Cir.1998), and its presence “depends on the particular circumstance of each case.” *Todd Shipyards*, 674 F.2d at 411.

[8] The particular circumstances of this case present a colorable claim of gross negligence. Viewed in the light most favorable to Royal,⁶ the evidence would support a finding that Southwest intentionally used SUNAIR as a “test weight” for the

newly-repaired crane even though: (1) the crane was damaged in the first place during an attempted lift of SUNAIR; (2) the crane had not been properly certified and returned to service following the repairs; (3) SUNAIR’s captain had given express instructions to Southwest not to use the yacht as the test weight; and (4) Southwest’s boat yard supervisor gave SUNAIR’s captain specific assurances that “all testing of the crane would be done before SUNAIR was lifted.” On this evidence, a rational trier of fact could conclude that Southwest’s conduct constituted an extreme departure from the standard of reasonable care.

[9] Because Royal raised a triable issue of fact with as to whether Southwest was grossly negligent, we must determine whether the limitation provisions in these contracts exclude liability for such negligence. Some policy considerations weigh against excluding gross negligence from an exculpatory clause.⁷ The Supreme Court has held that the common law tradition of distinguishing degrees of care produces “inconsistent and diverse results” and is “foreign to [admiralty law’s] traditions of simplicity and practicality.” *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631–32 & n. 10, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) (holding that ship owners have a duty of exercising “reasonable care” to protect passengers regardless of status as invitee or licensee). Differentiating simple negligence from gross negligence arguably would offend these same interests. Moreover, the policy that originally led the Ninth Circuit to enforce exculpatory provisions in ship repair contracts—freedom of contract—weighs in favor of extending the unqualified exculpatory provisions in these contracts to gross negligence. *See Hall–Scott Motor Car Co. v.*

6. *See Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998) (evidence must be viewed in light most favorable to party opposing summary judgment).

7. *See generally* Daniel B. MacLeod, *The Use and Enforceability of Exculpatory (Red Letter) Clauses in Ship Repair Contracts*, 6 U.S.F. Mar. L.J. 473, 492–500 (1994).

Universal Ins. Co., 122 F.2d 531, 536 (9th Cir.1941).

We are persuaded, however, that a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence. This position is endorsed by the First and Fifth circuits, see *La Esperanza*, 124 F.3d at 19; *Todd Shipyards*, 674 F.2d at 411, supported by sound public policy, see Rest. (2d) Contracts § 195(1) & cmt. a (1979) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.... The law of torts imposes standards of conduct for the protection of others against unreasonable risk of harm. One cannot exempt himself from such liability for harm that is caused either intentionally or recklessly.”), and consistent with well-settled principles of contract law, see 6A *Corbin on Contracts* § 1472 (1962 ed. & Supp.1999) (“It is generally held that those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence; but such an exemption is always invalid if it applies to harm wilfully inflicted or caused by gross or wanton negligence.”); 8 *Williston on Contracts* § 19:23 (4th ed. 1998) (“An attempted exemption from liability for ... a future willful or grossly negligent act is generally held void....”); Prosser & Keeton, *Torts* § 68, at 484 (5th ed.1984) (“such agreements generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross”). A rule reflecting these commonly-understood contract principles preserves the “simplicity and practicality” of admiralty law. *Kermarec*, 358 U.S. at 631–32, 79 S.Ct. 406.

8. Southwest contends that Royal’s claims are barred by an array of other clauses in the repair order, including a “time limit on all claims” and a “waiver of subrogation.” Like the exculpatory clauses, these are limitation provisions, see *M/V American Queen*, 708 F.2d at 1487, which are not effective as to gross negligence or intentional misconduct.

[10] We conclude that the exculpatory clauses do not shield Southwest from liability for gross negligence and, a fortiori, do not shield Southwest from liability for intentional misconduct. Royal may pursue its claims against Southwest for gross negligence and intentional misrepresentation.⁸ The remaining claims were properly dismissed.

III.

After the district court granted summary judgment in favor of Southwest, Royal sought leave to file a third amended complaint containing additional claims against Southwest for trespass, conversion, and bailment, and negligence claims against American Rigging and Accredited. The district court denied Royal’s motion. American Rigging and Accredited then moved for judgment on the pleadings, on the ground that Royal’s complaint failed to state a claim against them. The district court granted the motion, dismissing American Rigging and Accredited with prejudice. Royal argues the district court (1) abused its discretion in denying Royal’s motion to file a third amended complaint, and (2) erred by granting judgment on the pleadings.

A.

[11, 12] “A district court’s denial of leave to amend is reviewed for an abuse of discretion, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of amendment.” *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994).⁹ “[L]ate amendments to assert new theories are not reviewed favorably when the

9. The court also may consider whether the plaintiff previously amended the complaint. See *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 n. 3 (9th Cir.1987).

facts and the theory have been known to the party seeking amendment since the inception of the cause of action.” *Acri v. International Assoc. of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir.1986).

[13] Royal’s proposed third amended complaint did nothing more than reassert an old theory of liability based on previously-known facts. Royal had knowledge of the relevant facts from the inception of the lawsuit. Its second amended complaint, filed on October 29, 1996, contained allegations regarding Southwest’s use of SUNAIR as a test weight. Thus, the “newly-discovered” evidence—a statement by Southwest that the use of SUNAIR as a test weight fell outside the scope of the contract—was actually known to Royal *no later than* October 29, 1996. Considering that Royal had twice before amended its complaint and moved to amend a third time only after the district court dismissed its claims on summary judgment, the district court did not abuse its discretion by denying Royal’s motion to amend. *See Stein v. United Artists Corp.*, 691 F.2d 885, 898 (9th Cir.1982) (no abuse of discretion in denying motion to file amended complaint where complaint was submitted after district court granted defendants’ motions to dismiss, and plaintiff “provided no satisfactory explanation for [its] failure to fully develop his contentions originally, and the amended complaint was brought only to assert new theories, if anything, and was not premised upon new facts.”).

B.

The district court dismissed third-party defendants American Rigging and Accredited because (1) neither third-party complaint contained specific language demanding judgment in favor of Royal as required by Rule 14(c), and (2) Royal’s complaint alleged claims solely against Southwest, and “any liability as to American [Rigging] and [Accredited] was eliminated when summary judgment was granted in Southwest’s favor.”

1.

[14] Rule 14(c) governs third-party practice in admiralty and maritime cases. If the third-party plaintiff in admiralty “demand[s] judgment against the third-party defendant in favor of the plaintiff,” the action “shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.” Fed.R.Civ.P. 14(c). However, “[i]t is unclear what language is necessary for the third-party plaintiff to ‘demand’ judgment against the third party defendant in favor of the plaintiff.” 29 *Moore’s Federal Practice* § 704.06[1], at 704–74 (3d ed.1998). Some courts demand strict compliance with the “demand” language of the rule, *see, e.g., Northern Contracting Co. v. C.J. Langenfelder & Son, Inc.*, 439 F.Supp. 621, 623 n. 1 (E.D.Pa.1977); others take a more lenient approach, *see, e.g., Riverway Co. v. Trumbull River Servs., Inc.*, 674 F.2d 1146, 1154 (7th Cir.1982).

In *Riverway Co.*, the plaintiff alleged that its barge sunk as a result of the defendant’s negligence. The defendant filed a third party complaint disclaiming its own fault and alleging that the sinking of the barge “occurred as a result of the primary and active fault, negligence and carelessness of [the third party defendant],” and praying that “according to . . . Rules 4 and 14(c) . . . Third Party Defendant . . . appear and answer this Third Party Complaint and answer the Complaint of the Plaintiff.” *Id.* at 1148, 1154. The Seventh Circuit held these allegations sufficient to satisfy Rule 14(c)’s demand language:

[W]e believe the unmistakable meaning of this language was to designate [the third party defendant] as a defendant to [the plaintiff’s] complaint. Thus, the district court properly applied Rule 14(c) and was correct in treating this action as if [the plaintiff] had commenced it directly against [the defendant] and [the

third party defendant] as joint defendants.

Id. at 1154-55.

Like the Seventh Circuit, we have not interpreted Rule 14(c)'s demand language rigidly. In *Campbell Industries, Inc. v. Offshore Logistics International*, 816 F.2d 1401 (9th Cir.1987), we held that Rule 14(c) was satisfied by a third-party complaint praying that the third party defendant "make its defenses and answer directly to the claims of the Plaintiff. . . ." *Id.* at 1406. This holding properly reflects "the liberal third party practice" embodied in Rule 14(c). *General Marine Constr. Corp. v. United States*, 738 F.Supp. 586, 587 (D.Mass.1990) ("Fed.R.Civ.P. 14(c) . . . reflects one of the prominent aspects of the admiralty procedure, the liberal third party practice." (alterations omitted, quoting 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1465 (1990))).

[15] Neither of the third-party complaints in this case contained specific language "demand[ing] judgment against the third-party defendant in favor of [Royal]." Fed.R.Civ.P. 14(c). However, both specifically and repeatedly referred to Rule 14(c). Both were captioned "Third Party Complaint [F.R.Civ.P. 14(c)]" (brackets in originals), and both prayed that "the Third Party Defendant answer and respond to the complaint of Royal Insurance Company *in accordance with Rule 14(c).*" (Emphasis added.) Both explained how and why the third-party was directly liable to Royal. Southwest's complaint alleged that American Rigging "sold the wire rope to [Southwest] and reeved said wire onto the crane upon which it failed allegedly causing damage to [Royal] as set forth in [Royal's] complaint," and that the damage to SUNAIR "w[as] caused by the faulty workmanship and negligence of the third party defendant, American Rigging." Similarly, American Rigging's complaint alleged that Accredited "breached basic industry standards of care while conducting the aforesaid certification tests, and that such conduct acted as an immediate

and proximate cause of the damage alleged in [Royal's] complaint. . . ." American Rigging and Accredited filed answers to Royal's complaint "[i]n accordance with" and "pursuant to" Rule 14(c), respectively.

[16] Rule 14(c) "is to be liberally construed." 8 *Benedict on Admiralty* § 2.01[E] (1998). The "unmistakable meaning" of the language in the third-party complaints was to designate American Rigging and Accredited as defendants to Royal's complaint. *Riverway Co.*, 674 F.2d at 1154. This was sufficient to satisfy Rule 14(c)'s demand language.

2.

[17] The district court entered judgment on the pleadings in favor of American Rigging and Accredited because Royal's complaint alleged claims "solely against Southwest." Royal contends it was not required to make specific allegations against the third-party defendants. We agree.

Rule 14(c) provides that the third-party action "shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff." Fed.R.Civ.P. 14(c). This provision creates a "direct relationship" between the plaintiff and the third-party defendant:

Rule 14(c) provides that defendant may implead a party "who may be wholly or partially liable, either to the plaintiff or to the third-party plaintiff. . . ." This language specifically preserves defendant's traditional right to demand judgment directly in favor of plaintiff and against the third-party defendant. In such a case, the rule states that "the third-party defendant shall make any defenses to the claims of the plaintiff . . . and the action shall proceed as if the plaintiff had commenced it directly against the third-party defendant as well as the third-party plaintiff." As a consequence, *plaintiff is forced to assert his claims directly against the third-party defendant. This is to be distinguished*

from practice under Rule 14(a), which does not automatically establish a direct relationship between plaintiff and the third-party defendant upon the assertion of a third-party claim.

6 Wright & Miller, *Federal Practice and Procedure*, § 1465, at 483–85 (1990) (emphasis added).

The direct relationship created by Rule 14(c) between Royal and the third-party defendants required Royal to assert its claims directly against those parties, thereby avoiding “a separate suit for contribution or repetitious pleadings and testimony on the part of the plaintiff and the third-party plaintiff. . . .” *Riverway Co.*, 674 F.2d at 1154 (quoting *Ohio River Co. v. Continental Grain Co.*, 352 F.Supp. 505, 512 (N.D.Ill.1972)).

In *Riverway Co.*, a third-party defendant was found directly liable to the plaintiff under Rule 14(c) where the third-party complaint alleged that the injury “occurred as a result of the primary and active fault, negligence and carelessness of [the third-party defendant]. . . .” 674 F.2d at 1148. In this case, the third-party complaints explained in detail how the third-party defendants’ lack of care damaged SUNAIR: American Rigging allegedly “sold the wire rope to [Southwest] and reeved said wire onto the crane upon which it failed allegedly causing damage to [Royal] as set forth in [Royal’s] complaint,” and thus the damage to SUNAIR “w[as] caused by the faulty workmanship and negligence of the third party defendant, American Rigging.” Similarly, Accredited allegedly “breached basic industry standards of care while conducting the aforesaid certification tests, and that such conduct acted as an immedi-

ate and proximate cause of the damage alleged in [Royal’s] complaint. . . .”

The third-party complaints directed American Rigging and Accredited to answer Royal’s complaint, which they did. Each filed an answer to Royal’s complaint, disclaiming responsibility for SUNAIR’s damage and asserting numerous affirmative defenses to Royal’s claims. Neither exhibited any difficulty understanding the nature of the allegations against them. The parties themselves treated this action as if Royal had commenced it against Southwest, American Rigging, and Accredited as joint defendants.

Nonetheless, American Rigging and Accredited claim that Royal was required to amend its complaint to assert specific claims against them. If this contention were correct, “either a separate suit for contribution or repetitious pleadings and testimony on the part of the plaintiff and the third-party plaintiff would be necessary in the original trial. Such cannot be the meaning of Rule 14(c). The rule provides instead that the third-party plaintiff may demand judgment against the third party defendant in favor of the plaintiff and shall be construed as meaning precisely that. [Royal] is thus entitled to recover its damages from both [Southwest] and [American Rigging and Accredited].” *Ohio River Co. v. Continental Grain Co.*, 352 F.Supp. 505, 512–13 (N.D.Ill.1972).¹⁰

Judgment on the pleadings was improper.

IV.

The district court’s order granting summary judgment in favor of Southwest and

party, the suit proceeds as if the original plaintiff had sued the third party”); *Home Ins. Co. v. Puerto Rico Maritime Shipping Authority*, 524 F.Supp. 541, 545–46 (D.P.R.1981) (plaintiff could recover against third-party defendant under Rule 14(c); however, “[h]ad this case not been a case in admiralty, plaintiff’s case would have been disposed of solely by the dismissal of its claims against the defendants and third-party plaintiffs”).

10. See also *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880, 882 (7th Cir.1993) (plaintiff could recover against third-party defendant who “was not named as a defendant in the plaintiffs’ complaint, or for that matter in any other pleading by the plaintiffs” because “in an admiralty suit, once a defendant impleads a third party in an effort to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third

its order denying Royal's motion to amend its complaint are AFFIRMED, except that Royal may pursue its claims against Southwest for gross negligence and intentional misrepresentation. The order granting judgment on the pleadings in favor of American Rigging and Accredited is REVERSED. This matter is REMANDED for proceedings consistent with this opinion.



**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**REAL PROPERTY AT 2659 ROUND-
HILL DR., ALAMO, CA, Defen-
dant,**

**Robert Fitzstephens; Wilson Young;
Keith Slipper; Joseph Ippolito; Mi-
chael Thaler; Mark Schwab, Claim-
ants-Appellants,**

and

**Kathryn Payton; Gregg Payton;
Anthony Gregg Payton,
Claimants.**

**United States of America,
Plaintiff-Appellee,**

v.

