UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOCIÉTÉ GÉNÉRALE SECURITIES LITIGATION	:	08 Civ. 2495 (GEL)
	:	**Electronically filed**
	:	**ECF Case**

REPLY MEMORANDUM OF LAW (1) IN FURTHER SUPPORT OF THE MOTION OF DEFENDANTS SOCIÉTÉ GÉNÉRALE, DANIEL BOUTON, PHILIPPE CITERNE AND DIDIER ALIX TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT AND (2) IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AND MOTION TO PARTIALLY LIFT THE PSLRA DISCOVERY STAY

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Defendants Société Générale ("SG"), Daniel Bouton, Philippe Citerne and Didier Alix submit this reply memorandum of law in (1) further support of their Motion to Dismiss the Consolidated Amended Class Action Complaint ("MTD"); and (2) opposition to Plaintiffs' (a) "Motion to Strike Extraneous Materials Relied on by Defendants in Their Motion to Dismiss" ("Motion to Strike" or "MTS"); and (b) "Motion to Partially Lift the PSLRA Discovery Stay in Order to Allow Discovery Limited to Issues of Subject Matter and Personal Jurisdiction" ("Motion to Lift the PSLRA Stay" or "MLS").

PRELIMINARY STATEMENT

Plaintiffs ask this Court to find that their Amended Complaint ("Am. Compl.") meets the exacting pleading standards of Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2509 (2007), when viewed "holistically." (E.g., Opposition Brief ("Opp. Br.") at 34.) In this regard, Plaintiff's Opposition Brief would lead the Court to believe that it must only focus on the forest and not the trees; but Plaintiffs' Amended Complaint suffers from an overriding defect: there are no real trees (let alone a forest), as Plaintiffs' purportedly "detailed allegations" (Opp. Br. at 1) are anything but.

While the allegations of a complaint should be viewed as a whole, Tellabs did not hold that a collection of insufficient allegations can amount to a cogent or compelling inference of fraud under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (the "PSLRA") (codified in part at 15 U.S.C. §§ 77z-1, 78u-4). See Malin v. XL Capital Ltd., No. 07-3749-cv, 2009 WL 481897, at *1 (2d Cir. Feb. 26, 2009) ("'Plaintiffs cannot establish scienter by combining inadequate allegations of motive with inadequate allegations of recklessness.'") (citation omitted); see also City of Brockton Ret. Sys. v. Shaw Group, Inc., 540 F. Supp. 2d 464, 475-76 (S.D.N.Y. 2008) (finding "amalgam of suggestions" insufficient to create

cogent and compelling inference of scienter required by Tellabs, rejecting notion that "zero plus zero plus zero plus zero plus zero adds up to something").

Of a piece with their pleading strategy, Plaintiffs in their opposition brief continue to obfuscate the issues by attempting to interweave unrelated assertions relating to SG's subprime exposure and the rogue trading scheme implemented by Jerome Kerviel. Plaintiffs allege no facts from which it can be inferred that there was any relation between these independent events that occurred in completely different business lines. In any event, Plaintiffs have not sufficiently alleged that either set of events (whether viewed separately or together) constituted a deliberate or reckless scheme to purportedly artificially inflate the price of SG securities.

Plaintiffs' Opposition Brief conveniently ignores that the world's credit markets virtually seized up overnight in the third quarter of 2007 and that the markets continued to deteriorate dramatically thereafter, facts of which the Court may take judicial notice. Instead, Plaintiffs argue based solely on hindsight that SG's third and fourth quarter 2007 writedowns somehow indicate that SG, through senior officers Bouton, Citerne and Alix (hereinafter the "Individual Defendants"),[1] failed to make adequate disclosures beginning in August 2005.

