Case No. 21-4058

In the

United States Court of Appeals

for the

Tenth Circuit

INDIANA PUBLIC RETIREMENT SYSTEM, individually and on behalf of all others similarly situated and PUBLIC SCHOOL TEACHERS' PENSION AND RETIREMENT FUND OF CHICAGO, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

PLURALSIGHT, INC., AARON SKONNARD, JAMES BUDGE, GARY CRITTENDEN, SCOTT DORSEY, ARNE DUNCAN, RYAN HINKLE, LEAH JOHNSON, TIMOTHY MAUDLIN, FREDERICK ONION, BRAD RENCHER, BONITA STEWART, KARENANN TERRELL, MORGAN STANLEY & CO and JP MORGAN SECURITIES,
Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Utah - Salt Lake City
Case No. 1:19-CV-00128-JNP-DBP · Honorable Jill N. Parrish, U.S. District Judge

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF ROBERT J. JACKSON JR., LUIS A. AGUILAR, LYNN E. TURNER, DANIEL J. TAYLOR, JOSHUA MITTS, M. TODD HENDERSON, NEJAT SEYHUN, ALAN JAGOLINZER, STANLEY VELIOTIS, PHILLIP QUINN AND BRADFORD LYNCH IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR REVERSAL

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Robert J. Jackson Jr., Luis A. Aguilar, Lynn E. Turner, Daniel J. Taylor, Joshua Mitts, M. Todd Henderson, Nejat Seyhun, Alan Jagolinzer, Stanley Veliotis, Phillip Quinn, and Bradford Lynch respectfully request leave to file the attached brief as amici curiae in support of Plaintiffs-Appellants Indiana Public Retirement System and Public School Teachers' Pension And Retirement Fund Of Chicago ("Plaintiffs") appeal of the Motion to Dismiss of Pluralsight, Inc., Aaron Skonnard, James Budge, Gary Crittenden, Scott Dorsey, Arne Duncan, Ryan Hinkle, Leah Johnson, Timothy Maudlin, Frederick Onion, Brad Rencher, Bonita Stewart, Karenann Terrell, Morgan Stanley & Co., LLC, and JP Morgan Securities, LLC ("Defendants"). Counsel for Plaintiffs has advised that Plaintiffs consent to this motion. Amici reached out to Defendants-Appellees to inquire whether they consent to this motion and received no response.

1. Robert J. Jackson Jr. served as Commissioner of the SEC from 2018-2020 after being appointed by President Donald J. Trump. He is now the Pierrepont Family Professor of Law and Co-Director of the Institute for Corporate Governance and Finance at the New York University School of Law. Previously, he served as a senior policy advisor in the U.S. Treasury Department.

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4. Daniel J. Taylor is an Associate Professor of Accounting at the Wharton School of the University of Pennsylvania. Dr. Taylor is an award-winning researcher and teacher with extensive expertise on issues related to corporate transparency, accounting fraud, insider trading, and corporate governance. A world-renowned scholar, Professor Taylor leads the Wharton Forensic Analytics Lab; has written more than 20 articles published in leading academic journals in accounting, finance, and management; led seminars at dozens of top business

schools across the globe; and won numerous academic and industry awards. His research frequently appears in the business media; has been cited in rules and regulations promulgated by the Securities and Exchange Commission; and has been instrumental in multiple investigations by the SEC, FBI, Treasury, and Department of Justice. Professor Taylor received his bachelor's degree from University of Delaware, his master's from Duke University, and his PhD from Stanford University.

5. Joshua Mitts is an Associate Professor of Law and Milton Handler Fellow at Columbia Law School. He uses advanced data science for his research on corporate and securities law. His primary focus is on information disclosure in capital markets, consumer financial protection, and related topics in law and finance. Mitts employs empirical methods, including statistical analysis and machine learning, for his research on short-selling, informed trading on cybersecurity breaches, information leakage and hedge-fund activism, insider trading on corporate disclosure, and information transmission in financial markets. Mitts frequently speaks at conferences, symposiums, and workshops. Mitts is also a member of the Center for Financial and Business Analytics at Columbia University's Data Science Institute. He has a Ph.D. in Finance & Economics from Columbia Business School, a J.D. from Yale Law School, and a B.A. in Liberal Studies from Georgetown University.