**Real Property at 2659 Roundhill
Dr., Alamo, CA, Defendant,**

**World Savings & Loan Association,
Intervenor-Appellant.**

Nos. 98-15836, 98-16207.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 11, 1999.

Filed Oct. 15, 1999.

Government brought in rem forfeiture action against certain real property, and

mortgagee filed claim asserting innocent lienholder interest. Following sale of the property at mortgage foreclosure sale, purchasers and government filed cross-motions for summary judgment. After denying summary judgment for purchasers, 1995 WL 714357, the United States District Court for the Northern District of California, D. Lowell Jensen, J., entered summary judgment for government. Purchasers and mortgagee appealed. The Court of Appeals, Michael Daly Hawkins, Circuit Judge, held that: (1) purchasers had standing, despite failing to file timely claims and answers in forfeiture proceedings; (2) district court did not lose in rem jurisdiction over the property following foreclosure sale; (3) relation back provision of forfeiture statute did not extinguish purchasers' interest, even though owners' drug trafficking occurred before lender executed its deed of trust; and (4) purchase of privately foreclosed property extinguished any claims to that property attaching after deed of trust was recorded and before foreclosure sale, and, thus, purchasers' interest predated that of government, which had initiated forfeiture action against the property during that time period.

Reversed.

1. Forfeitures ⇌5

In rem forfeitures are conducted in accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims. Supplemental Admiralty and Maritime Claims Rule C(6), 28 U.S.C.A.

2. Forfeitures ⇌5

While at least some purchasers, who bought mortgaged property at foreclosure sale, failed to file timely claims and answers in forfeiture proceeding involving the property, district court had exercised its discretion to overlook this failure, and, thus, purchasers had standing in forfeiture

William KAPLAN, Administrator of the Estate of Lois Kaplan, on behalf of himself and all others similarly situated; Thomas Devere, Plaintiffs–Appellants,

v.

Freeman ROSE; Errol Payne; Richard Penfil; David Radlinski; Weeden & Co., L.P.; Medstone International, Inc., Defendants–Appellees.

Georgiane KRAMER, on behalf of herself and all others similarly situated, Plaintiffs–Appellants,

v.

Freeman ROSE; Medstone International, Inc.; Errol Payne; Richard Penfil; David Radlinski; Weeden & Co., L.P., Defendants–Appellees.

Nos. 92–55879, 92–56055.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 1, 1994.

Decided Oct. 11, 1994.

Rehearing Denied Feb. 9, 1995.

Class action representative sued issuer and certain officers and directors, alleging registration statement misrepresentations and use of manipulative scheme or device in connection with public offering. The United States District Court for the Central District of California, Alicemarie H. Stotler, J., granted summary judgment to defendants and appeal was taken. The Court of Appeals, Boochever, Circuit Judge, held that: (1) misrepresentations claims contained in a second class action, incorporated into first, would not be considered on appeal; (2) material issues of fact, precluding summary judgment against certain defendants, existed as to whether success of issuer's product had been overstated; and (3) material issues of fact existed as to whether certain defendants had requisite scienter to support claim that they had used manipulate scheme or device in connection with public offering.

Affirmed in part; reversed in part.

1. Federal Courts ⇌766

Prospectus statements alleged to be misrepresentations, which were referred to in complaint or amendment and either cited in plaintiff's papers opposing summary judgment motion or referred to by court in its opinion granting defendant's summary judgment motion, were properly before Court of Appeals.

2. Federal Courts ⇌766

Claims of securities misrepresentations, contained in complaint in second class action which had been dismissed on statute of limitations ground at the time summary judgment adverse to class was issued in first class action, were not before the Court of Appeals on appeal of summary judgment, even though second class action was reinstated four months later and consolidated with first.

3. Federal Civil Procedure ⇌839.1

District court could decline to allow amendment of pleadings, in securities fraud case, to allege four more statements claimed to be misrepresentations; parties had engaged in voluminous and protracted discovery, trial was only two months away and discovery was completed, complaint had already been amended twice, and two documents containing two of the statements were known to complainant from beginning of litigation. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

4. Securities Regulation ⇌25.18, 25.21(3)

Plaintiff alleging damages arising from false and misleading registration statement must demonstrate that (1) registration statement contained an omission or misrepresentation, and (2) omission or misrepresentation was "material," that is, would have misled a reasonable investor about nature of his or her investment. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

See publication Words and Phrases for other judicial constructions and definitions.

5. Securities Regulation ⇌25.21(2)

No scienter is required for liability for damages arising out of false and misleading

registration statement; defendants are liable for innocent or negligent material misstatements or omissions. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

6. Securities Regulation ⇌25.21(4)

Defendants other than issuer can establish a "due diligence" defense to a claim of registration statement misrepresentation if they show that after reasonable investigation they had reasonable grounds to believe (and did believe) that, at time registration statement became effective, statements were true and there was no material omission. Securities Act of 1933, § 11(b)(3)(A), 15 U.S.C.A. § 77k(b)(3)(A).

7. Federal Civil Procedure ⇌2511

Material issues of fact, precluding summary judgment in favor of securities issuer, existed as to whether claim in registration statement, that issuer believed its gallstone lithotripsy system compared favorably with competitive units, was false and misleading; issuer's vice president of regulatory affairs had prepared memorandum, prior to issuance of statement, that issuer had obtained "dismal" results of 18.5% significant fragmentation of patients' gallstone conditions in clinical trial of unit, versus approximately 80% success rate for a competitor's product, as reported in a medical journal. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

8. Federal Civil Procedure ⇌2511

Material issues of fact, precluding summary judgment for issuer in registration statement misrepresentation case, existed as to whether issuer could claim that its lithotripsy machine had been used successfully to treat gallstone patients; at time of statement there had been only one clinical test of machine, which had produced significant fragmentation in only 18.5% of patients, and a competitor's machine had achieved a similar fragmentation rate in 80% of cases. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

9. Securities Regulation ⇌25.18

Issuer of stock engaged in manufacture of lithotripter device for breaking up body stones by sound waves did not make misrepresentation in registration statement by claiming that its marketing plan was based

upon belief that within next five or ten years there would be total of approximately 2,000 lithotripters installed in United States for use in treating kidney stone and gallstone patients, even though it was claimed that three months after registration statement became effective issuer's chief executive officer had written that kidney machine market was dead, and that issuer knew from low success rate with experiments that its system was not successful with gallstone patients; statement that kidney machine market was dead could not support claim, as misrepresentations were measured at time registration statement became effective, and poor gallstone record with issuer's unit was irrelevant to issuer's projection as to industry-wide acceptance of lithotripters. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

10. Federal Civil Procedure ⇌2511

Material issues of fact, precluding summary judgment, existed as to materiality of representation in registration statement, that issuer's lithotripter machine, used to dissolve gallstones and kidney stones by sound waves, compared favorably with competitive devices; investors might have hesitated to buy stock if they had known that success rate of issuer's unit was far below that of its main competitor. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

11. Federal Civil Procedure ⇌2511

Material issues of fact, precluding summary judgment, existed as to whether there were misrepresentations in registration statement involving issuer's lithotripter, device for dissolving kidney and gallstones by ultrasound, that it compared favorably with competitors and had been successfully used to treat kidney and gallstones, even though registration statement also contained warning that system to date had been used at only one hospital on limited number of patients and that there was no assurance that clinical trials of machine for use with gallstones would be successful. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

12. Federal Civil Procedure ⇌2511

Material issues of fact, precluding summary judgment for issuer of securities, exist-

ed as to whether issuer had made a material prospectus omission by failing to set forth test results from clinical trial of its lithotripsy machine, device to dissolve gallstones and kidney stones through use of ultrasound, which showed significant fragmentation in only five of 27 patients (18.5%); reasonable jury could have found study results might have given reasonable investor pause. Securities Act of 1933, § 11, 15 U.S.C.A. § 77k.

13. Federal Courts ⇌762

Court of Appeals would not decide claim by underwriter, that it had "due diligence" defense to claim that there had been misrepresentations in registration statement; as district court had found that all representations made in registration statement were true, it had not addressed due diligence claim. Securities Act of 1933, § 11(b)(3)(A), 15 U.S.C.A. § 77k(b)(3)(A).

14. Securities Regulation ⇌60.27(1)

Projection or statement of belief is "factual" misstatement, actionable as a manipulative or deceptive device used in connection with purchase or sale of security if (1) statement is not actually believed, (2) there is no reasonable basis for belief, or (3) speaker is aware of undisclosed facts tending seriously to undermine statement's accuracy. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

15. Securities Regulation ⇌60.45(1), 60.48(1)

Plaintiff seeking to establish manipulative or deceptive device was used in connection with purchase or sale of securities must show reliance on material misstatement and scienter (intent to defraud or deceive). Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

16. Securities Regulation ⇌60.48(3)

Claim of reliance by stock purchaser, based on assertion that misrepresentations constituted fraud on market with resulting effect on price of stock, can be rebutted upon showing that evidence tending to refute claims had entered market through other channels, provided that evidence is transmitted to public with degree of intensity and credibility sufficient to effectively counterba-

lance misleading impression created by issuer's one-sided representations. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

17. Federal Civil Procedure ⇌2511

Material issues of fact, precluding summary judgment on behalf of issuer of securities in fraud case, existed as to whether there was sufficient evidence, up to last two months of period covered by suit, that issuer was having problems with its lithotripsy machine for fragmentation of gallstones and kidney stones through ultrasound sufficient to counterbalance optimistic statements made in prospectus and preclude investors from using fraud on market theory to establish reliance on representations; bulk of articles regarding subject matter generally were optimistic, and the few articles addressing issuer particularly and focusing on problems were in obscure sources. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

18. Securities Regulation ⇌60.63(2)

Issuer of securities which manufactured lithotripsy machine for ultrasound reduction of kidney and gallstones satisfied burden of showing that information counterbalancing optimistic statements contained in prospectus had been transmitted to public with degree of intensity and credibility sufficient to overcome investor's claim that there had been fraud on market, during last two months of period covered by class action following issuer's release of medical test results; there had been articles in major general newspapers, medical journal, and two stock and analyst reports apprising market of problems, limited success of trials, small patient group, possible side effects, and possibility that Food and Drug Administration approval would not be forthcoming. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

19. Securities Regulation ⇌60.45(1)

In order to prevail on § 10(b) claim, investor must establish "scienter," mental state embracing intent to deceive, manipulate or defraud involving actual knowledge or recklessness only one step down from intent.

Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

20. Securities Regulation ⇔60.45(1)

Insider trading in suspicious amounts, or at suspicious times, is probative of bad faith and scienter in suit alleging manipulative or deceptive devices in connection with purchase and sale of securities. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

21. Federal Civil Procedure ⇔2511

Material issues of fact existed as to whether sale of two-thirds of stock held by chief executive officer of issuer, and one-fourth of stock held by president of issuer, as soon as legally possible after completion of public offering, and sale one year later by president of remainder of his stock, was evidence that officers had sufficient scienter to support claim that they had used manipulative or deceptive device in connection with public offering, even though chief executive officer claimed that he was selling in order to realize benefits of substantial efforts he had put in on issuer's behalf, and president indicated he wished to provide funds for retirement. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

22. Securities Regulation ⇔60.45(1)

Successor chief executive officer of issuer, and its chief financial officer, did not have requisite scienter to sustain claim that they had employed manipulative or deceptive device in connection with issuer's public offering; they had submitted uncontradicted affidavits indicating that they were ignorant of falsity of projections made regarding quality of issuer's product and they had participated in no insider trading. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

23. Federal Civil Procedure ⇔2511

Material issues of fact, precluding summary judgment on behalf of underwriter in securities fraud case, existed as to whether underwriter had scienter to support claim that it employed manipulative or deceptive device in connection with public offering; although director of corporate finance for underwriter had submitted affidavit stating that

underwriter's public statements following offering had been based on consulting firm and affiant's good faith in making public statements about issuer's market, there had been doubt cast on reasonableness of underwriter's investigation, and affiant had apparently become member of issuer's board of directors right after public offering. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

24. Securities Regulation ⇔60.46

Stock fraud plaintiff who shows reliance under theory that market relied on misrepresentation or omission must also establish materiality by showing that reasonable shareholder would consider misrepresentation or omission important because it altered total mix of available information. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

25. Securities Regulation ⇔35.15

Director is not automatically liable for stock fraud as a "controlling person" under the Securities Exchange Act, although director status is a "red light" to court. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a).

26. Securities Regulation ⇔60.40

Successor chief executive officer did not have liability as a "controlling person" of issuer, for purposes of stock fraud claim under Securities Exchange Act; officer had stated, without contradiction, that he had never directed or induced anyone to make public statements known to be false or misleading and to his knowledge all information released to public was true. Securities Exchange Act of 1934, § 20(a), 15 U.S.C.A. § 78t(a).

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Paul L. Gale and Darryl S. Gibson, Stradling, Yocca, Carlson & Rauth, Newport Beach, CA, for defendant-appellee Freeman Rose.

Robert E. Currie, Latham & Watkins, Costa Mesa, CA, for other defendants-appellees.

Appeals from the United States District Court for the Central District of California.

Before: BROWNING, BOOCHEVER, and KLEINFELD, Circuit Judges.

BOOCHEVER, Circuit Judge:

William Kaplan appeals the district court's grant of summary judgment to the defendants in his class action alleging securities violations against Medstone International, Inc., various Medstone officers and directors, and an underwriter (hereinafter collectively referred to as "Medstone," or "the defendants," unless individual identification is required). Georgiane Kramer appeals the dismissal as *res judicata* of her similar class action against the same defendants.

Kaplan alleged that the defendants made numerous material false and misleading statements and omitted material information in the company's prospectus, in violation of § 11 of the Securities Act of 1933. He also alleged that the defendants made false and misleading statements, and omitted material information, from statements made after the prospectus on which the plaintiffs relied in purchasing shares of Medstone stock, in violation of § 10(b) of the Securities and Exchange Act of 1934. Medstone and Kaplan both moved for summary judgment. The district court granted Medstone's motions, finding that the prospectus statements were not false, that Kaplan had not shown reliance on the statements made after the prospectus, and that the defendants had not acted with scienter in making the post-prospectus statements.

On this appeal, the parties dispute which statements and omissions were properly before the district court on summary judgment. Kaplan also argues that there were material issues of fact whether the statements and omissions were false or misleading, whether the plaintiffs relied on the post-prospectus statements under the "fraud on the market" theory, and whether the defendants made the post-prospectus statements with scienter.

The parties also dispute the secondary liability of Medstone's chief executive officer as a "controlling person." We reverse in part and affirm in part.

FACTS AND PROCEDURAL BACKGROUND

In 1984, Medstone International, Inc. began engineering, manufacturing, and marketing a shockwave lithotripsy system ("system") for the treatment of kidney stones. Lithotripsy treats kidney stones with soundwaves, disintegrating the stones without invasive surgery. In January 1988, the Food and Drug Administration ("FDA") granted Medstone permission to begin clinical studies to test its system for the treatment of gallstones. Medstone began clinical evaluations. In April 1988, the FDA granted Medstone approval to sell its system to treat kidney stones.

In June 1988, Medstone issued its initial public offering. Medstone's prospectus stated that the Medstone system compared favorably with other lithotripters offered by competitors, that the system had been used successfully to treat kidney stone patients since 1986 and gallstone patients since January 1988, and that Medstone's marketing plan was based on its belief that 2,000 lithotripters would be installed in the United States in the next five to ten years to treat kidney stone and gallstone patients. Following the public offering, Medstone sold 1.15 million shares of its common stock at \$13 per share.