Plaintiffs' hodgepodge of so-called inferences are neither cogent nor compelling, whether viewed individually or collectively. Rather than fraudulently misstating SG's subprime exposure, it is a far more cogent and compelling inference that SG engaged in complex judgment-based valuations – with which Plaintiffs now disagree – of securities that suddenly went from AAA-rated to illiquid and less valuable as the world-wide credit crisis began to engulf the financial markets. Plaintiffs' challenges to SG's judgment-based valuations are nothing more

[1] Unless otherwise indicated, "Individual Defendants" does not include Robert Day, who is submitting a separate reply brief.

than hindsight attacks based on later writedowns that were taken as the financial markets and economy worsened. As this Court previously held, this difference of opinion on complex valuations is inactionable under the federal securities laws. See In re Allied Capital Corp. Sec. Litig., No. 02 Civ. 3812 (GEL), 2003 WL 1964184, at *4 (S.D.N.Y. Apr. 25, 2003).

Plaintiffs' pervasive use of hindsight cannot satisfy their pleading threshold, particularly given that the alleged untrue statements all concerned matters of opinion and judgment, such as management's assessment of risk and the valuation of complex securities, which cannot be deemed false unless they are found to be both objectively and subjectively false. Indeed, as Chancellor William Chandler of the Delaware Chancery Court recently observed in dismissing a claim that Citigroup's directors should be held liable for failing to manage Citigroup's subprime exposure, viewing a situation in hindsight, a "Court [cannot] properly evaluate whether corporate decision-makers made [the] 'right' or 'wrong' decision" regarding the assessment of risk. In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009). The court in Citigroup further stressed the risk of relying on hindsight bias: "'[T]here is a substantial risk that suing shareholders and reviewing judges will be unable to distinguish between competent and negligent management because bad outcomes often will be regarded, ex post, as having been foreseeable and, therefore, preventable ex ante.'" Id. at 126 n.58 (quoting Stephen M. Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 VAND. L. REV. 83, 114-15 (2004)); see also id. at 124 n.50.

Similarly, Plaintiffs argue that SG's disclosure of the positions and losses incurred by the unwinding of Jerome Kerviel's rogue trades in January 2008 somehow rendered SG's disclosures regarding the firm's overall risk management false and misleading as early as August 2005. But there is simply no basis to argue that Mr. Bouton or any other senior management was

aware of, much less complicit in, this rogue trader's massive, concealed fraudulent trading scheme which ultimately caused billions of Euros in losses for the bank. Nor have Plaintiffs sufficiently alleged that Mr. Bouton or any other senior management recklessly ignored any "red flags" having to do with Kerviel or his fictitious hedges. See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195 (2d Cir. 2008). Instead, the more cogent and compelling inference, confirmed by sources relied on by Plaintiffs, is that this rogue trader utilized extraordinary means to circumvent internal controls and avoid detection. The failure to prevent Kerviel's rogue trading at most amounts to poor business judgment which again, as this Court held previously, is not actionable. See, e.g., Waxman v. Envipco Pick Up & Processing Servs., Inc., No. 02 Civ. 10132 (GEL), 2003 WL 22439796, at *8-9 (S.D.N.Y. Oct. 28, 2003).

Additionally, Plaintiffs do not and cannot establish this Court's subject matter jurisdiction over foreign purchasers of SG shares on foreign exchanges. As much as Plaintiffs try, they cannot escape the grasp of Morrison v. Nat'l Austl. Bank Ltd., in which the Second Circuit held that U.S. courts lack subject matter jurisdiction over securities claims by foreign plaintiffs who purchase shares of foreign companies on foreign exchanges. 547 F.3d 167, 176-77 (2d Cir. 2008), petition for cert. filed, (U.S. Mar. 23, 2009) (No. 08-1191). The foreign purchasers here, as in Morrison, did not rely directly on any alleged U.S.-based conduct, instead relying on allegedly false financial statements issued from France.

This fact alone is dispositive. Indeed, if anything, the alleged conduct in Morrison – that manipulated financial information was created in the United States and then incorporated into a foreign parent's financial statements – has a greater nexus to the U.S. than Plaintiffs' allegations that the valuations of the assets at issue were actually done in Paris in connection with the issuance of SG's financial statements there. As a result, the U.S. conduct

alleged here is, a fortiori, preparatory under Morrison. Plaintiffs' alternative attempt to invoke the "effects" test of subject matter jurisdiction simply because there were some U.S. purchasers on foreign exchanges or ADRs traded in the U.S. (as there were in Morrison) is without merit.