6. M. Todd Henderson is the Michael J. Marks Professor of Law at the University of Chicago Law School. Professor Henderson's research interests include corporations, securities regulation, and law and economics. He has taught classes ranging from Banking Regulation to Torts to American Indian Law. Professor Henderson received an engineering degree from Princeton University and a law degree from The University of Chicago Law School. Professor Henderson served as a clerk to the Hon. Dennis Jacobs of the U.S. Court of Appeals for the Second Circuit. He then practiced appellate litigation at Kirkland & Ellis in Washington, DC, and was an engagement manager at McKinsey & Company in Boston, where he specialized in counseling telecommunications and high-tech clients on business and regulatory strategy.

7. Nejat Seyhun is the Jerome B. and Eileen M. York Professor of Business Administration and Professor of Finance at the University of Michigan. Nejat's research activity focuses on backdating of executive options, risk-return trade-off in asset prices, intra-day impact of insider trading, long-run performance of IPOs, managerial overconfidence, Chinese walls and conflicts of interest in securities firms, option pricing, and conflict between information efficiency and rewards to information gathering. His backdating work with M.P. Narayanan has helped uncover one of the biggest corporate scandals of recent years, bringing to light a business practice with numerous legal, ethical and corporate governance

implications. He received a PhD and MS from the University of Rochester and a BSEE from Northwestern University.

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9. Stanley Veliotis is an Associate Professor at the Fordham University Gabelli School of Business and is Co-director, Center for Professional Accounting Practices. He received a PhD (Business Administration: Accounting) from the University of Connecticut, an LLM (Taxation) from the New York University School of Law, a JD from Fordham University School of Law, and a BBA (Public Accounting) from Baruch College. His areas of expertise are Tax Effects on Taxpayer and Market Behavior, Tax Policy, Insider Trading and Earnings Management.

10. Phillip Quinn is an Associate Professor of Accounting and Lane A. Daley Endowed Fellow at the University of Washington Foster School of Business. He received a PhD from the University of Iowa and a BSBA from Drake University. His academic expertise is financial accounting.

11. Bradford Lynch is a researcher and PhD candidate at the University of Pennsylvania, Wharton Accounting Department. His research interests are the flow and use of information, incorporating non-traditional data (*e.g.*, job postings) into earnings forecasts, stock return predictions, and credit risk, how downstream trading partner surprises affect upstream firms. He received a B.S. from Worchester Polytechnic Institute and an MBA from the University of Michigan.

12. We are a group of professors, scholars, financial economists, and former federal securities regulators who have conducted and compiled decades of research on Rule 10b5-1 plans and their usage, and advised plaintiffs, defendants, regulators, and enforcement authorities on these issues.

13. The lower court decision in *Pluralsight* raises profound issues of public policy that have wide-ranging implications for securities fraud cases brought under Rule 10b-5. As experts on Rule 10b5-1 plans, we believe that the Court's deliberations would be aided by an academic perspective informed by the relevant empirical research and scholarly literature.

14. No party or counsel for a party authored this motion or the brief in whole or in part. No party, counsel for a party, or person other than the prospective amici or their counsel made any monetary contribution intended to fund the preparation or submission of this motion or the brief.

For the foregoing reasons, the prospective amici's motion should be granted.

Dated: September 10, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d), I hereby certify that the foregoing motion was produced using Times New Roman 14-point font and contains 6 pages.

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CERTIFICATE OF SERVICE

I hereby certify, on the 10th day of September 2021, the foregoing brief was filed electronically with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to all counsel of record by cooperation of the CM/ECF system.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, PayneGroup Metadata Assistant, and according to the program, is free of viruses.

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IDENTITY AND INTEREST OF AMICI CURIAE

Robert J. Jackson Jr. served as Commissioner of the SEC from 2018-2020 after being appointed by President Donald J. Trump. He is now the Pierrepont Family Professor of Law and Co-Director of the Institute for Corporate Governance and Finance at the New York University School of Law. Previously, he served as a senior policy advisor in the U.S. Treasury Department.

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No party or counsel for a party authored this motion or the brief in whole or in part. No party, counsel for a party, or person other than the prospective amici or

their counsel made any monetary contribution intended to fund the preparation or submission of this motion or the brief.