In the year following the offering, Medstone issued a number of statements regarding the prospects of its gallstone lithotripsy system. For example, Medstone represented that its gallstone investigations were proceeding as expected; that the demand for lithotripsy to treat kidney stones and gallstones was on the rise and would result in increased demand for Medstone's system; and that Medstone's future was bright.

The price of Medstone's stock increased steadily following the June 1988 public offering to a high closing bid of almost \$40 a share in August 1988. In the fall of 1988, Errol Payne resigned as Medstone's Chief

Executive Officer ("CEO"), and shortly thereafter he and his family sold two-thirds of their stock, for \$6.5 million. At about the same time, Richard Penfil, Medstone's President, and his family sold one-fourth of their Medstone stock for approximately \$2.4-2.5 million. After Penfil's resignation in August of 1989, Penfil and his family sold the vast majority of their remaining stock for an additional \$4.5 million.

By early October 1989, the Medstone stock price had decreased to \$15 per share, and it continued to fall to \$12 per share by October 18, 1989.

On October 20, 1989, the FDA announced that it would not approve Medstone's application for its system to treat gallstones, because it lacked "reasonable assurance that the device is effective." The FDA also denied the application for gallstone lithotripsy of Medstone's main competitor, the German company Dornier Medizintechnik GmbH ("Dornier"). A week following the October 20, 1989 announcement, the price of Medstone stock fell to as low as \$6 per share.

On October 25, 1989, William Kaplan, as administrator of the estate of a Medstone shareholder, filed a shareholder class action against Medstone alleging violations of federal securities law. In addition to Medstone, Kaplan named the following defendants: Payne (Medstone's former CEO); Penfil (Medstone's former president); Freeman Rose (Medstone's Executive Vice President of Engineering at the time of the offering, and Medstone's CEO from July 1988 to July 1990); David Radlinski (Medstone's Vice President of Finance and Chief Financial Officer ("CFO")); and Weeden & Co., L.P. ("Weeden") (the underwriter of Medstone's initial public offering). Kaplan alleged that the defendants made false and misleading statements in the initial public offering on June 2, 1988, and that up until October 20, 1989, the date of the FDA's rejection of Medstone's application for approval of its gallstone lithotripsy system, they issued further misleading statements inflating the prospects for the success of Medstone's system in treating gallstones.

Shortly after Kaplan filed a second amended complaint on August 2, 1990, the district

court granted Kaplan's motion for class certification. The deadline to amend the pleadings or join other parties was set at May 13, 1991.

On June 11, 1991, Georgiane Kramer, a member of the class of Medstone shareholders, filed a separate class action securities fraud complaint against the same defendants named in the *Kaplan* action. On October 7, 1991, the district court dismissed the *Kramer* complaint as barred by the statute of limitations, but later reinstated Kramer's claims regarding statements made after the prospectus. On March 17, 1992, Kramer filed a first amended complaint, and shortly thereafter filed a motion for consolidation with *Kaplan*.

Meanwhile, Kaplan filed a motion for summary judgment on his claims regarding statements in the prospectus and a motion for summary adjudication of facts on the claims regarding Medstone's statements after the prospectus. Medstone filed motions for summary judgment on all Kaplan's claims. The district court granted in full Medstone's motions for summary judgment and denied Kaplan's motions. Without ruling on Kramer's motion for consolidation, the district court dismissed *Kramer* as res judicata.

DISCUSSION

I. *Statements by Medstone properly before the district court on the motions for summary judgment*

A. *The nine statements before the court on summary judgment*

[1] We must first determine which of Medstone's statements are properly before us on appeal. Kaplan alleges that the district court improperly granted summary judgment for Medstone on thirteen statements that Kaplan claims were false and misleading. Medstone responds that only three of the alleged misstatements identified by Kaplan on appeal were before the district court on summary judgment, and that the remainder were specifically rejected as late attempts to amend the pleadings. Medstone is wrong. Nine of the thirteen statements

challenged by Kaplan appear in Kaplan's second amended complaint. The remaining four appear in Kramer's original and amended complaints.

Of course, locating these statements somewhere in the pleadings does not answer whether they were properly before the district court on summary judgment, so that we may consider them on this appeal. To preserve his claims regarding these statements for appeal, Kaplan's opposition to Medstone's motions for summary judgment must have informed the district court of the legal or factual reasons why summary judgment was inappropriate. *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466-67 (9th Cir.1990). See also *In re Worlds of Wonder Sec. Litig.*, 814 F.Supp. 850, 861 n. 8 (N.D.Cal.1993) ("*Worlds of Wonder I*") (where parties "have thrown in the proverbial kitchen sink" with numerous allegations of misleading statements or omissions in complaint, district court addresses only those contentions raised by parties in opposition papers), *aff'd in part*, 35 F.3d 1407 (9th Cir.1994). All the alleged misstatements that Kaplan cites on appeal appear in the parties' motions for summary judgment. The district court expressly refused to consider the four statements which appeared only in the *Kramer* complaints, and we address them separately below. All but two of the remaining nine statements, contained in Kaplan's second amended complaint, either appeared in Kaplan's opposition papers to Medstone's motions for summary judgment or were addressed directly by the district court in granting summary judgment to Medstone. The two statements that were not quoted in Kaplan's opposition papers or in the district court's opinion appeared in Medstone's motion for summary judgment and were addressed generally in Kaplan's

1. Those statements are as follows:

Statement 10. In April, 1988, the company won final [renal] approval by the FDA, clearing the way for the sale of 19 lithotripters ... [in 1988]. (March 15, 1989 Los Angeles Times article)

Statement 11. Depending on the size and number of stones, fragmentation rates as high as 97 percent and stone-free results of 90 percent were achieved at six months following treatment. (April 25, 1989 Medstone press release)

arguments regarding Medstone's future prospects and sales. On appeal, Kaplan argues that all these statements violated the securities laws. We therefore find none was abandoned on appeal. *Self Directed Placement*, 908 F.2d at 467.

We find that Kaplan included nine of the statements in his complaint, putting Medstone on notice as to those statements; adequately preserved his contentions regarding those nine statements at summary judgment; and properly presented his arguments regarding the statements in his brief on appeal. The first nine statements thus are properly before us.

B. *The four additional statements rejected by the district court*

[2] Kaplan further argues that the district court erred in failing to consider four other statements which Kaplan alleged were false in his motion for summary judgment.¹ None of these statements appear in Kaplan's second amended complaint. Instead, two appear in the *Kramer* complaint, filed June 11, 1991, less than a month after the deadline to amend the pleadings in *Kaplan*. By the time the parties filed their motions for summary judgment, the *Kramer* complaint had been dismissed as barred by the statute of limitations.

The other two appear in the amended complaint in *Kramer*, filed March 17, 1992, after Kramer's § 10(b) claims were reinstated, more than four months after the parties submitted motions for summary judgment in *Kaplan*, and more than two months after argument on the summary judgment motions.

Thus at the time the summary judgment motions were filed, these four statements were not before the court in pleadings in

Statement 12. Medstone sold its first PMA renal lithotripter after obtaining the PMA in the second quarter of 1988 and since then, such sales have improved dramatically. (November 15, 1988 Weeden Research Report)

Statement 13. The increase in sales revenue principally resulted from the shipments of 19 [lithotripter] Systems during 1988 compared to eight Systems shipped in fiscal 1987, and an increase in the average sales price per System. (Medstone's 1988 Form 10-K)

either *Kaplan* or *Kramer*. The first two were in the initial *Kramer* complaint which already had been dismissed, and the last two, which appeared in the *Kramer* amended complaint, had yet to be alleged at all.

Nevertheless, Kaplan argues that the district court should have considered these four statements. First, he argues that the four statements were "fairly reflected" in his second amended complaint because they were connected to other statements alleged there. Second, he argues that the inclusion of these new statements constituted a motion to amend the complaint under Federal Rule of Civil Procedure 15, the denial of which was an abuse of discretion.

1. "Fairly reflected" in the complaint

Federal Rule of Civil Procedure 9(b) requires that "the circumstances constituting fraud . . . shall be stated with particularity." In a securities fraud action, a pleading is sufficient under Rule 9(b) if it identifies the circumstances of the alleged fraud so that the defendant can prepare an adequate answer. *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir.1987). The pleadings must state precisely the time, place, and nature of the misleading statements, misrepresentations, and specific acts of fraud. *Id.* at 1439-40. See also *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.1989) ("the allegations should include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations").

The four statements are missing entirely from Kaplan's second amended complaint and, at the time when the motions for summary judgment were filed, were not present in any pleading before the district court, except for Kaplan's summary judgment motion. We therefore conclude that the four statements are not fairly reflected in the complaint. The district court did not err in refusing to consider them. *Id.*

2. Motion to amend

[3] An addition of new issues during the pendency of a summary judgment motion can be treated as a motion for leave to amend the

complaint. *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 n. 1 (9th Cir.1981). A district court's denial of leave to amend is reviewed for an abuse of discretion, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: bad faith, undue delay, prejudice to the opposing party, and the futility of amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987).

The district court found that Medstone would suffer prejudice if Kaplan were allowed to amend the complaint, stating: "The parties have engaged in voluminous and protracted discovery. . . . Expense, delay, and wear and tear on individuals and companies count toward prejudice." Trial was only two months away, and discovery was completed. See *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir.1991) (no amendment allowed where defendant "would have been unreasonably prejudiced by the addition of numerous claims so close to trial, regardless of [plaintiff's] argument that they were 'implicit' in the previously pleaded claims"). Further, Kaplan had already amended the complaint twice, and "a district court's discretion over amendments is especially broad 'where the court has already given a plaintiff one or more opportunities to amend his complaint.'" *DCD Programs*, 833 F.2d at 186 n. 3 (quoting *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980)). Finally, two documents containing two of the statements were known to Kaplan from the beginning of the litigation, as evidenced by his complaint, which quotes from different portions of them both. Kaplan offers no evidence that he was unaware of the sources of the other two statements. "[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1398 (9th Cir.), cert. denied, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986). The district court did not abuse its discretion in refusing to consider the new allegations.

We therefore hold that the district court properly excluded Statements 10-13.

II. *Kaplan's § 11 claims*

Kaplan alleges that Statements 1-3 in Medstone's registration statement were material, false, and misleading, and that the statements omitted material information about the success of and market for Medstone's system.

Under § 11 of the Securities Act of 1933, anyone who buys a security pursuant to a false and misleading registration statement may sue for damages. Section 11 states that any signer of the registration statement, any partner or director of the issuer, any professional involved in preparing or certifying the statement, and any underwriter of a registration statement may be liable "[i]n 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 . . ." 15 U.S.C. § 77k (1988).

[4] The plaintiff in a § 11 claim must demonstrate (1) that the registration statement contained an omission or misrepresentation, and (2) that the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment. *See In re VeriFone Sec. Litig.*, 11 F.3d 865, 868-69 (9th Cir.1993). *See also In re Keegan Management Co. Sec. Litig.*, 794 F.Supp. 939, 944 (N.D.Cal.1992) (misstatement is material if correct disclosure would have deterred, or tended to deter, the average prudent investor from buying the offered securities). *Cf.* 17 C.F.R. § 230.405 (information is material if reasonable investor would attach importance to it in considering whether to purchase securities).

[5, 6] No scienter is required for liability under § 11; defendants will be liable for innocent or negligent material misstatements or omissions. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382, 103 S.Ct. 683, 687, 74 L.Ed.2d 548 (1983). Defendants other than the issuer can establish a "due diligence" defense if they show that after reasonable investigation they had reasonable ground to believe (and did believe) that, at

the time the registration statement became effective, the statements were true and there was no material omission. 15 U.S.C. § 77k(b)(3)(A).

Three of the nine misstatements alleged by Kaplan appear in Medstone's June 2, 1988, Registration Statement. The defendants potentially liable under § 11 are Medstone, as the issuer; Payne and Penfil, as directors and signatories; Radlinski, as a signatory; and Weeden, as the underwriter. The district court granted summary judgment in favor of the defendants on Statements 2 and 3 without mentioning Statement 1, although Statement 1 appears in Medstone's motion for summary judgment, Kaplan's opposition, and Medstone's reply, and Kaplan raises and discusses this statement on appeal. Statement 1 was fully briefed in the district court and is fully argued before us. Because we review a grant of summary judgment de novo, *Jones v. Union Pac. R.R. Co.*, 968 F.2d 937, 940 (9th Cir.1992), we consider all three statements.

A. *Misrepresentation*

[7] Kaplan alleges that Statements 1-3 were false and misleading.

1. *Statement 1:* The Company believes the Medstone System compares favorably with other lithotripters presently being offered by competitors with respect to the precision of its imaging system . . . and its success rate in treating patients.

Kaplan argues that this statement was misleading because on June 2, 1988, the date of the offering, the clinical trials of Medstone's gallstone lithotripsy system could not be considered successful. Kaplan relies on a May 4, 1988 memorandum from Josh Burke, Medstone's Vice President of Regulatory Affairs, in which Burke presents a "brief, preliminary summary of data obtained from the first phase of the gallstone study at Baylor University." That memorandum states that five of 27 patients, or 18.5%, showed significant fragmentation of their gallstones (to fragments less than or equal to three millimeters) within 24 hours of treatment with the Medstone system. Those patients were classified as "successes."

Kaplan contends that this "dismal" success rate was misleadingly characterized as comparing favorably with Medstones' competitors' rates of success, and "could mislead potential investors by portraying that Medstone possessed a device that would be well received in the marketplace." Kaplan relies on a February 1988 New England Journal of Medicine article about a German test using a Dornier lithotripter on gallstone patients. Medstone submitted the article as an exhibit in support of its motions for summary judgment. The German study showed that 139 of 175 patients, or almost 80%, had no stones or had significant fragmentation (also to fragments less than or equal to three millimeters) within 24 hours of treatment. Kaplan argues that it was at least misleading to state that the Medstone system, with a 24-hour "success" rate of 18.5%, "compares favorably" to Dornier's system, with its 80% "success" rate.

Medstone responds by claiming that the German success rate cannot be compared to Medstone's, because the patients in the German study had undergone six months of lithotripsy. That is simply wrong. The German study reported that "one day after the first shock-wave treatment," of 175 patients two had no stones and 137 had small fragments (emphasis added). At between four and eight months, 63% of all patients in the German study had no stones at all. Contrary to Medstone's statement that "plaintiffs have submitted no evidence that Medstone's 18.5% success rate after just 24 hours of treatment compared poorly to the success rate achieved by the German studies for a comparable time period," there was material evidence to that effect in the article showing the German success rate of 80% after 24 hours.

We find there is a genuine issue of material fact whether Statement 1 was misleading.

2. *Statement 2:* The Medstone [lithotripsy system] has been used successfully to treat kidney stone patients since October 1986 and gallstone patients since January 1988.

[8] Kaplan argues that because clinical trials of the Medstone system on gallstone patients had failed to achieve a significant or

competitive level of success, it was false and misleading to state that the system had been "used successfully to treat . . . gallstone patients since January 1988," when the clinical trials began. As explained above, Medstone's system had achieved a success rate of 18.5% at the time of the prospectus statement, while the system of its competitor Dornier had a success rate of 80%.