Nor does Plaintiffs' Opposition Brief offer any basis for personal jurisdiction over defendants Philippe Citerne and Didier Alix, as it merely relies on their roles with SG and their status as purported control persons of the company, neither of which is adequate. Having not presented a prima facie case for personal or subject matter jurisdiction, Plaintiffs are not entitled to any purported "jurisdictional discovery," let alone the overly broad discovery they now seek.

Finally, Plaintiffs also move to strike certain materials submitted with Defendants' Motion to Dismiss. The Motion to Strike, aside from being procedurally improper, ignores that the Court may take judicial notice of economic phenomena (such as the credit crisis) and other undisputed facts in weighing competing inferences. See, e.g., In re Bausch & Lomb, Inc. Sec. Litig., 592 F. Supp. 2d 323, 338-39 (W.D.N.Y. 2008). Indeed, Tellabs explicitly allows courts to consider judicially noticeable facts. See Tellabs, 127 S. Ct. at 2509.

For the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed, and their Motions to Strike and Lift the PSLRA Stay denied.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTION 10(b) OF THE EXCHANGE ACT OR SEC RULE 10b-5

A. Plaintiffs have failed to allege a cogent or compelling inference of scienter

Plaintiffs do not (and cannot) dispute that to sufficiently allege scienter under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2008) they must plead "***either*** (a) strong circumstantial evidence of conscious misbehavior or recklessness, ***or*** (b) that defendants had both motive and opportunity to commit fraud." (Opp. Br. at 33 (emphasis in original) (citing Novak v. Kasaks, 216 F.3d 300, 307-08, 311 (2d Cir. 2000))). Recklessness is a state of mind approaching actual intent, and not merely a heightened form of negligence. See Chill v. Gen. Elec. Co., 101 F.3d 263, 269 (2d Cir. 1996); In re PXRE Group, Ltd., Sec. Litig., No. 06 Civ. 3410, 2009 WL 539864, at *21 (S.D.N.Y. Mar. 4, 2009); Steinberg v. Ericsson LM Tel. Co., No. 07 CV 9615 (RPP), 2008 WL 5170640, at *12 (S.D.N.Y. Dec. 10, 2008). Nevertheless, Plaintiffs fail to set forth factual allegations creating a cogent and compelling "'strong inference'" that Defendants """knew facts or had access to information suggesting that their public statements were not accurate.""" (Opp. Br. at 34 (quoting Dynex, 531 F.3d at 190).)[2]

1. Plaintiffs' overall theory of scienter is implausible

The Amended Complaint must be dismissed because Plaintiffs' central theory – that SG allegedly (i) recklessly continued to allow, or allegedly encouraged, Kerviel to take on massive unhedged trading positions, and (ii) continued to invest in collateralized debt obligations

[2] To sufficiently allege scienter, Plaintiffs' allegations of recklessness must be even greater because, as discussed below, they have failed to sufficiently allege motive and opportunity as to any SG officer through alleged stock sales. See Kalnit v. Eichler, 264 F.3d 131, 142 (2d Cir. 2001); see also PXRE, 2009 WL 539864, at *21.

("CDOs") and Residential Mortgage Backed Securities ("RMBS"), despite supposedly knowing that such an investment strategy would lose money, and then deliberately misstated their value – is entirely implausible. See ECA v. JP Morgan Chase Co., 553 F.3d 187, 205 (2d Cir. 2009) (rejecting as implausible theory of scienter that JP Morgan continued to pursue investment strategy it purportedly knew was "worthless all along"). In JP Morgan, the Second Circuit found the theory that JP Morgan allegedly kept lending money to Enron despite supposedly knowing that Enron was a sham was not sufficiently plausible to raise an inference of scienter. The Second Circuit held this implausible theory was insufficient to allege a Section 10(b) violation. See id. at 205 (affirming In re JP Morgan Chase Sec. Litig., No. 02 Civ. 1282, 2007 WL 950132, at *13 (S.D.N.Y. Mar. 29, 2007) (MTD at 54)).