ARGUMENT

I. RULE 10B5-1 TRADING PLANS MAY BE HIGHLY PROBATIVE OF SCIENTER IN SECURITIES FRAUD CLAIMS, EVEN IF ENTERED INTO BEFORE THE CLASS PERIOD

The District Court held that "*[b]ecause the Pluralsight Defendants argue that Skonnard and Budge retained substantial portions of their Pluralsight stock holdings and that their stock trading was primarily made pursuant to Rule 10b5-1 plans and 'automatic transactions' to pay withholding taxes, this 'rebut[s] any inference of scienter.*'" JA3_664. As it stands, the District Court's holding would find that even when insiders make statements that would normally be actionable—as the District Court found in this case, *see* JA3_639—and even when insider sales are disproportionate in volume, the transactions are immune from liability because Rule10b5-1 was employed. The disturbing result here would be that Rule 10b5-1 would protect not only the executive who maintains total silence, but also the executive who is chattering like mad at the market between when a 10b5-1 plan is adopted and when his or her sales under the plan execute—in what could be characterized as a classic "*pump and dump*" scheme.

Indeed, the notion that automatic stock sales indicate a lack of scienter is inconsistent with the text and history of Rule 10b5-1 as well as empirical evidence

on the profitability of automatic trading plans. The text of the rule merely defines when a trade is "*on the basis of*" material nonpublic information and makes no mention of scienter. 17 C.F.R. § 240.10b5-1. The history of Rule 10b5-1 shows that the availability of an affirmative defense for automatic trading plans was intended to ensure that information was not a factor in the trading decision, and the Securities and Exchange Commission (the "Commission") specifically noted that Rule 10b5-1 "*does not change*" the scienter requirement under Section 10(b). Rule 10b5-1 does not purport to provide an affirmative defense from engaging in activities that are designed to inflate a share price for the purpose of triggering sales at pre-specified price targets. Indeed, empirical evidence shows that depending on the nature and structure of the plan, automatic trading plans may be highly probative of scienter in securities fraud claims. Certain types of Rule 10b5-1 plans link transactions to material nonpublic information or have other kinds of "*red flags*," which indicate that making a material misstatement or omission can be motivated by personal financial gain.

A. The Text of Rule 10b5-1 Merely Defines Whether a Trade is "On the Basis of" Material Nonpublic Information

Nothing in the text of Rule 10b5-1 refers to the probative value of purchases or sales for scienter allegations in a claim brought for a material misstatement or omission in violation of the federal securities laws. The preliminary note to Rule 10b5-1 states that the rule "*defines when a purchase or sale constitutes trading 'on*

the basis of' material nonpublic information in insider trading cases brought under Section 10(b) [] and Rule 10b-5 []." 17 C.F.R. § 240.10b5-1. Subsection (b) of the rule defines whether a purchase or sale of a security is "*on the basis of*" material nonpublic information in insider trading cases. Subsection (c) provides an affirmative defense that an automated trading plan is not "on the basis of" material nonpublic information. None of these refer to the probative value of 10b5-1 trades for purposes of scienter where an executive allegedly made a misstatement or omission.

B. Rule 10b5-1 Has No Bearing on Scienter

Rule 10b5-1 was enacted due to conflicting case law interpreting the requirement that insider trading be "*on the basis of*" material nonpublic information to incur liability under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. One court held that "*knowing possession*" of the information was sufficient;[1] another allowed for knowing possession to give rise to a rebuttable presumption that the defendant had "*used*" the information;[2] and yet a third required actual proof that the defendant used the information to trade, at least in a criminal

[1] *United States v. Teicher*, 987 F.2d 112, 120 (2d Cir. 1993), *cert. denied*, 510 U.S. 976 (1993) (emphasis added).

[2] *SEC v. Adler*, 137 F.3d 1325, 1342 (11th Cir. 1998).

case.[3] Rule 10b5-1 provided that knowing possession is sufficient for liability, but established a series of affirmative defenses, the most common of which allows for an individual to establish a plan in advance to execute trades automatically.