Medstone replies that this statement was not literally false because one patient was stone-free in 36 hours, and 18.5% had significant fragmentation in 24 hours. The system was thus "used successfully" on this limited group of patients. Nevertheless, while it is literally true that some gallstone patients were treated successfully by the Medstone system, a material issue of fact remains whether Medstone misleadingly represented that the system was being used successfully on a regular basis, especially given the much higher success rate of the German machine. See *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990) (statement that is literally true may be considered material misrepresentation if misleading in context), *cert. denied*, 501 U.S. 1249, 111 S.Ct. 2887, 115 L.Ed.2d 1052 (1991).

[9] We find there is a genuine issue of material fact whether Statement 2 was false or misleading.

3. *Statement 3:* The Company's marketing plan is based upon its belief that within the next five to ten years there will be a total of approximately 2,000 lithotripters installed in the United States which will be used to treat kidney stone and gallstone patients.

Kaplan argues that this statement was misleading because it implies that Medstone would have a significant share of the lithotripter market. Kaplan also argues that Medstone knew the lithotripter market was saturated, relying on a September 1988 document in which Freeman Rose, then Medstone's CEO, wrote of the kidney machine market: "It's dead." Kaplan also points to Medstone's sluggish sales in 1988, and claims that Medstone knew it would not participate

in any future market because of its system's low success rate with gallstone patients.

Medstone responds that there is no evidence that the market was saturated at the time the prospectus was circulated in June 1988. Medstone points to an independent study prepared as part of Weeden's two due diligence investigations, as the source of the projection of 2,000 installed lithotripters. Medstone also points out that Rose's "It's dead" statement was made three months after the date of the prospectus, and that the statement applied only to the market for single-purpose kidney lithotripsy systems. Rose testified at his deposition that the lack of demand for single-purpose machines gave Medstone's dual-purpose (kidney and gallstone) machine a competitive advantage. Finally, Medstone again asserts that the clinical trials were successful.

A statement in a prospectus will be grounds for liability under § 11 only if it was false or misleading at the time that the registration statement became effective. See 15 U.S.C. § 77k(a). Rose's "It's dead" statement was made three months after the prospectus was issued; it thus is not evidence to support a § 11 claim. See *Keegan Management*, 794 F.Supp. at 942 ("Because this information appeared so soon after the [public offering], it is tempting to assume, as Plaintiffs do, that Defendants must have had an inkling of it before the [public offering]. Yet the assumption may not be warranted; on summary judgment, Plaintiffs must produce evidence that it is."). Medstone also provided market figures to show that a substantial number of lithotripters were sold between 1988 and 1991, as evidence that the market was not actually saturated.

Finally, there is a basic flaw in Kaplan's argument. Statement 3 is not a prediction of Medstone's market but a general statement about the entire market for lithotripters. The success of Medstone's clinical trials thus has no direct relevance to this market estimate.

We conclude that there was no genuine issue of material fact regarding whether the market projection of 2,000 machines was

false at the time that the registration statement became effective. Summary judgment in favor of Medstone on Statement 3 was appropriate.²

B. Materiality

[10] Whether Statements 1 and 2 were material is also a question that should have been left for the jury. We find a rational jury could conclude that reasonable investors, reading these statements in the prospectus, could have been misled about the nature of an investment in Medstone. Such investors might have hesitated to buy Medstone stock if they had known that the success rate of Medstone's system, however preliminary, was far below that of its main competitor in the U.S. market. Reasonable jurors certainly could differ on whether this information might affect the stock-purchasing decision. See *Keegan Management*, 794 F.Supp. at 945.

[11] Medstone argues that because its prospectus contained a cautionary statement, its optimistic assessment of the competitiveness and success rate of its system in Statements 1 and 2 is not misleading. In the "Risk Factors" section of the Prospectus, Medstone stated that "To date the System has only been used at one hospital on a limited number of patients. No assurance can be given that the clinical trials for the use of this System in treating patients with gallstones under the IND/IDE [the FDA approval to conduct clinical trials] will be successful." Medstone is not saved by pointing to this statement.

This court recently has adopted the "be-speaks caution" doctrine, which holds that if "precise cautionary language ... directly addresses itself to future projections, estimates, or forecasts in a prospectus," the projections will not give rise to a claim of securities fraud. *In re Worlds of Wonder Sec. Litig. (Worlds of Wonder II)*, 35 F.3d 1407, 1414, 1415 (9th Cir.1994) (quoting *Worlds of Wonder I*, 814 F.Supp. at 858). See *Worlds of Wonder II*, at 1414-15 (citing cases from the First, Second, Fifth, Sixth,

2. Because we conclude that there was no evidence that the market estimate was false at the

time of the registration statements, we do not address whether Statement 3 was material.

Seventh, and Eighth Circuits adopting the doctrine); *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 515 (9th Cir.1991) (applying a similar analysis without explicit reference to the doctrine). We need not apply the doctrine in this case, however, because the cautionary statement quoted by Medstone does not relate directly to Statements 1 and 2. While the statement that no assurance can be given that the clinical trials ultimately will be successful might “bespeak caution” as to the *future* success of clinical trials, see *Worlds of Wonder I*, 814 F.Supp. at 858–59, at least a jury question remains whether it neutralized Medstone’s statement that its system *already* had been used successfully and was thus competitive.

We find that there is a genuine issue of fact whether Statements 1 and 2 were material.

C. Omission of the study results

[12] Kaplan also argues that Medstone had a duty to disclose the results of the Baylor clinical study in the prospectus, given the results detailed in Burke’s memorandum. Medstone counters that the clinical data was too speculative and premature. If the failure to disclose the clinical results would have misled the reasonable investor about the nature of an investment in Medstone stock, then the omission was material. *VeriFone*, 11 F.3d at 868–69.

This is a close question. “[S]ilence is not misleading in the absence of a duty to disclose.” *In re VeriFone Sec. Litig.*, 784 F.Supp. 1471, 1480 (N.D.Cal.1992), *aff’d*, 11 F.3d 865 (9th Cir.1993). While internal forecasts need not be disclosed, *VeriFone*, 11 F.3d at 869, the scientific evaluation of clinical trials is harder data. Kaplan alleges the omission of “material, actual facts” from which forecasts of success may be derived. *Id.* Although a prospectus should not “bury the shareholders in an avalanche of trivial information,” *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S.Ct. 978, 983, 99 L.Ed.2d 194 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976)), this information was not trivial, as the efficacy

and competitiveness of Medstone’s system was essential to the company’s performance.

Medstone argues that the study results were preliminary. But Medstone also bases its claim that Statements 1 and 2 were not misleading on the same study, characterizing the results as successful. Having used the study results to justify its prospectus statements, Medstone may not simultaneously claim that the study was too preliminary to disclose.

Viewing the evidence in the light most favorable to Kaplan, we believe the inclusion of the test results might have explained what “successful” use of the Medstone system meant and whether it compared favorably with its competitors. The rate of fragmentation achieved by the Medstone system was well below the German machine’s results, and is generally inconsistent with the term “successfully.” We believe a reasonable jury could find that the study results might have given a reasonable investor pause. We therefore find there is a genuine issue of fact whether the omission of the study results was material, especially in the light of Medstone’s statement that the lithotripter was competitive and had been used successfully.

D. Weeden’s due diligence defense

[13] Weeden moved for summary judgment on its defense of “due diligence” to the § 11 claims. To prevail on this defense at summary judgment, Weeden would have to show as a matter of law that, at the time of the registration statement, it had reasonable ground to believe and did believe, following a reasonable investigation, that the statements in the registration statement were true, that they omitted no required material fact, and that they contained all material facts necessary to ensure that statements in the registration statement were not misleading. 15 U.S.C. § 77k(b)(3)(A).

The district court noted that material issues of fact remained on the due diligence defense, although the court granted the defendants’ motion for summary judgment on other grounds. Because the district court found that the prospectus statements were not false, it did not decide the motion for summary judgment on Weeden’s due dili-

gence defense. Because the defense was not decided below, and is not fully argued to us on appeal, we do not address it here.

Therefore, we reverse the district court's grant of summary judgment on the § 11 claims with respect to Statements 1 and 2; we find that there are genuine issues of material fact as to whether these statements were material and misleading. In addition, we find that there is a genuine issue of fact whether the omission of the study results was material. However, we uphold the district court's determination that there is no genuine issue of material fact as to whether Statement 3 was false, and affirm the grant of summary judgment with respect to that statement. Finally, we decline to address Weeden's due diligence defense.

III. Kaplan's § 10(b) claims

Kaplan alleges that Medstone violated § 10(b) by making six post-prospectus statements, Statements 4–9, in Medstone's press releases, the Annual Report for 1988, and a research report prepared by Weeden. He also alleges that Statements 1–3 in the prospectus violated § 10(b).

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to use any "manipulative or deceptive device" in connection with the purchase or sale of any security. 15 U.S.C. § 78j(b) (1988). Rule 10b–5, a regulation issued under § 10(b), makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of all the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b).

[14, 15] A projection or statement of belief is a "factual" misstatement actionable under § 10(b) if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy. *In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 930 (9th Cir.1993), *cert. denied*, — U.S. —, 115 S.Ct. 295, 130 L.Ed.2d 209 (1994); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir.1989), *cert. denied*, 496 U.S.

943, 110 S.Ct. 3229, 110 L.Ed.2d 676 (1990). A plaintiff under § 10(b) must show reliance on the material misstatement, and scienter (an intent to defraud or deceive). *See Hannon v. Dataproducts Corp.*, 976 F.2d 497, 506–07 (9th Cir.1992).

In a securities fraud action, "[m]ateriality and scienter are both fact-specific issues which should ordinarily be left to the trier of fact," although "summary judgment may be granted in appropriate cases." *Apple*, 886 F.2d at 1113. To survive summary judgment, a plaintiff in a securities fraud suit must show a genuine issue of material fact regarding a particular statement or statements by the defendant company or its insiders. *Id.* at 1118.

A. Post-Prospectus Statements

Statements 4–9 contain optimistic pronouncements regarding Medstone's clinical trials for gallstone lithotripsy (4 and 8), the market demand for Medstone's machines (5, 6, and 9), Medstone's competitive position in the market (4), the volatility in its public stock prices (4), and its future success (6 and 7).

The individual statements are as follows:

Statement 4. There is no fundamental reason for the recent volatility in the company's common stock Our gallstone investigations are progressing as expected and our competitive position remains strong. (November 11, 1988 Medstone press release)

Statement 5. We believe noninvasive lithotripsy procedures for the treatment of kidney stones and gallstones will rise from 100,000 in 1987 to at least one million annually in the U.S. by the mid-1990s. This procedural demand should support an installed base, increasing from 200 machines at present, to in excess of 2,000 units in the U.S. alone. (November 15, 1988 Weeden Research Report)

Statement 6. Demand for Medstone lithotripters is strong and growing. (November 15, 1988 Weeden Research Report)

Statement 7. 1988 was an excellent year for Medstone. . . . We achieved exceptional financial results during the year and believe

our outlook is bright. (1988 Medstone Annual Report)

Statement 8. The U.S. Food and Drug Administration (FDA) granted us permission in January 1988 to commence clinical trials to determine the safety and effectiveness of the Medstone STS for the treatment of gallstones. Progress is excellent. (1988 Medstone Annual Report)

Statement 9. The financial results for the first quarter were below plan, but we see increased sales activity compared to the fourth quarter of 1988. The market is responding favorably to Medstone's Dual Imaging therapy system. (May 2, 1989, press release)

In granting Medstone's motion for summary judgment, the district court found that Kaplan failed as a matter of law to show reliance on any of the alleged misstatements because any material information Medstone had failed to disclose was made available to the market by other sources. The district court thus found that as a matter of law Medstone had not perpetrated a "fraud on the market." We therefore first discuss the reliance element of the § 10(b) analysis.

1. Reliance

[16] Rather than alleging specifically the class's reliance on the statements in buying Medstone stock, Kaplan brought his claim under the "fraud on the market" theory, endorsed by the Supreme Court in *Basic*, 485 U.S. at 245-49, 108 S.Ct. at 990-93, and described in detail in *Apple*, 886 F.2d at 1113-16. "Under the fraud on the market theory, the plaintiff has the benefit of a presumption that he has indirectly relied on the alleged misstatement, by relying on the integrity of the stock price established by the market." *Apple*, 886 F.2d at 1113-14. Kaplan's claim is that Medstone's alleged misstatements misled the market, the price of the stock responded accordingly, the plaintiff class bought the stock in reliance on the integrity of the price, and the class later lost money when the true state of affairs became clear and the price of Medstone's stock fell.

If, however, the information that defendants are alleged to have withheld from or

misrepresented to the market has entered the market through other channels, the market will not have been misled, and the stock price will reflect the full universe of information, despite the defendants' misrepresentations. *Id.* at 1114. In such a case the element of reliance will not be satisfied, and plaintiffs' claims based on a fraud on the market theory will fail. *Id.* at 1115. ("[I]n a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources."). The information that the defendants withheld or misrepresented, however, "must be transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by the insiders' one-sided representations." *Id.* at 1116.

Because the fraud on the market theory affords § 10(b) plaintiffs a presumption of reliance, Medstone has the burden of producing evidence to rebut the presumption. *Basic*, 485 U.S. at 245, 108 S.Ct. at 990-91; Fed.R.Evid. 301. To succeed at the summary judgment stage, Medstone's evidence must show that no rational jury could find for Kaplan on this issue. *Hanon*, 976 F.2d at 500. Our inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

[17] Kaplan alleged that Medstone's optimistic statements 4-9 misled the market and omitted negative information about the success of the clinical trials, the likelihood of FDA approval, the size of the future market for lithotripsy and Medstone's place in the market, and the safety and efficacy of gallstone lithotripsy.

As evidence that the omitted information was conveyed to the market, Medstone submitted sixty articles discussing kidney and gallstone lithotripsy and published during the class period to the district court. Numbers can be deceiving. Only fourteen articles discuss Medstone specifically. An additional eight mention the company only in passing.

Six of the seven articles discussing Medstone's clinical trials are generally positive about the success of the trials, with a few cautionary notes. None predicts the low rate of success actually achieved by Medstone's system. Only one of the seven articles reports less than optimistic data. That single article is a summary of Medstone's clinical study results in the *American Journal of Surgery*, released one month before the end of the class period, which reported that only 10% of the patients who contacted the researchers ultimately were found eligible for lithotripsy, and that only 36% of those were stone-free after six months. The article concludes that surgical removal of the gall bladder is the "gold standard" of gallstone treatment, and lithotripsy "may or may not replace or sharply curtail surgery." Two articles discuss the much more successful German trials of the Dornier lithotripter on gallstones.

The likelihood of FDA approval is addressed in eight articles, almost all of which assume approval is likely to be granted. Only two articles, from two stock analyst reports in September and October 1989, just before the end of the class period, express serious reservations. These articles warn that FDA approval may be "iffy," and "there is a good chance . . . that Medstone will *not* receive panel approval." (emphasis in original).

General market estimates for lithotripters appear in ten articles, again mostly positive. Four articles forecast an eventual 2000 machines in the United States, one projects 400 by 1991, and two are generally optimistic. Only the remaining three, appearing in the two months before the end of the class period in October 1989, acknowledge that the market had leveled off and that Medstone's sales had dropped.

Over twenty general articles discussed the size of the gallstone patient group eligible for lithotripsy in sources including the *New England Journal of Medicine* (two articles), stock analyst reports, *Associated Press* and other newswires, the *Los Angeles Times*, *Reader's Digest*, medical specialty and business journals, the *Denver Post*, the *Pittsburgh Post Gazette*, and *USA Today*. These articles,

however, gave widely varying estimates of the eligible patient group, ranging from 10%–80%, with most in the 20%–30% range.