Plaintiffs' theory of scienter here is equally, if not more, implausible than the one rejected by the Second Circuit in JP Morgan. For instance, Plaintiffs' allegations – that SG (i) manipulated its CDO and RMBS valuations (Opp. Br. at 59), (ii) continued to expand its CDO and RMBS business, and (iii) failed to write down its CDOs and RMBS earlier and in greater amounts than it did – are implausible because:

- If SG supposedly knew its CDOs and RMBS were overvalued as early as August 1, 2005 (the beginning of the class period (when Plaintiffs do not even allege that the positions ultimately written down were on the books)), then SG would not have begun its "TGV initiative" in 2006. (Opp. Br. at 1.) Plaintiffs make no attempt to refute the argument that a lengthy class period itself weakens any inference of scienter. See Malin v. XL Capital Ltd., 499 F Supp. 2d 117, 151 (D. Conn. 2007), aff'd, No. 07-3749-CV, 2009 WL 481897 (2d Cir. Feb. 26, 2009);[3]
- If SG knew as early as late-2006, as some confidential witnesses posit, that the CDO and RMBS market would collapse, then SG would not have continued to invest in, let alone expand, its CDO group through the end of

[3] It is not the Court's responsibility to parse Plaintiffs' allegations to come up with a plausible claim. See Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 115 (2d Cir. 1982) ("[I]t is important that the wheat in plaintiff's pleading be separated from the chaff.").

2007, as Plaintiffs argue. Rather, the more plausible inference is that SG believed this was a profitable line of business that would gradually improve (as Plaintiffs acknowledge SG disclosed). As a financial institution, SG could have reaped enormous profits had it been prescient enough to predict the credit crisis. See In re Axonyx Sec. Litig., No. 05 Civ. 2307, 2009 WL 812244, at *3, *4 (S.D.N.Y. Mar. 27, 2009) (that company would "knowingly or recklessly" engage in "defective" behavior "virtually defies reason" and "would be a bizarre departure from any normal method of doing business");[4]

- No other financial institution disclosed material write downs on CDOs prior to the credit crisis striking in the 2007 third quarter, despite Plaintiffs' contention that write downs of super-senior trenches of CDOs should have been taken because of earlier declines in lower-rated trenches of the ABX index; and
- SG increased its writedowns (as it advised investors might be necessary) in response to the rapidly escalating credit crisis.

As to the Kerviel allegations, Plaintiffs seek to turn a fraud against SG committed by a rogue trader into an alleged scheme by SG to artificially increase its stock price. Such a theory is entirely implausible, especially in light of Kerviel's use of extraordinary means to circumvent internal controls and conceal his conduct. "[J]ust as all bank robberies demonstrate the failure of bank security and all burglaries demonstrate the failure of locks and alarm systems . . . no system is so foolproof that it cannot be evaded." Higginbotham v. Baxter Int'l Inc., 495 F.3d 753, 760 (7th Cir. 2007). Plaintiffs have done nothing to turn what is, if anything, inactionable mismanagement into knowing, or even reckless, conduct on the part of SG's senior management.

[4] It is likewise more plausible that if SG was selling the equity tranches of CDOs to Magnetar (Opp. Br. at 81), they were legitimate transactions to get rid of the lowest-rated, highest risk CDO tranches as opposed to a short-selling scheme as Plaintiffs vaguely allege. In any event, this "scheme" would amount to an alleged fraud on Magnetar's investors, not Plaintiffs'. See In re JPMorgan Chase Sec. Litig., 363 F. Supp. 2d 595, 623 (S.D.N.Y. 2005) (intent to defraud another company was not actionable by JP Morgan's shareholders).