The Proposing Release for Rule 10b5-1 explains that the purpose of the affirmative defense for automatic trading plans is to "*cover situations in which a person can show that the information he or she possessed was not a factor in the trading decision.*" 64 Fed. Reg. 72590, 72601 (Dec. 28, 1999) (emphasis added). This is ultimately a causation inquiry: would the individual have traded even if he or she were not in possession of the material, nonpublic information?[4] If so, that information was "not a factor in the trading decision." *Id.* That causation inquiry is wholly distinct from scienter, which is "*a mental state embracing intent to deceive, manipulate, or defraud*." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.1 (1976).

The irrelevance of Rule 10b5-1 to scienter was expressly stated by the Commission in the release adopting the rule:

> *As discussed in the Proposing Release and expressly stated in the Preliminary Note, Rule 10b5–1 is designed to address only the use/possession issue in insider trading cases under Rule 10b–5. . . .* ***Scienter remains a necessary***

[3] *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), *cert. denied,* 525 U.S. 1071 (1999).

[4] *See, e.g.*, *Adler*, 137 F.3d at 1335 ("In addition to the Supreme Court's language in *Chiarella, Dirks,* and *O'Hagan,* several cases arguably provide support for the proposition that there is no violation of § 10(b) and Rule 10b–5 in the absence of some causal connection between the material nonpublic information and an insider's trading.").

> ***element for liability under Section 10(b) of the Exchange Act and Rule 10b–5 thereunder, and Rule 10b5–1 does not change this.***

65 Fed. Reg. 51716, 51727 (Aug. 24, 2000) (emphasis added).

To be sure, comments on the proposed Rule 10b5-1 considered whether the "*knowing possession*" standard would allow bringing an insider trading claim even if the defendant lacked intent to deceive. But the Commission's conclusion—that Rule 10b5-1 is "*designed to address only the use/possession issue in insider trading cases*" and has no bearing on scienter (*id.*)—is equally applicable when employing the affirmative defense under Rule 10b5-1 to rebut the ordinary inference of scienter that one would draw from insider stock sales. By contrast, the approach adopted by the District Court would heighten the scienter burden when the affirmative defense is employed, without regard to whether an automated trading plan in fact allows an executive to profit from trading in connection with a material misstatement or omission made after the plan was adopted.

C. Automated Trading Plans Can Improperly Allow Executives to Profit From Trading on a Material Misstatement or Omission, Even if the Plan Was Entered Into Before the Class Period

Automated trading plans can be highly probative of scienter when they link a defendant's stock sales to a share-price increase procured by fraud. Rule 10b5-1 provides that a plan may "*[i]nclude[] a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold.*"

17 C.F.R. § 240.10b5-1(c)(B)(2). Plans which are triggered by share-price increases are common in the industry. These plans may specify the sale of shares at escalating prices (*e.g.*, sell 200,000 shares at $5 per share, another 200,000 shares at $6 per share, etc.).[5] There are even more complex plans that directly specify sales as a function of the increase in price. As one guide explains:

> *A [10b5-1] plan could, for example, provide for sales when a particular market indicator rises 10 percent in a two-month span, or when one company's stock outperforms a benchmark index (or a competitor's stock) by 10 percent over a specified period. Sales could also be triggered by a 'gap' in a company's stock price: for example, when a company's stock opens more than 5 percent over the prior day's close.*[6]

Because a material misstatement or omission may lead to a share-price increase during the Class Period, a Rule 10b5-1 trading plan based on a price trigger may suggest a kind of "*personal financial gain*" that "*weigh[s] heavily in favor of a scienter inference*." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 310 (2007).

Rule 10b5-1 trading plans are rarely disclosed, so plaintiffs cannot easily identify the terms of the plan or the price triggers in pleadings. But academic studies have found indirect evidence: "*public companies disproportionately disclose*

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[5] *See, e.g.,* Global ePoint, Inc.'s Rule 10b5-1 Sales Plan, voluntarily disclosed at https://www.sec.gov/Archives/edgar/data/896195/000119312505149795/dex1.htm.