A smaller group of fourteen articles mentions side effects. Of these, five said side effects were few, two had to do with kidney lithotripsy only, and four report possible kidney damage. Subsequent articles minimized the possibility of serious side effects.

Viewing this evidence in the light most favorable to Kaplan, we conclude that a genuine issue of fact remains whether, during the majority of the class period, cautionary information about the results of Medstone's clinical trials, the likelihood of FDA approval, the size of the lithotripsy market and Medstone's share in it, and the safety and efficacy of gallstone lithotripsy was "transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance" Medstone's allegedly misleading statements. *Apple*, 886 F.2d at 1116. The information available during all but the very end of the class period was generally optimistic about the success of the clinical trials, the size of the market, the likelihood of FDA approval, and the prospects of gallstone lithotripsy in general and of Medstone in particular. In contrast to the evidence found sufficient for summary judgment in *Apple*, 886 F.2d at 1111–12, 1116, the negative articles Medstone submitted are not as numerous as the "at least" twenty articles from such sources as *Business Week* and the *Wall Street Journal*, citing the specific *problems* with a new computer. In fact, a significant number of the Medstone articles came from obscure sources, and only a few mention any specific problems. *See id.* at 1116 (not enough to refute fraud on the market theory where the omitted "information has received only brief mention in a few poorly-circulated or lightly-regarded publications").

We therefore hold that, for most of the class period, Medstone has failed to sustain its burden of establishing that no reasonable jury could find that the market was misled by its statements and omissions. "[T]he total mix of information . . . sufficiently gives rise to different interpretations as to whether the representations and/or omissions made by [Medstone] were materially misleading to

the market. The impression that this mix of information conveyed cannot be resolved as a matter of law." *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1262 (4th Cir. 1993) (citation omitted).

We emphasize that we do not hold that Kaplan has established his theory. We find only that Medstone has not eliminated the possibility that a rational jury could find that the alleged misrepresentations and omissions misled the market. Our role is not to weigh the conflicting inferences to be drawn from the articles presented by Medstone. That is a function that is properly left to the finder of fact.³

[18] The end of the class period presents a different picture. About two months before the October 20, 1989 FDA rejection of Medstone's application (which marks the end of the class period), detailed negative articles began to appear in such major sources as the Los Angeles Times Orange County Edition, the American Journal of Surgery, and two stock analyst reports. In combination, these articles fully apprised the market of Medstone's business problems and falling sales, the limited success of the clinical trials, the small eligible patient group, the possible side effects, and the possibility that FDA approval would not be forthcoming. Kaplan cannot claim that the market was misled after this information became available. We therefore agree with the district court that summary judgment was proper as to claims accruing after the beginning of September 1989, when Medstone's clinical results were published. All of the submitted articles after that time warned of the problems Medstone faced. The pessimistic conclusions in the study report, in conjunction with the Los Angeles Times article detailing Medstone's business problems and the later stock analyst reports predicting FDA rejection, were sufficient as

3. Medstone also argues that Kaplan's argument is contradictory, because the fraud on the market theory assumes an efficient market, and the only way to argue that the 60 articles did not reach the market is to concede that the market was not efficient. We reject this argument. As pointed out above, many of the 60 articles did not contain directly relevant information counterbalancing Medstone's public optimism. Some of the

a matter of law to counter the market effect of Medstone's earlier optimistic statements.

We therefore find that the district court erred in granting Medstone summary judgment on the fraud on the market theory only for claims accruing prior to September 1989. This factual issue is best left to the jury. See *Cooke*, 998 F.2d at 1262 (claims based on fraud on the market theory are fact-specific and generally for the trier of fact to decide). We affirm the district court's grant of summary judgment for claims accruing in the period beginning in September 1989.

2. *Scienter*

The district court also granted Medstone summary judgment on the scienter element of the § 10(b) claims, finding that Kaplan failed to produce evidence that the defendants intended to deceive investors.

[19] In order to prevail on his § 10(b) claim, Kaplan must establish that the defendants made the allegedly misleading statements and omissions with scienter, "a mental state embracing intent to deceive, manipulate or defraud." *Hanon*, 976 F.2d at 507. Kaplan must show actual knowledge or a recklessness that is only one step down from intent,

a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir.1990) (en banc) (as amended), *cert. denied*, 499 U.S. 976, 111 S.Ct. 1621, 113 L.Ed.2d 719 (1991) (citations and quotations omitted).

articles that did contain relevant information appeared in obscure sources. An efficient market will ignore irrelevant articles and articles that did not appear in sufficiently circulated and credible sources. The Supreme Court noted that the ultimate resolution of this question is an issue for trial. *Basic*, 485 U.S. at 249 n. 29, 108 S.Ct. at 992 n. 29 ("[p]roof [that information did not actually reach the market] is a matter for trial").

Medstone moved for summary judgment on the issue of scienter, and submitted sworn declarations from each individual defendant, each testifying that he believed in good faith that his challenged statements (including Statements 4-9) were true. Medstone also submitted declarations regarding actions Medstone took in 1988 and 1989, including moving its operations to a larger facility, hiring more employees, increasing its inventory, and entering into an international distribution agreement in late 1988; an internal memo written in June 1989 regarding a productive meeting with the FDA; and positive statements made by FDA personnel in the spring and summer of 1989, as evidence that Medstone had a good faith belief in the future success of its system.

Kaplan's opposition repeated his allegations that Medstone had made false statements, using as specific examples three statements not even properly before the court on this appeal. Kaplan's opposition incorporates his own motion for summary adjudication on his § 10(b) claims, which asked for summary judgment on the issue of falsity only. He also referred the court to a declaration which was struck on a motion from Medstone.

Without the declaration, this portion of Kaplan's argument boils down to an assertion that "These statements are so false that defendants must have known they were false and must have intended to mislead the public." Such an argument does not suffice to rebut the declarations of good faith made by the defendants. "A plaintiff . . . must offer more than conclusory allegations, and if the defendant presents affidavits or other evidence establishing a lack of scienter, the plaintiff must come forward with some affirmative showing." *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir.1984) (per curiam). Kaplan, however, presented affirmative evidence as to several defendants.

a. Insider trading

Kaplan presented evidence that Payne, Medstone's CEO at the time of the public offering, sold two-thirds of his stock in the fall of 1988 for \$6.5 million, and Penfil, Med-

stone's president, sold one-fourth of his stock at the same time for \$2.4-2.5 million. These sales occurred as soon as was legally possible after the public offering in June 1988. Penfil then sold the rest of his stock for another \$4.5 million in August of 1989, just before the publication of Medstone's clinical results. Kaplan alleged that these sales coincided with the anticipation that negative information about Medstone would surface.

[20] "Insider trading in suspicious amounts or at suspicious times is probative of bad faith and scienter." *Apple*, 886 F.2d at 1117. Payne and Penfil's stock sales, in conjunction with the allegations that they were aware of undisclosed negative information about Medstone, do raise suspicions about their intent, as they are massive sales at times alleged to have been calculated to avoid the negative effects of undisclosed inside information. See *Apple*, 886 F.2d at 1117 (cases basing scienter on insider trades "have involved trades in amounts dramatically out of line with prior trading practices at times calculated to maximize personal benefit from undisclosed inside information").

[21] Medstone cites *Apple* to support its argument that Payne and Penfil's affidavits providing innocent explanations of their stock sales are sufficient as a matter of law to prove that no scienter existed. Payne explained that he sold the stock in the fall of 1988 after he decided to resign as CEO, to reap the economic rewards for the "significant effort and risk that I had invested in Medstone." Penfil explained that he and his family sold one-fourth of his stock in the fall of 1988 for the same reason as Penfil, and sold the remainder concurrent with his resignation in August of 1989 to ensure his financial security so he could spend more time with his family, and because he feared the possibility of hereditary early cancer.

In *Apple*, this court found that sales consistent with earlier patterns (and in much smaller amounts) did not create a genuine issue of fact regarding scienter in the face of "credible and wholly innocent explanations" for the sales. *Apple*, 886 F.2d at 1117. *Apple* does not apply here, however, for two reasons. First, these sales were not consis-

tent with earlier patterns; they were in large amounts and at sensitive times. Second, Payne's and Penfil's explanations—that they wanted to reap financial benefits for personal reasons—merely beg the question of whether they acted on the basis of undisclosed inside information in order to reap large returns. Penfil's implication that he wanted to retire can even be read to support a finding of his scienter.

[If defendant's] motivation in selling his stock was to fund retirement activities, plaintiff would doubtless argue that the desire to sell the stock to fund retirement was an incentive for [the defendant] to cause the making of inflationary misstatements. Such an implication would give substance to the contention that the alleged misrepresentations and omissions were deliberate.

Goldman v. Belden, 754 F.2d 1059, 1071 (2d Cir.1985).

Viewing the evidence in the light most favorable to Kaplan, we find that the evidence of the stock sales was sufficient to create a genuine issue of material fact as to the scienter of Payne and Penfil, and through them Medstone.

b. Good faith affidavits

[22] Radlinski and Rose's affidavits present a different picture. Radlinski, Medstone's CFO, submitted affidavits stating that to the extent he made or participated in the statements alleged to be misleading in the prospectus and afterwards, he "acted in the good faith belief that each of the statements . . . [was] accurate and not misleading." He also stated that as to the statements made after the prospectus "I did not believe I was omitting any material information, and I was not aware of any objective fact contradicting any of the statements." He also pointed out that he owned Medstone stock (he did not say how much) and had never sold any shares.

With his summary judgment motion, Rose (Medstone's CEO after Payne) submitted an affidavit stating that all the statements he made were true at the time and were made in good faith. He also stated that to his knowledge, all the information given to the

public was true, and he never directed or induced anyone to make public statements that he knew were false or misleading. He stated that he owned approximately 101,000 shares of Medstone stock throughout the class period, and had never sold any.

Even viewing the evidence in the light most favorable to Kaplan, these affidavits, uncontradicted by any evidence of insider trading or other evidence of scienter, are enough to justify granting Radlinski and Rose summary judgment on the issue of their scienter. See *Worlds of Wonder II*, 35 F.3d at 1425 (affirming summary judgment finding good faith where officers held on to stock during period of decline); *Apple*, 886 F.2d at 1117 (statements of good faith in affidavits were uncontroverted for purposes of summary judgment when there was no evidence of suspicious stock sales); *Bryson v. Royal Business Group*, 763 F.2d 491, 494 (1st Cir.1985) (uncontradicted affidavit by CEO allows summary judgment on scienter).

c. Weeden

[23] Don Hill, the former Director of Corporate Finance of Weeden, also submitted an affidavit regarding Weeden's public statements following the offering. Hill's affidavit describes his reliance on the reports of the Wilkerson Group, a consulting firm, and his good faith in making any public statements about Medstone's market (including Statements 5 and 6, which appeared in a Weeden Research Report of November 15, 1988). He also purchased stock in Medstone just before the FDA denied approval in October 1989.

Hill is not named as an individual defendant, however, and his affidavit of personal good faith does not establish as a matter of law that Weeden lacked scienter. The district court cast some doubt on the reasonableness of Weeden's investigation and mentioned a possible conflict of interest in the context of Weeden's due diligence defense to the § 11 claims. Hill apparently became a member of Medstone's board right after the public offering. Unresolved issues remain regarding the objectivity of Weeden's investigation and Hill's membership on Medstone's

board at a time when Weeden purported to perform objective research. Given the conflicting evidence, this affidavit from a single Weeden officer does not establish Weeden's lack of scienter as a matter of law for its statements after the initial public offering.

3. *Falsity*

Because it granted Medstone's summary judgment motion by finding as a matter of law that Medstone had rebutted Kaplan's presumption of reliance and that Kaplan had failed to establish scienter, the district court did not address the falsity of the post-prospectus statements made by Medstone after the initial public offering. The district court did address the falsity of the statements attributed to Rose, Statements 4, 8, and 9, and found they were not false.

We decline to address the falsity of any of the post-prospectus statements. Because we find that Kaplan produced no evidence that Rose or Radlinski had scienter, we find that summary judgment in their favor was appropriate on that ground. Further, as to the other defendants, Medstone's motion for summary judgment argued the issues of materiality and scienter, and the district court based its holding on those issues. On appeal, Medstone does not address the falsity of the post-prospectus statements, claiming that they are not properly before the court. We therefore do not decide the issue of the statements' falsity.

4. *Materiality*

In a § 10(b) action, an omitted fact is material if a reasonable investor would have been misled about the nature of an investment in Medstone, *VeriFone*, 11 F.3d at 869, because 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." *Basic*, 485 U.S. at 231-32, 108 S.Ct. at 983 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1986)).

[24] The parties' summary judgment papers and the district court's opinion, howev-

er, discuss materiality as if it were determined by whether the omitted information were credibly available to the market through other sources. Their discussion combines the fraud on the market theory of establishing reliance with the analysis of an individual statement's materiality. The two inquiries are closely related but not identical. A plaintiff who shows reliance under the theory that the market relied on a misrepresentation or omission must also establish materiality by showing that a reasonable shareholder would consider the misrepresentation or omission important, because it altered the total mix of available information.

The district court thus did not fully address the materiality of Statements 4-9. We therefore do not address it here. We note, however, that this issue is fact-specific and usually left to the fact-finder. *See Basic*, 485 U.S. at 239-41, 108 S.Ct. at 987-89; *TSC Indus.*, 426 U.S. at 450, 96 S.Ct. at 2133 (materiality is mixed question of law and fact generally not properly resolved on summary judgment).

Therefore, as regards Kaplan's § 10(b) claims for Statements 4-9, we find that there is a material issue of fact as to reliance prior to September 1989. Moreover, there are material issues of fact regarding the scienter of Medstone, Payne, Penfil, and Weeden. Thus, we reverse the district court's grant of summary judgment for those defendants prior to September 1989. However, summary judgment was appropriate for any § 10(b) claims after that date. In addition, we affirm summary judgment for Rose and Radlinsky, as there is no genuine issue of material fact regarding their scienter.

B. *The prospectus statements*

The district court granted summary judgment to Medstone on Kaplan's claim that Statements 1-3 in the prospectus violated § 10(b), finding that Kaplan had failed to show any evidence of scienter. Because we find that Kaplan presented a material question of fact regarding the scienter of Payne, Penfil, and Weeden, and because we find above that there is a material question of fact whether Statements 1 and 2 in the prospectus were false and material, we find that

there is a material question of fact whether Medstone, Payne, Penfil, and Weeden violated § 10(b) in making Statements 1 and 2 in the prospectus.⁴

IV. *Rose as a control person of Medstone*

Kaplan does not argue on appeal that Freeman Rose is liable under § 11 for false or misleading statements made in the prospectus. (At the time of the offering, Rose was not a director of Medstone, and he did not sign the registration statement.) We hold above that there was no material question of fact concerning Rose's lack of scienter in regard to statements made after the initial public offering, and so summary judgment on Rose's liability under § 10(b) for his own public statements was appropriate.

In addition to the summary judgment rulings on Kaplan's § 11 and § 10(b) claims, Kaplan also appeals the district court's holding that Rose was not secondarily liable for allegedly misleading statements made by the other defendants. Although Rose's position as CEO and his participation in the day-to-day affairs of the company were evidence that he exercised control over the other defendants, the court concluded that Rose was not a "controlling person" subject to liability for the statements of others because Kaplan "ha[d] not provided any evidence to support the contention that Rose was a culpable participant in the violations allegedly perpetrated by the other defendants."