2. Plaintiffs fail to allege that SG deliberately or recklessly misstated its subprime exposure

(a) It is a far more cogent and compelling non-fraudulent inference that SG's disclosures of its subprime exposure was dictated by the onset of the credit crisis and continuing deteriorating market.

Plaintiffs argue that SG was supposedly manipulating valuations in response to market changes "in order to defer writing them down." (Opp. Br. at 39; see also id. at 41.) But the far more cogent and compelling inference to be drawn is that SG's losses associated with its subprime exposure increased as industry-wide losses grew due to the unique and devastating catastrophe of the credit crisis (which, as discussed below, is a proper subject for judicial notice). See PXRE, 2009 WL 539864, at *20 (more compelling that defendant's losses increased due to revised estimate of industrywide losses from hurricanes rather than to stave off collapse). As Judge Sullivan held in PXRE, "Plaintiff's factual allegations suggest an industry, and a company, shocked by a unique and devastating catastrophe," and that the company, "in an unprecedented and uncertain situation, simply lacked the software and internal mechanisms to calculate accurately the full extent of losses." Id. at *32; see also Pittleman v. Impac Mortgage Holdings, Inc., No. SACV 07-0970, 2009 WL 648983, at *4 (C.D. Cal. Mar. 9, 2009) (more cogent and compelling that subprime lender was "involved in a volatile industry at the onset of a long, destructive economic downturn" than committing fraud); Axonyx, 2009 WL 812244, at *4 (more cogent and compelling that despite "best efforts" clinical trials did not work, rather than defendants committing fraud.)

(b) Plaintiffs have not sufficiently alleged that SG senior management knew or had access to facts contradicting their public statements about SG's subprime exposure

Plaintiffs are unable to identify with specificity any portion of SG's audited financial statements that were purportedly rendered false and misleading due to SG's exposure to

CDO's and RMBS backed by subprime securities. Despite Plaintiffs' insinuations (Opp. Br. at 2), SG did not, as the Amended Complaint acknowledges, restate financial results for any subprime exposure (as opposed to the restatement due to Kerviel's falsified hedges). Instead, ignoring the economic and market crisis that struck in the third quarter of 2007, Plaintiffs seek to argue that SG management was aware of information that contradicted SG's financial statements and other public statements regarding SG's exposure to the U.S. subprime markets. (E.g., Opp. Br. at 13.) In doing so, Plaintiffs rely almost entirely on four "confidential witnesses" out of the seven purported confidential witnesses referenced in the Amended Complaint. But this reliance is wholly insufficient to create a cogent or compelling inference of scienter.

These purported confidential witnesses, all of whom were allegedly based in New York, do nothing other than present vague and conclusory assertions about meetings – none of which was allegedly attended by any of the Individual Defendants – and reports and analyses – none of which was allegedly provided to any of the Individual Defendants. (Opp. Br. at 39-40 (reports supposedly went to "a manager in the Middle Office" and unnamed people in SG's Paris office among others).)[5]

Nor is Plaintiffs' vague, conclusory contention that there was "significant interaction" between SG New York and Paris on issues of valuation, (Opp. Br. at 39) sufficient to "establish that Defendants had access to information demonstrating that their statements regarding SocGen's subprime exposure were false and misleading" (Opp. Br. at 41), or that

[5] Plaintiffs also argue that TCW, a wholly-owned subsidiary of SG and "the leading player in the CDO market" (Opp. Br. at 17), had unspecific information about "the deterioration in the CDO market" (Opp. Br. at 33), such as "that the market for subprime-related assets had become illiquid." (Id. at 40.) As discussed below, Plaintiffs do not and cannot allege that these assets were illiquid as early as August 2005, or that when they became illiquid, the complex valuations engaged by SG were deliberately or recklessly false and misleading when made. Moreover, Plaintiffs also fail to allege that this information was ever reported to SG management responsible for making public statements about subprime exposure.