[6] Robert W. Baird & Co., *Rule 10b5-1 Trading Plans* (Jan. 2010), http://www.bairdfinancialadvisor.com/steelzellergroup/mediahandler/media/27758/TS_-_Web_rule_10b5-1_trading_plans.pdf (last visited Sept. 9, 2021).

positive news on days when corporate executives sell shares under predetermined Rule 10b5-1 plans."[7] The likelihood, share volume and dollar volume of insider sales under 10b5-1 plans are higher when good news is disclosed, and each of these are higher when the disclosed news is better. Moreover, these stock sales are directly linked to investor losses: stock prices reverse after high levels of Rule 10b5-1 selling on positive news days, and the price reversal increases with the share volume of Rule 10b5-1 selling.

Studies have also found that these plans often have characteristics which are highly relevant to an inference of scienter in connection with a material misstatement or omission. These include short cooling-off periods (*e.g.*, plans that are adopted and execute a trade on the same day), plans that cover a single trade or are cancelled after the first trade, and plans that are adopted and commence trading immediately prior to earnings announcements.[8] The potential for Rule 10b-5 plans to exploit unsuspecting investors is heightened by the absence of mandatory disclosure of the contents of these plans. And it is rare for a public company or corporate executives to voluntarily disclose the contents of a Rule 10b5-1 plan. Studies have found that

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[7] Joshua Mitts, *Insider Trading and Strategic Disclosure*, COLUM. L. & ECON. WORKING PAPER NO. 636 (Dec. 8, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464.

[8] David F. Larcker et al., *Gaming the System: Three 'Red Flags' of Potential 10b5-1 Abuse*, ROCK CTR. FOR CORP. GOVERNANCE AT STANFORD UNIV. (Jan. 21,2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3769567.

disclosure of 10b5-1 trades is often made strategically in an effort to deflect scrutiny—trades voluntarily disclosed as being pursuant to a 10b5-1 plan are often better-timed and avoid larger losses than those that were not.[9]

Critically, even if a Rule 10b5-1 plan lacks these problematic characteristic, the possibility that a plan may "*[i]nclude[] a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold,*" 17 C.F.R. § 240.10b5-1(c)(B)(2), means that it may effectively serve as a kind of limit order to sell shares when certain price targets are reached. An automatic trading plan which functions equivalently to a sell-side limit order at certain share prices gives executives a powerful incentive to make a material misstatement or omission. For this reason, sales of stock executed pursuant to Rule 10b5-1 trading plans may very well shed light on an executive's "*mental state embracing intent to deceive, manipulate, or defraud*." *Ernst & Ernst*, 425 U.S. at 193 n.12.

One scholar summarizes the problem concisely with an example:

> *"A CEO entered into a 10b5-1 plan on January 1, 2009 to sell stock on August 1, 2009, the moment her restricted stock award vests. . . . When the CEO entered the 10b5-1 plan in January 2009, the CEO had no material nonpublic information, entered the plan with good faith, and had no desire*

[9] M. Todd Henderson et al., *Offensive Disclosure: How Voluntary Disclosure Can Increase Returns from Insider Trading*, 103 GEORGETOWN L. J. 1275 (2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12130&context=journal_articles.

> *to scheme to evade any laws. However, the CEO has a change of moral values in July, perhaps due to newly developed greed or perhaps aggravated by a depressed stock price. She develops bad faith in the weeks leading up to the scheduled sale date. She thus distorts disclosure content before the scheduled sales. For example, the CEO manages earnings up on the quarterly earnings reports released in mid-July to her benefit. Rule 10b5-1(c) should not shield this activity. Yet, based on how the courts have decided many cases involving Rule 10b5-1 plans, it will be difficult to punish this behavior unless plaintiffs revisit the scienter element in ways that have not been argued in the many cases to date."* [10]

This Court and other circuits have long acknowledged that Rule 10b5-1 plans can raise an inference of scienter when adopted during the Class Period. *See, e.g.*, *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1346-47 (10th Cir. 2012); *Elam v. Neidorff*, 544 F.3d 921, 928 (8th Cir. 2008). But the empirical evidence shows that Rule 10b5-1 plans can reveal a motive of personal financial gain even when adopted before the Class Period if these plans contain trigger formulas or other "*red flags*" like short cooling-off periods, a single trade, or immediate adoption prior to an earnings announcement. These characteristics are probative of scienter because they tie stock sales to the profits from securities fraud.