[25] Section 20(a) of the 1934 Securities Exchange Act provides:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indi-

rectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a) (1988).

[26] Whether Rose is a controlling person "is an intensely factual question," involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions. *Arthur Children's Trust v. Keim*, 994 F.2d 1390, 1396-97 (9th Cir.1993). "A director is not automatically liable as a controlling person," although director status is a "red light" to the court. *Id.* (quotations omitted).

Rose was Medstone's CEO and a member of Medstone's board of directors during almost the entire class period. Kaplan also alleged Rose's significant participation in day-to-day activities at Medstone. Although Rose's status as an officer and director may not *per se* establish that he controlled the other defendants, his participation in the daily affairs of a relatively small company such as Medstone suffices to establish a material question of fact whether he was a controlling person. *See id.* Viewing the evidence in the light most favorable to Kaplan, we find that Kaplan alleged enough to survive summary judgment on Rose's status as a controlling person.

Rose relies on a line of cases holding that the plaintiff had the burden of showing that the defendant alleged to be a controlling person did not come within the good faith exception, thus requiring the plaintiff to show that the defendant had been a "culpable, knowing participant" in the misstatements. *See, e.g., Orloff v. Allman*, 819 F.2d 904, 906-07 (9th Cir.1987). By a subsequent en banc decision, however, we have established that it is the alleged controlling person who has the burden of showing that he acted in good faith, and so did not share in the scienter required for liability under § 10(b). *Hollinger*, 914 F.2d at 1575. *See also Arthur*, 994 F.2d at 1398; *San Mateo County Transit Dist. v. Dearman, Fitzgerald and Roberts, Inc.*, 979 F.2d 1356, 1358 (9th Cir.1992). Therefore, once Kaplan has shown a material

address it here.

4. Because the district court did not consider the issue of reliance on Statements 1-3, we do not

question of fact whether Rose was a controlling person, the burden shifts to Rose to show as a matter of law that he acted in good faith.

Rose has met his burden. To establish his good faith, Rose submitted an affidavit in support of defendants' motion for summary judgment, stating that "[d]uring the time I was employed by Medstone, I never directed or induced anyone to make any public statements on behalf of or regarding Medstone which I knew to be false or misleading." Rose also stated: "To my knowledge, all information released to the public was done entirely in good faith, was supported by fact, and was true." Kaplan points to no evidence disputing Rose's declaration of innocence.

Because an uncontradicted declaration of good faith can establish a lack of scienter, see *Apple*, 886 F.2d at 1117, Rose's uncontroverted statement that he never directed anyone to make statements that he knew to be misleading, and that to his knowledge all the information made public was true, is enough to shield him from secondary liability. Summary judgment was properly granted to Rose under § 20(a).

V. *Res judicata* dismissal of *Kramer's* action

Kramer argues that her complaint was improperly dismissed as *res judicata*, because the *Kramer* complaint contained allegations that did not appear in *Kaplan*. Those allegations were the allegedly misleading Statements 10–13, which Kaplan attempted to add to his complaint at the summary judgment phase. Kramer argues that the district court cannot find that the statements did not appear in *Kaplan* and yet dismiss them as *res judicata* in *Kramer*.

We need not address this argument. Because we reverse in part the grant of summary judgment to Medstone, the judgment that was the basis for *res judicata* is reversed. Kramer's § 10(b) claims will thus be reinstated, except to the extent we affirm the district court's grant of summary judgment in favor of Medstone as to all § 10(b) claims against Rose and Radlinski, and in favor of Rose on the claims based on secondary liability.

CONCLUSION

We find that Statements 1–9 were before the district court on summary judgment, and that the district court did not abuse its discretion in refusing to allow Kaplan to add Statements 10–13 at the summary judgment stage.

We reverse the district court's grant of summary judgment to Medstone, Payne, Penfil, Radlinski, and Weeden on the § 11 claims as to Statements 1 and 2, and on the omission of the study results. We affirm the grant of summary judgment to the same defendants on Statement 3.

Further, we reverse the district court's grant of summary judgment to Medstone, Payne, Penfil, and Weeden on the § 10(b) claims with respect to Statements 4–9 and Statements 1 and 2 in the prospectus. Summary judgment was appropriate, however, for claims accruing after the beginning of September 1989. We affirm the grant of summary judgment to Rose and Radlinski, as there is no genuine issue of fact regarding their scienter.

We affirm summary judgment to Rose on the ground that Rose established a good faith defense to controlling person liability under § 20(a).

Finally, we reverse the district court's dismissal of the *Kramer* action as *res judicata* to the extent that we reverse the district court's grant of summary judgment to Medstone, Payne, Penfil, and Weeden on the § 10(b) claims.

Neither party is awarded fees or costs on appeal.



lien on personal property within the twenty-day period required under the “enabling loan” exception under section 547(c)(3). 522 U.S. at 216, 118 S.Ct. 651. It held that the creditor must have actually acted to perfect its security interest within twenty days, as the Code demands, and the state’s relation back doctrine could not “deem” the date of that act as having occurred at an earlier time. *See id.*⁵ The Court’s ultimate conclusion was that a “transfer of a security interest is ‘perfected’ under [the enabling loan exception] on the date that the secured party has completed the steps necessary to perfect its interest,” such that “a creditor may invoke the enabling loan exception only by satisfying state-law perfection requirements within the 20-day period required by the federal statute,” section 547(c)(3)(B). *Id.* at 212–13, 118 S.Ct. 651. We find this authority inapposite.

We first note the obvious—that *Fink* involved a different Code provision relative to perfection than the one at issue here. Because the case involved personalty—a car—rather than realty, the perfection language in *Fink* tracked section 547(e)(1)(B), which states that perfection occurs when “a creditor . . . cannot acquire a *judicial lien* that is superior to the interest of the transferee” (emphasis added). Here, on the other hand, we focus on section 547(e)(1)(A), which defines perfection on the basis of an “*interest* that is superior to the interest of the transferee” (emphasis added). As earlier noted, the Code’s differentiation between an “interest” and a “lien” is meaningful, and the debtors here make no effort to take this distinction into account in their reliance on *Fink*.

More importantly, Banco Popular has not invoked the enabling loan exception and is not looking to rely on the local relation back doctrine to extend a perfec-

tion period limited by section 547. *See id.* at 212, 118 S.Ct. 651. Indeed, the acts taken by Banco Popular to “perfect” its interest in the real property against a bona fide purchaser occurred in 2004 and 2005—well before the ninety day preferential transfer time period. *See* 11 U.S.C. § 547(e)(1)(A), (e)(2). In short, we discern no error in the bankruptcy court’s decision that the debtors failed to establish the necessary elements of a preferential transfer.

IV. CONCLUSION

The judgment is **affirmed**.



Luis Javier VILLANUEVA,
Plaintiff–Appellant,

v.

UNITED STATES of America,
Defendant–Appellee.

No. 10–2431.

United States Court of Appeals,
First Circuit.

Heard Nov. 10, 2011.

Decided Nov. 30, 2011.

Background: Former federal employee brought action against United States under Federal Tort Claims Act (FTCA) and Administrative Procedure Act (APA) alleging that his firing and procedures employed during firing were improper. The United States District Court for the District of Puerto Rico, Francisco A. Besosa, J., 740 F.Supp.2d 322, dismissed complaint,

5. The Court in *Fink* noted that it was resolving a circuit dispute. 522 U.S. at 214 n. 2,

118 S.Ct. 651. Each of the cases cited by the Court involved an automobile loan.

and denied employee's motions for leave to amend and for reconsideration. Employee appealed.

Holdings: The Court of Appeals held that:

- (1) FTCA did not provide subject matter jurisdiction over action, and
- (2) district court did not abuse its discretion in denying employee's motion for leave to amend.

Affirmed.

1. Federal Courts ⇌776

Court of Appeals reviews de novo district court's ultimate legal conclusion on motion to dismiss for lack of jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

2. United States ⇌125(3)

Absent waiver, sovereign immunity, which is jurisdictional in nature, shields United States from suit.

3. United States ⇌78(5.1)

Constitutional tort claims are not cognizable under Federal Tort Claims Act (FTCA). 28 U.S.C.A. § 1346(b).

4. United States ⇌78(5.1)

Federal Tort Claims Act (FTCA) did not provide subject matter jurisdiction over former federal employee's action against United States alleging that his termination violated his constitutional rights. 28 U.S.C.A. § 1346(b).

5. Federal Courts ⇌817

Court of Appeals reviews district court's denial of request for leave to amend a complaint for abuse of discretion.

6. Federal Civil Procedure ⇌834, 840, 851

Grounds for denial of leave to amend complaint include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously al-

lowed, undue prejudice to opposing party, and futility of amendment.

7. Federal Civil Procedure ⇌392, 840

District court did not abuse its discretion in denying former federal employee's motion for leave to amend his complaint against United States under Federal Tort Claims Act (FTCA) alleging that his termination violated his constitutional rights to add his former supervisors as defendants and to assert new *Bivens* claims, even though employee filed motion to amend only four months after filing his initial complaint, where employee was well aware of facts underlying his claim and involvement of his former supervisors before he filed suit, but provided no justification for delay and declined to drop United States as party. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

8. Federal Courts ⇌829

Court of Appeals reviews denial of motion for reconsideration for abuse of discretion.

9. Federal Civil Procedure ⇌928

Reconsideration may be proper where movant shows manifest error of law or newly discovered evidence, or where district court has misunderstood party or made error of apprehension.

10. Federal Civil Procedure ⇌928

Motions for reconsideration are not to be used as vehicle for party to advance arguments that could and should have been presented to district court prior to its original ruling.

Juan José Nolla-Acosta on brief for appellant.

Héctor E. Ramírez-Carbo, Assistant United States Attorney, with whom Rosa Emilia Rodríguez-Vélez, United States Attorney, Nelson Pérez-Sosa, Assistant United States Attorney, Chief, Appellate Division, and Luke Cass, Assistant United States Attorney, were on brief, for appellee.

Before TORRUELLA, STAHL, and THOMPSON, Circuit Judges.

PER CURIAM.

Former federal employee Luis Javier Villanueva (“Villanueva”) appeals the dismissal of his lawsuit against the United States. Finding that this appeal lacks merit, we summarily affirm.

Villanueva was employed as a custodial worker at a Coast Guard Air Station in Puerto Rico for four and one half years before being fired for allegedly pilfering various items. Claiming that the firing and the procedures employed during the firing were improper, Villanueva filed suit. More specifically, he alleged constitutional violations and negligence, and claimed jurisdiction under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671 et seq., and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 et seq. The only defendant Villanueva named was the United States.

The United States moved to dismiss the complaint for lack of subject matter jurisdiction. *See* Fed.R.Civ.P. 12(b)(1). The government argued that there was no jurisdiction under the FTCA because its limited waiver of sovereign immunity is not applicable to constitutional tort claims. It further claimed jurisdiction was lacking under the APA because Nonappropriated Fund employees like Villanueva cannot

proceed under the APA. Villanueva filed an opposition to the motion to dismiss, offering no counter argument as to the FTCA or APA’s applicability, and instead requesting that he be allowed to amend the complaint to name his former supervisors as defendants and to include a *Bivens* action. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Villanueva offered no grounds to support his request for amendment, nor did he proffer a proposed amended complaint. The district court denied the request to amend and granted the motion to dismiss. Villanueva filed a motion seeking reconsideration of the request to amend, which the court also denied. This appeal followed. In it, Villanueva argues that all three rulings—dismissal of the complaint, denial of the request to amend, and denial of the motion to reconsider—were erroneous. We consider each in turn.

[1] We review de novo a district court’s ultimate legal conclusion on a motion to dismiss for lack of jurisdiction. *Gill v. United States*, 471 F.3d 204, 205 (1st Cir.2006). As Villanueva has abandoned his position that jurisdiction is proper under the APA by entirely failing to brief the issue on appeal, that argument is waived, *see United States v. Marsh*, 561 F.3d 81, 83 n. 4 (1st Cir.2009), and we only consider whether jurisdiction exists under the FTCA.¹

[2] Absent a waiver, sovereign immunity (which is jurisdictional in nature) shields the United States from suit. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). The FTCA provides a limited congressional waiver of sovereign immunity for certain

1. Additionally, in a proposed amended complaint, which Villanueva attached to his motion for reconsideration, he removed the lan-

guage from the original complaint that claimed jurisdiction under the APA. Only a claim under the FTCA remained.

torts committed by federal employees acting in the scope of their employment. *Santoni v. Potter*, 369 F.3d 594, 602 (1st Cir.2004). One requirement of the FTCA is that circumstances must be present whereby “the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). This requirement is fatal to Villanueva’s position.

[3, 4] The Supreme Court has consistently held that “law of the place” means law of the state—making state law the source of substantive liability under the FTCA. *Meyer*, 510 U.S. at 478, 114 S.Ct. 996. Since federal and not state law provides the basis for liability in a constitutional claim (such as Villanueva’s), constitutional tort claims are not cognizable under the FTCA. *Id.* As explicitly stated by the Supreme Court, “the United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims.” *Id.* The result is clear—the FTCA does not provide jurisdiction over Villanueva’s suit.² The district court did not err in dismissing the complaint. We proceed to the request to amend.

[5, 6] We review a district court’s denial of a request for leave to amend a complaint for abuse of discretion. *Chiang v. Skeirik*, 582 F.3d 238, 243 (1st Cir.2009). We defer to the court’s denial if any adequate reason for the decision is apparent on the record. *Id.* “Grounds for denial include ‘undue delay, bad faith or dilatory motive . . . repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . [and] futility of amendment.’” *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512

F.3d 46, 56 (1st Cir.2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

[7] Here the district court found that amendment of the complaint would be tantamount to restarting the proceedings, complete with new defendants (Villanueva’s supervisors) and an entirely new cause of action (the *Bivens* claim). The court found that Villanueva had waited too long to alter the nature of the proceedings so drastically. We agree.

This is not a case of new allegations coming to light following discovery, or of previously unearthed evidence surfacing. Rather Villanueva was well aware of the facts underlying his claim and the involvement of his former supervisors before he filed suit. *See Palmer v. Champion Mortg.*, 465 F.3d 24, 31 (1st Cir.2006). He has offered no justification for his delayed attempt to bring them on board. Nor can we discern one. Therefore, while the four month period between the filing of the complaint and the request to amend may not on its face seem particularly long, we think it is under the circumstances at hand. *See, e.g., Kay v. N.H. Democratic Party*, 821 F.2d 31, 34–35 (1st Cir.1987) (per curiam) (finding undue delay when plaintiff offered no justification for waiting three months after new information came to light to seek to amend his complaint).

Furthermore, amendment of the complaint would have been unduly prejudicial to the United States. While Villanueva wanted to add a *Bivens* action and to include his former supervisors as named defendants, he also sought to maintain the United States as a defendant. The *Bivens* doctrine allows a plaintiff to pursue consti-

2. Villanueva makes a bald assertion that the Constitution and federal common law provide jurisdiction for his suit. This argument is untenable. As noted, sovereign immunity

bars the United States from suit absent waiver. Villanueva points to no source of waiver other than the inapplicable FTCA.

tutional claims against federal officials in their individual capacities. *See Chiang*, 582 F.3d at 243; *see also McCloskey v. Mueller*, 446 F.3d 262, 271 (1st Cir.2006). It does not override sovereign immunity so as to permit suits against the United States. *Chiang*, 582 F.3d at 243; *McCloskey*, 446 F.3d at 272. Thus, even if the district court had granted the motion to amend, the court still would not have had subject matter jurisdiction over the United States, and one can hardly claim that having to defend that action would not have been unduly prejudicial to the United States. The district court did not abuse its discretion in denying the motion to amend. We turn to the motion for reconsideration.

[8–10] We review the denial of a motion for reconsideration for abuse of discretion. *United States v. Allen*, 573 F.3d 42, 53 (1st Cir.2009). Reconsideration may be proper where the movant shows a manifest error of law or newly discovered evidence, or where the district court has misunderstood a party or made an error of apprehension. *See Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 81–82 (1st Cir. 2008). Motions for reconsideration are not to be used as a vehicle for a party to advance arguments that could and should have been presented to the district court prior to its original ruling. *See Allen*, 573 F.3d at 53.

Villanueva's motion falls short. He did not demonstrate an error of law, the existence of new evidence, or that the district court misapprehended the original request to amend. Instead, Villanueva simply reiterated his request and then advanced various arguments as to why amendment was appropriate. These arguments could and should have been presented in his original request (which, as noted above, was devoid of any rationale). The district court did not abuse its discretion.

For these reasons, we summarily *affirm*. *See* 1st Cir. R. 27.0(c).



**In re CITIGROUP ERISA
LITIGATION.**

**Stephen Gray, James Bolla, and Samier
Tadros, Lead Plaintiffs–Appellants,**

**Sandra Walsh, Anton K. Rappold,
and Alan Stevens, Plaintiffs–
Appellants,**

v.

**Citigroup Inc., Citibank, N.A., The Plans
Administration Committee, The Plans
Investment Committee, Charles O.
Prince, Robert E. Rubin, Jorge Ber-
mudez, Michael Burke, Steve Calabro,
Larry Jones, Faith Massingale, Thom-
as Santangelo, Alisa Seminara, Rich-
ard Tazik, James Costabile, Robert
Grogan, Robin Leopold, Glenn Regan,
Christine Simpson, Timothy Tucker,
Leo Viola, Donald Young, Marcia
Young, and John Does 1–20, Defen-
dants–Appellees.**

Docket No. 09–3804–cv.

United States Court of Appeals,
Second Circuit.

Argued: Sept. 28, 2010.

Decided: Oct. 19, 2011.

Background: Participants in retirement plans covered by the Employee Retirement Income Security Act (ERISA) sued employers and plan fiduciaries, claiming that because an employer's stock became an imprudent investment, defendants should have limited plan participants' abili-

Sean THOMPSON-EL, Appellant,

v.

Jimmy JONES, Superintendent; Dick
Moore, Theresa Thornburg,
Appellees.

No. 88-1968.

United States Court of Appeals,
Eighth Circuit.

Submitted March 13, 1989.

Decided June 1, 1989.

Inmate filed amended pro se complaint against Missouri correctional officials alleging he was being held in administrative segregation without having received a report of definite misconduct, without adequate access to the courts, and without meaningful investigation into the incident. Following plaintiff's motion to file second-amended complaint, the United States District Court for the Eastern District of Missouri, Carol E. Jackson, United States Magistrate, denied motion, and plaintiff appealed. The Court of Appeals, Bowman, Circuit Judge, held that district court did not abuse its discretion in denying civil rights plaintiff leave to file second-amended complaint even though first-amended complaint was filed pro se.

Affirmed.

1. Federal Civil Procedure ¶833

Policy favoring liberal allowance of amendment to pleadings does not mean that the right to amend is absolute.

2. Federal Civil Procedure ¶840

Denying civil rights plaintiff leave to file second-amended complaint was not abuse of discretion even though first-amended complaint was filed pro se; motion to amend was filed after case had been pending approximately 18 months and just two weeks before trial was scheduled to start, and there was some evidence that motion was filed to delay trial until more

convenient time for counsel, rather than to press legitimate claims.

Jeffrey S. Kerr, St. Louis, Mo., for appellant.

Paul Rauschenbach, Asst. Atty. Gen., Jefferson City, Mo., for appellees.

Before JOHN R. GIBSON and
BOWMAN, Circuit Judges, and
HEANEY, Senior Circuit Judge.

BOWMAN, Circuit Judge.

Sean Thompson-El appeals following a grant of summary judgment in favor of defendants-appellees. Thompson-El claims that the United States Magistrate¹ erred prior to granting summary judgment by denying him leave to file a second amended complaint. We affirm.

I.

This case was initiated in October 1986 when Thompson-El filed a pro se complaint under 42 U.S.C. § 1983 (1982) against officials of the Missouri Training Center for Men (MTCM) in Moberly, Missouri. The next month Thompson-El amended his complaint, adding both defendants and claims, and the claims in his original complaint subsequently were dismissed. His amended complaint alleged *inter alia* that individuals associated with MTCM had violated his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights. Specifically, Thompson-El claimed that he was being held in administrative segregation without having received "a report of definite misconduct, without adequate access to the courts and without a meaningful . . . investigation" into the incident that precipitated his confinement in administrative segregation. Appendix of Appellant (App.) at 14. He demanded that the investigation be concluded or that he be returned to the general prison population.

On December 29, 1987, Jeffrey S. Kerr was appointed as Thompson-El's counsel. Kerr entered his appearance on Thompson-

1. The Honorable Carol E. Jackson, United States Magistrate for the Eastern District of Mis-

souri, before whom the parties consented to trial. See 28 U.S.C. § 636(c) (1982).

El's behalf February 4, 1988. Around February 22 the trial court entered discovery deadlines and notified the parties that trial had been set for May 23, 1988. Thompson-El moved for a continuance March 3, 1988, stating that "a prior scheduling conflict render[ed] [his] counsel unavailable for trial" on the scheduled date and requesting that the trial be re-scheduled for "a later time to be determined by the Court." App. at 34. The continuance was granted and the trial re-scheduled for May 25, 1988.

Although Thompson-El's counsel was appointed in December 1987, he did not meet with Thompson-El to discuss the case until May 3, 1988. Prior to that, discussions between counsel and Thompson-El had been limited to brief telephone calls. On May 10, two weeks before the trial was to start, Thompson-El sought leave to file a second amended complaint, in which he named four more defendants, presented at least one new claim (that the Adjustment Board's December 18, 1986 proceedings finding Thompson-El guilty of involvement in an assault were unconstitutional), and added demands for actual and punitive damages. The motion for leave to amend was denied. Thereafter, defendants' motion for summary judgment, which argued *inter alia* that Thompson-El's claims were moot, was granted. The trial court agreed that the claims were moot, stating that "[b]ecause the investigation . . . has been completed and the plaintiff has been transferred from MTCM to another institution, his claim for injunctive relief is moot," and "there is nothing in the complaint from which a request for monetary relief may be inferred." App. at 68. Judgment in favor

of defendants was entered, and Thompson-El appeals.

II.

Federal Rule of Civil Procedure 15(a) governs a party's right to amend its pleadings. The Rule provides in pertinent part that leave of court to amend a complaint "shall be freely given when justice so requires."² As explained by the Supreme Court, absent a good reason for denial—such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of amendment—leave to amend should be granted. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Amendment of pleadings is to be liberally allowed, but the trial court's decision whether to allow amendment will be reviewed only for an abuse of discretion. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77 (1971). Having considered the circumstances surrounding the denial of Thompson-El's motion to amend, we find that there was good reason to deny the motion, and therefore cannot say that the trial court abused its discretion.³

[1, 2] The policy favoring liberal allowance of amendment does not mean that the right to amend is absolute. When a considerable amount of time has passed since the filing of a complaint and the motion to amend is made on the eve of trial and will cause prejudice and further delay, courts require the movant to provide some valid reason for the belatedness of the motion.

2. The full text of Rule 15(a) provides:

(a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the origi-

nal pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

3. The trial court's failure to articulate its reasons for denying the motion, contrary to what Thompson-El suggests, is not per se an abuse of discretion. *See, e.g., Rhodes v. Amarillo Hosp. Dist.*, 654 F.2d 1148, 1153-54 (5th Cir.1981). We reiterate, however, that as a matter of good practice a trial court should provide reasons for the denial of a motion to amend. *See Hannah v. City of Overland*, 795 F.2d 1385, 1392 (8th Cir.1986).

See *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 933 (1st Cir. 1983); see also *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 825-26 (8th Cir. April 19, 1989). Here the motion to amend was filed after the case had been pending for approximately eighteen months and just two weeks before the trial was to start. It was made almost six weeks after the date originally set for completion of discovery and two weeks after the deadline for summary judgment motions. Furthermore, grant of the motion most likely would have necessitated additional discovery and further delay. Indeed, Thompson-El moved to file discovery out of time and for a continuance the day before he filed the motion to amend, and in the motion for a continuance he indicated that to allow him adequate time to prepare for trial on the matters raised in his second amended complaint the court should set trial no earlier than August 1, 1988.

Thompson-El argues, of course, that the belatedness of his motion to amend should have been excused. He contends that it was "impossible for . . . counsel to discover the need" for a second amended complaint until he and counsel met and received certain discovery materials. Brief for Appellant at 13-14. As noted above, however, counsel was appointed for Thompson-El in December 1987. The discovery materials were not requested until the first week of the following April and counsel and Thompson-El did not meet until the following May. Thompson-El provides no explanation for not requesting the discovery materials earlier, except to say the request was not late under the discovery schedule, and the failure to meet until May 3 he attributes to "counsel's scheduling conflicts and [his own] incarceration at [the Missouri State Penitentiary (MSP)], some four (4) hours away, one way, from counsel's of-

fices by automobile."⁴ Brief for Appellant at 13. Suffice it to say that we find these explanations unimpressive.

Thompson-El also makes much of the fact that the complaint he was denied leave to amend, *i.e.*, his first amended complaint, was filed pro se. He argues that the "rules favoring liberality in amending pleadings are particularly crucial" here because the pro se litigant is more prone to make errors than is the litigant represented by counsel. Brief for Appellant at 12-13. In the circumstances of this case, however, we think that point provides little excuse. Because Thompson-El had been acting pro se, counsel should have realized that deficiencies in the pleadings were likely and, once he had an opportunity to become familiar with this case, should have filed the motion to amend promptly.

Defendants contend that Thompson-El's attorney simply did not want to go to trial in late May because of certain social engagements and his late-date maneuvering was an attempt to avoid having to do so. The record provides some support for this view. For example, in the May 9 motion for continuance (filed the day before the motion to amend), Thompson-El explained that the May 9 and March 3 continuances both were made because counsel planned to be "absent for ten (10) of the last fourteen (14) days immediately preceding the trial date" in order to participate in two out-of-town weddings. App. at 53-54.⁵ Defendants argue in essence that, rather than seeking leave to file a second amended complaint in order to press legitimate claims, Thompson-El filed the motion in order to delay trial until a time more convenient for counsel. If a motion to amend is filed for dilatory purposes, a court has good reason to deny the motion. See *Foman*, 371 U.S. at 182, 83 S.Ct. at 230. On

4. Counsel's offices are in St. Louis, Missouri, and MSP is located approximately 130 miles away in Jefferson City, Missouri. Thompson-El was transferred from MTCM to MSP after the Adjustment Board found him guilty of involvement in an assault on a fellow MTCM inmate.

5. Had the March 3 motion for continuance been more artfully drafted, Thompson-El might then have received a continuance more to his liking.

As we noted earlier, however, Thompson-El simply stated in that motion that counsel would be unavailable May 23 and requested only that the trial not start that day but at "a later time to be determined by the Court." App. at 34. Apparently, no clarification of counsel's schedule or other request for a delayed trial date was presented to the trial court until May 9.

Cite as 876 F.2d 69 (8th Cir. 1989)

the facts of this case, we believe the trial court could well have concluded that the motion to amend was prompted by such motives.

Parties in litigation, as well as the courts, are entitled to expect opposing parties to prepare their cases in timely fashion. "Trial settings are to be taken seriously and discovery must be conducted [in such a way that the parties are prepared] for trial on the date scheduled. . . ." *Mercantile Trust Co. Nat'l Ass'n v. Inland Marine Prods.*, 542 F.2d 1010, 1013 (8th Cir.1976). In this case, it is clear that Thompson-El's pretrial preparation was approached with a marked lack of diligence: Thompson-El and counsel did not even meet until two weeks after defendants filed their motion for summary judgment. More importantly, the addition in the second amended complaint of four new defendants, a distinct claim, and demands for actual and punitive damages would have changed this case quite substantially. The additional burdens of discovery and delay the amendment would have placed on defendants we are unwilling to characterize as insignificant prejudice, especially in light of Thompson-El's inability to provide a valid excuse for his failure to act earlier. See *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15, 20 (1st Cir.1979); see also *Mills*, 872 F.2d at 825-26; *Stepanischen*, 722 F.2d at 933. In the circumstances of this case, the trial court did not abuse its

6. Although the above discussion disposes of the issue before us, we add this brief comment. As we noted, this case stems from Thompson-El's confinement in administrative segregation. Thompson-El was placed in administrative segregation July 20, 1986 pending the outcome of an investigation into his involvement in a July 19 assault on a fellow MTCM inmate. The investigation lasted into the following December, and Thompson-El alleged in his first amended complaint that the investigation was a mere pretext for keeping him in administrative segregation. Because the trial court correctly dismissed the case as moot, it did not address the substance of Thompson-El's claims. Absent mootness, we believe Thompson-El's claims might have had some merit, for our review of the record discloses little or no investigative activity for much of the period between July and December. We, of course, do not decide

discretion in denying Thompson-El leave to file his second amended complaint.⁶

AFFIRMED.



Darrell N. WILLIAMSON, Appellant,

v.

A.G. EDWARDS AND SONS, INC.;
Bruce Morgan, Appellees.

No. 88-2421.

United States Court of Appeals,
Eighth Circuit.

Submitted May 19, 1989.

Decided June 2, 1989.

Rehearing Denied June 30, 1989.

A black homosexual male sued his former employer and his former supervisor under Title VII and 42 U.S.C.A. § 1981, alleging that he was discharged from his position on the basis of his race. The United States District Court for the Eastern District of Missouri, William L. Hungate, J., granted summary judgment for defendants, and employee appealed. The Court of Appeals held that employee's complaint

here whether the investigation was unduly delayed or prolonged to provide a pretext for keeping Thompson-El in administrative segregation. We do point out, however, that when an inmate has acquired a constitutionally protected interest in remaining in the general prison population, the fact that an investigation is characterized as "ongoing" will not automatically justify keeping the inmate in administrative segregation. See *Hewitt v. Helms*, 459 U.S. 460, 477 n. 9, 103 S.Ct. 864, 874 n. 9, 74 L.Ed.2d 675 (1983). Moreover, we think it fair to say that "[t]he lengthier the period of administrative detention, the more likely it may be that [the] investigation' is merely a pretext." *Id.* at 493, 103 S.Ct. 883 (Stevens, J., dissenting). As protection against deprivation of their rights, inmates so confined are entitled to periodic review of their administrative segregation status. *Id.* at 477 n. 9, 103 S.Ct. at 874 n. 9.

**Maureen HAMILTON, Administratrix of
the Estate of John B. Hamilton,
Plaintiff, Appellant,**

v.