D. The District Court Failed to Consider Whether the Individual Defendants' Rule 10b5-1 Plans Suggested an Improper Motive

Relying on this Court's precedent in *Level 3*, the District Court held that "*automatic*" sales made pursuant to a 10b5-1 plan rebut any inference of scienter

[10] Stanley Veliotis, *Rule 10b5-1 Trading Plans and Insiders Incentive to Misrepresent*, 47 AM. BUS. L. J. 313, 346 (2010).

that otherwise might be drawn from these transactions. JA1_221 (slip op. at *20). In so doing, the District Court misconstrued this Court's decision in *Level 3* and failed to consider characteristics of Rule 10b5-1 trading plans relevant to scienter.

Level 3 held that stock sales made pursuant to "*automatic transactions*" did not raise an inference of scienter when they were "*set up prior to the class period to pay withholding taxes that became due*." *Level 3*, 667 F.3d at 1346-47. The *Level 3* defendants claimed that the sole purpose of the Rule 10b5-1 sales was to pay withholding taxes—a purpose unrelated to the alleged fraud. Br. for Defs.-Appellees, *In re Level 3 Commc'ns, Inc. Sec. Litig.*, No. 11-1029, 2011 WL 1636129, at *56 (10th Cir. Apr. 18, 2011).

By contrast, the defendants here distinguished between two groups of automatic transactions: one group of sales by Skonnard and Budge pursuant to their 10b5-1 trading plans and a second group of sales made by Pluralsight itself to satisfy tax liabilities. *Compare* JA1_220 at *19 *to* JA1_221 at *20 ("*The second group of sales were not executed by Skonnard or Budge, but rather were made automatically by Pluralsight, pursuant to agreement and on their behalf to satisfy tax liability*.") Unlike in *Level 3*, the defendants here do not claim that the ***first*** group of transactions pursuant to 10b5-1 trading plans were for the purpose of paying taxes, much less solely for that purpose. Even if *arguendo* the tax motivation rebutted scienter under *Level 3*, the District Court improperly conflated those two groups of sales pursuant

to 10b5-1 trading plans—those made by Pluralsight and those made by the individual defendants.

Here, the Rule 10b5-1 sales by the individual defendants raise several "*red flags*" suggestive of an improper purpose. First, a disproportionately large volume of sales occurred during the Class Period compared to the months before and after, consistent with research showing that 10b5-1 sales are often triggered by an inflated share price.[11] Skonnard and Budge sold 1,268,036 shares in just over six months, during the Class Period of January 16 to July 31, 2019. By comparison, they sold only 277,963 shares in the following ten months. Insider lockups notwithstanding, on a per-month basis Skonnard and Budge sold over ***seven*** times as many shares during the Class Period as in these months after.[12]

Moreover, Budge's trades had a short cooling-off period. He adopted his 10b5-1 plan on November 28, 2018, less than two months before the beginning of the Class Period and less than three months before selling $9 million in stock on February 19 and 20, 2019. These are "*red flags*" which are highly relevant to an

[11] Mitts, *supra* n.7; Veliotis, *supra* n.10.

[12] Research shows that large volume 10b5-1 trades foreshadow share price underperformance. Patrick Temple-West, *Corporate Insiders' Well-Timed Share Sales Raise Concerns*, FIN. TIMES (July 4, 2021), https://www.ft.com/content/5c84bcb5-1f48-4642-bb0c-2291d3575b41.

inference of scienter in connection with a material misstatement or omission.[13] Indeed, Skonnard sold $2.5 million worth of shares pursuant to a 10b5-1 trading plan just five days before Pluralsight's second quarter 2019 earnings call, just days before the corrective disclosure regarding Pluralsight's sales execution failure. Even though planned in advance, research shows that trades like these, that are in close proximity to earnings announcement, are a red flag for opportunistic behavior.[14]

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[13] Larcker, *supra* n. 8.

[14] Usman Ali & David Hirshleifer, *Opportunism as a Firm and Managerial Trait: Predicting Insider Trading Profits and Misconduct*, 126 J. FIN. ECON. 490 (2017); Alan D. Jagolinzer et al., *Corporate Governance and the Information Content of Insider Trades*, 49 J. ACCT. RES. 1249 (2011).

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,009 words.

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I hereby certify, on the 10th day of September 2021, the foregoing brief was filed electronically with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to all counsel of record by cooperation of the CM/ECF system.

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