**UNITED STATES of America,
Defendant, Appellee.**

No. 83-1358.

United States Court of Appeals,
First Circuit.

Argued Sept. 16, 1983.

Decided Sept. 22, 1983.

Former serviceman's widow brought wrongful death action against United States pursuant to Federal Tort Claims Act. The United States District Court for the District of Massachusetts, 564 F.Supp. 1146, David S. Nelson, J., granted Government's motion for reconsideration of earlier denial of motion to dismiss and granted motion, and widow appealed. The Court of Appeals held that action was barred by *Feres* doctrine.

Affirmed.

United States ⇐78(16)

Former serviceman's widow's wrongful death action alleging negligent and careless diagnosis of serviceman's cancer as skin lesion during active duty with United States Coast Guard was barred by *Feres* doctrine, and there was no duty on part of Government to provide follow-up care to former serviceman, breach of which would be actionable under Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

Raymond J. Kenney, Jr., with whom Martin, Magnuson, McCarthy and Kenney was on brief, for plaintiff, appellant.

Marianne B. Bowler, Asst. U.S. Atty., with whom William F. Weld, U.S. Atty., was on brief, for defendant, appellee.

* Of the Federal Circuit, sitting by designation.

Before BOWNES, Circuit Judge, ALDRICH and COWEN *, Senior Circuit Judges.

PER CURIAM.

We agree with the district court, 564 F.Supp. 1146, that the *Feres* doctrine bars this action. Under the facts, we cannot recognize a duty to follow up because this would mean creating continuous onsets of new causes of action extending beyond the period of active service.

Affirmed.



**Charles A. TIERNAN, Plaintiff,
Appellant,**

v.

**BLYTH, EASTMAN, DILLON & CO., et
al., Defendants, Appellees.**

No. 82-1917.

United States Court of Appeals,
First Circuit.

Argued Sept. 9, 1983.

Decided Oct. 12, 1983.

Customer brought securities action against his broker for allegedly churning his account. The United States District Court for the District of Massachusetts, A. David Mazzone, J., entered judgment in favor of broker, and customer appealed. The Court of Appeals, Fairchild, Senior Circuit Judge, sitting by designation, held that: (1) district court did not err in refusing to give customer's requested instruction that requisite degree of control in churning is met where client routinely follows advice or recommendation of his broker, and (2) trial court properly denied customer's motion to amend his complaint to include claim of

unsuitability of investments made by broker in his account in violation of Rule 10b-5 and pendent state claims of misrepresentation and nondisclosure in violation of state Uniform Securities Act, and breach of broker's fiduciary duty to customer.

Affirmed.

1. Securities Regulation ⇔148

In customer's securities action against his broker for allegedly churning his account, district court did not err in refusing to give customer's requested instruction that requisite degree of control in churning is met where a client routinely follows advice or recommendations of his broker, since the routine following of broker's advice is an element of control, but not the determinative factor. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

2. Federal Civil Procedure ⇔840

In customer's securities action against his broker for allegedly churning his account, district court did not err in denying as untimely customer's motion to amend his complaint to include claim of unsuitability of investments made by broker in his account in violation of Rule 10b-5 and pendent state claims of misrepresentation and nondisclosure in violation of state Uniform Securities Act, and in breach of broker's fiduciary duty to customer, coming as it did more than two years after filing of original complaint, in that customer offered no justification for his delay and addition of claims, no matter how factually similar, grounded in legally distinct theories of liability at late stage would have invariably delayed resolution of case. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); M.G.L.A. c. 110A, § 101 et seq.

Paul J. Tiernan, Littleton, Mass., for plaintiff, appellat.

* Of the Seventh Circuit, sitting by designation.

1. Some eight months after the closing of Tiernan's securities account with Blyth, the corporation was merged into Paine Webber Jackson

Robert B. Allensworth, Boston, Mass., with whom William L. Patton, Donald M. Keller, Jr., and Ropes & Gray, Boston, Mass., were on brief, for defendants, appellees.

Before COFFIN, Circuit Judge, FAIRCHILD *, Senior Circuit Judge, and BREYER, Circuit Judge.

FAIRCHILD, Senior Circuit Judge.

Plaintiff Tiernan brought this civil suit to recover losses sustained in his securities account with defendant Blyth Eastman Dillon & Co., Incorporated ("Blyth").¹ Tiernan's complaint charged that Blyth, through its broker, was guilty of misrepresentation, deception and fraud in the conduct of his account in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983). Tiernan specifically alleged that Blyth "churned" his account. See 17 C.F.R. § 240.15c1-7(a) (1983).

At trial the jury was instructed that for Tiernan to recover on a claim of churning he must prove that Blyth (1) exercised control over the securities account, (2) traded excessively in the account in light of Tiernan's stated investment objectives and the nature of his account, and (3) acted with intent to defraud or with wilful and reckless disregard for Tiernan's interests. See *Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673, 676 (9th Cir.1982); *Landry v. Hemphill, Noyes & Co.*, 473 F.2d 365, 368 n. 1 (1st Cir.1973). The court submitted a special verdict. The first question inquired whether defendant exercised control. The jury answered "No" and in keeping with their decision judgment was entered in Blyth's favor.

On appeal Tiernan asserts the district court committed two errors that justify a

& Curtis and now does business under that name. In keeping with the pattern established by the parties to this appeal, the defendant is referred to here as Blyth.

new trial. First, he contends the district court erred in refusing to instruct the jury that if the plaintiff has demonstrated that he routinely followed the advice of Blyth's broker, then the element of control is "met." Second, Tiernan contends the district court erred in denying his motion to amend his complaint to include a claim of the unsuitability of the investments made by Blyth in his account in violation of Rule 10b-5 and pendent state claims of misrepresentation and nondisclosure in violation of the Massachusetts Uniform Securities Act, Mass.Gen.Laws Ann. ch. 110A, § 101 et seq. (West Supp.1983-1984), and in breach of Blyth's fiduciary duty to Tiernan. We find no merit in either contention.

I.

Judge Mazzone gave a detailed jury instruction concerning the proper factors to consider in deciding the question of control over plaintiff's securities account including:

Who initiated the trading in the account?

Did Tiernan purchase stocks not recommended to him by [the broker]? Did Tiernan act on his own? Or upon the advice of another investment service?

Who initiated the trading in the account?

Did Tiernan reject [the broker's] recommendations with respect to the purchase of some investments?

The jury was also instructed to consider evidence of Tiernan's general business acumen, investment background, and knowledge of the broker's investment activities.

[1] Tiernan did not object to the jury being told to consider any of these factors in deciding the question of control. Tiernan had, however, requested an instruction that "[t]he requisite degree of control in 'churning' is met where a client routinely follows the advice or recommendations of

his broker," and timely objected to the court's failure to give this additional instruction. See Fed.R.Civ.P. 51. Tiernan's requested instruction simply misstates the law.

Evidence that an investor routinely followed his broker's recommendations is certainly an important consideration in deciding who controlled an investment account but this evidence alone is not determinative. Considerations of the investor's sophistication in securities transactions and independent evaluation about the handling of his account are at least equally important. See *Karlen v. Ray E. Friedman & Co. Commodities*, 688 F.2d 1193, 1203 (8th Cir.1982); *Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673, 676-77 (9th Cir.1982); *Landry v. Hemphill, Noyes & Co.*, 473 F.2d 365, 373-74 (1st Cir.), cert. denied, 414 U.S. 1002, 94 S.Ct. 356, 38 L.Ed.2d 237 (1973). To hold otherwise would prevent imputing control to the highly sophisticated investor who actively monitors his account but typically does not disagree with his broker's recommendations.

Read literally plaintiff's instruction would appear to require exactly that result: that the regular following of a broker's advice *establishes* broker control over the account. Even reading the requested instruction as plaintiff apparently advocates—that a jury may *infer* control from evidence that an investor routinely followed his broker's advice—would suggest to a jury that they may find control in the face of overwhelming evidence of an investor's sophistication, knowledge and attention to the account. The district court properly rejected the proffered instruction, stating that the routine following of a broker's advice is "an element of control" but not the determinative factor.²

2. The text of plaintiff's proposed jury instruction tracks the language of the Ninth Circuit in *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814, 821 (9th Cir.1980) ("the requisite degree of control is met when the client routinely follows the recommendations of the broker"). But the *Mihara* language must be read in context; the court was considering only whether sufficient evidence would support a jury's finding of control. The Ninth Circuit has since cautioned

against construing *Mihara* "to mean that the most sophisticated investor is not in control of his account simply because he usually follows the recommendations of his broker." *Follansbee*, 681 F.2d at 677.

Of course the word "routine" might be read to encompass the concept of *blind* as well as *regular* following of the broker's recommendations. In this respect Tiernan's instruction and

To the extent the instruction may have been offered merely to emphasize the importance of evidence that Tiernan consistently followed the recommendations of the Blyth broker, no grounds for reversal of the judgment is presented.³ The court's instruction adequately underlined the significance of who "initiated the trading in the account" and whether Tiernan rejected the broker's "recommendations with respect to the purchase of some investments." Having advised "the jury on the proper legal standards to be applied in determining the issues of fact . . . , [t]he trial court is not obligated to give instructions which are erroneous or misleading." *Harrington v. United States*, 504 F.2d 1306, 1317 (1st Cir. 1974) (citations omitted).

II.

Leave to amend a complaint following submission of a responsive pleading "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). While "this mandate is to be heeded," the decision to grant or deny a motion to amend lies within the discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). See also *Hayes v. New England Millwork Distributors, Inc.*, 602 F.2d 15, 19 (1st Cir.1979); *Ondis v. Barrows*, 538 F.2d 904, 909 (1st Cir.1976). The reviewing court will generally defer to a decision to deny the motion where an underlying basis for denial—"such as undue delay, bad faith or dilatory motive on the part of the movant . . . [or] undue prejudice to the opposing party"—is "apparent or declared." *Foman v. Davis*, 371 U.S. at 182, 83 S.Ct. at 230.

[2] Judge Mazzone denied Tiernan's motion to amend his complaint as "untimely," coming as it did more than two years after the filing of the original complaint. "While courts may not deny an amendment solely

the language of the *Mihara* court might be intended to mean that the blind, regular following of a broker's advice establishes broker control. This of course comes closer to the actual test for control in a churning charge. Indeed, even a sophisticated investor who blindly relinquishes all decisions to a broker may not be in control of his account. But the court's actual instruction to the jury, emphasizing the many

because of delay and without consideration of the prejudice to the opposing party, . . . it is clear that 'undue delay' can be a basis for denial." *Hayes*, 602 F.2d at 19 (citations omitted). In *Hayes* this Circuit found a delay of more than two years sufficient to place "the burden upon the movant to show some 'valid reason for his neglect and delay.'" 602 F.2d at 20 (quoting *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir.1967)). See also *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 896 (1st Cir.1979).

Tiernan offers no justification for his delay. Like the movant in *Hayes*, Tiernan "does not argue on appeal, as he did in his motion . . . before the district court, that discovery led to previously unknown facts which altered the shape of his case." 602 F.2d at 20. Indeed, Tiernan now contends that his new theories of liability are based on the same facts pled in his original complaint.

Rather than advance some excuse for his delay, Tiernan argues that it was an abuse of discretion to deny his motion to amend absent some showing of prejudice to Blyth by the addition of unsuitability or pendent state claims. Tiernan's motion to amend came a month after the date the court had originally targeted to begin trial, and only one and one-half months before the actual start of trial. The addition of claims, no matter how factually similar, grounded in legally distinct theories of liability at this late stage would have invariably delayed the resolution of the case. Although Tiernan alleged that no further discovery would have been necessary because the proposed amendments concerned the same facts and issues implicated by the churning claim already in the case, the three additional claims may well have affected defendants' planned trial strategy and tactics. The

factors suggesting control, better conveyed this message to the jury than the misleading addition offered by Tiernan.

3. It is at least worthy of note that the record includes evidence that Tiernan actually played an active role in the handling of his securities account.

second element of a churning claim requires plaintiff to show that the *quantity* of trades was excessive in light of plaintiff's investment objectives. An unsuitability claim, which plaintiff included in his amended complaint, requires plaintiff to show that the *quality* of stocks bought was inappropriate to his investment objectives.⁴ Thus, the churning claim and the unsuitability claim do not involve precisely the same issues or facts. Had the trial court granted plaintiff's motion to amend his complaint, both Blyth and the court would likely have required additional time to prepare for trial. "Given the appellant's failure to excuse in any way his delay in prosecuting his suit, we cannot describe this prejudice as insignificant." *Hayes*, 602 F.2d at 20.

The judgment for defendant is AFFIRMED.⁵



Michael E. MOSS, Plaintiff-Appellant,

v.

**MORGAN STANLEY INC., E. Jacques
Courtois, Jr., Adrian Antoniu, and
James M. Newman, Defendants,**

**Morgan Stanley Inc. and James M.
Newman, Defendants-Appellees.**

No. 1281, Docket 83-7120.

**United States Court of Appeals,
Second Circuit.**

Argued May 19, 1983.

Decided Sept. 9, 1983.

Target corporation shareholder brought action for damages under the securities

4. Tiernan now argues that no real evidentiary difference exists between claims of churning and unsuitability. In a memorandum of law opposing discovery of his income tax returns and transactions with other financial institutions filed earlier in this litigation, however, Tiernan asserted that important distinctions existed between the two claims.

laws and the Racketeer Influenced and Corrupt Organizations Act in connection with the shareholder's unwitting sale of stock of a target company on the open market prior to the public announcement of tender offer. On motions to dismiss and for summary judgment, the United States District Court for the Southern District of New York, Milton Pollack, J., 553 F.Supp. 1347, dismissed. Appeal was taken. The Court of Appeals, Meskill, Circuit Judge, held that: (1) the shareholder's inability to show that any of the participants owed him the duty of disclosure precluded a violation of the securities laws; (2) as individual defendants were not liable for violating federal securities laws, the investment banking firm retained to evaluate the tender offer could not be held derivatively liable as a "controlling person"; (3) because the shareholder failed to state a claim of securities fraud, the RICO claim which premised its "pattern of racketeering activity" on the alleged securities fraud likewise failed; and (4) since the shareholder failed to allege that his injury was causally connected to the "unlawful" conduct, the civil RICO claim was subject to dismissal.

Affirmed.

1. Securities Regulation ⇌ 62

Traditional corporate "insiders," directors, officers and persons who have access to confidential corporate information, must preserve confidentiality of nonpublic information that belongs to and emanates from corporation. Securities Exchange Act of 1934, §§ 10(b), 16(b), 15 U.S.C.A. §§ 78j(b), 78p(b).

2. Securities Regulation ⇌ 62

Corporate "insider" must either disclose nonpublic corporate information or abstain

5. We need not address the contention that the district court erred in refusing to admit expert testimony on the question of whether the securities in Tiernan's account were traded excessively or what damages may have resulted. Those issues were rendered moot by the jury's finding of no liability because Tiernan, not Blyth, was in control of the account.

PROOF OF SERVICE BY ELECTRONIC MAIL

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is jkaddah@orrick.com.

On November 27, 2019, I served the interested parties in this action with the following document(s):

NOTICE OF CASES SUPPORTING ORACLE AMERICA, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

Laura Bremer (Bremer.Laura@dol.gov)
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U.S. Department of Labor, Office of the Solicitor, Region IX – San Francisco
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 27, 2019, at San Francisco, California.



Jacqueline D. Kaddah