Defendants "deliberately shut their eyes to the facts." Hart v. Internet Wire, Inc., 145 F. Supp. 2d 360, 365 (S.D.N.Y. 2001); see also PXRE, 2009 WL 539864, at *32 (allegation that defendants "'should have been more alert and more skeptical'" does not create a strong inference of fraud (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129 (2d Cir. 1994))).[6]

Moreover, the confidential witnesses were "low level" employees that had no responsibility for SG's public statements and were not in direct contact with SG officials in Paris who did. See PXRE, 2009 WL 539864, at *23 (rejecting confidential witness allegation, where witness had no firsthand knowledge as to whether concerns over modeling were brought to the attention of individual defendants); accord Malin v. XL Capital Ltd., 499 F. Supp. 2d at 141; see also In re Downey Sec. Litig., No. CV 08-3261, 2009 WL 736802, at *13 (C.D. Cal. Mar. 18, 2009) (rejecting confidential witness allegations about subprime lender's reserves that were not based on conversations with individual defendants).[7]

In addition, none of the confidential witnesses' opinions is cogent or compelling, as they merely comment on widely-reported facts regarding the tightening of the CDO and RMBS market. In particular, "CW5," contrary to Plaintiffs' contention (Opp. Br. at 44), comments that there was "no viable market in mid-2007" for CDOs (Am. Compl. ¶ 149), despite the fact that he left SG in January 2007 (Am. Compl. ¶ 220). See Malin, 499 F. Supp. 2d at 140-

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[6] Plaintiffs' attempt to distinguish Steinberg (Opp. Br. at 43) is misplaced, as Plaintiffs are discussing that court's decision on falsity, not scienter. Steinberg v. Ericsson LM Tel. Co., No. 07 CV. 9615 (RPP), 2008 WL 5170640, at *6 (S.D.N.Y. Dec. 10, 2008) (confidential witnesses misunderstood what corporate officer said and misinterpreted it as false).

[7] Plaintiffs' confidential witness allegations are nothing like those accepted in Hall v. Children's Place Retail Stores, Inc., (Opp. Br. at 44) where the court credited confidential witness allegations of a "systemic failure" in the company's management, consistent violation of a licensing agreement and the company's knowledge that its positive statements were unwarranted. 580 F. Supp. 2d 212, 232-33 (S.D.N.Y. 2008). None of this is alleged here.

41 (that confidential witness alleged problems were "well-known" was insufficient to allege scienter).

Similarly, Plaintiffs allege SG moved its VaR modeling to Paris in "late 2006" (Opp. Br. at 15 n.10), more than one year before the end of the class period, so none of the confidential witnesses, who were all supposedly based in New York, would have any firsthand knowledge of SG's valuations after this time. In any event, there is no sufficient allegation that any change in valuation parameters was made for any improper or fraudulent purpose, only that valuation models were "not working." (Opp. Br. at 40.)

The failure to allege that any of the confidential witnesses had firsthand knowledge of what the Individual Defendants considered in valuing the CDO and RMBS portfolio and making statements about purported subprime exposure is fatal. See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc., 531 F.3d 190, 196 (2d Cir. 2008) ("'[w]here plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.'" (alteration in original, emphasis added) (quoting Novak v. Kasaks, 216 F.3d 300, 309 (2d Cir. 2000)); PXRE, 2009 WL 539864, at *22-23 (plaintiffs did not allege recklessness as they failed to allege defendants "had access to information that *specifically* informed them of the alleged flaws in the preparation of PXRE's loss estimate reports" or that any concerns about modeling by lower-level employees "were ever brought to the attention of the Individual Defendants or anyone else at PXRE").[8]

[8] In the cases relied on by Plaintiffs (Opp. Br. at 41), Asher v. Baxter Int'l Inc., 377 F.3d 727, 728-29 (7th Cir. 2004), In re WorldCom, Inc. Securities Litigation, 294 F. Supp. 2d 392, 425-26 (S.D.N.Y. 2003) and Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 706-707 (7th Cir. 2008), plaintiffs alleged with particularity, unlike here, that those responsible for the publicly-issued statements were aware of contrary facts.

Plaintiffs' allegations are far weaker than those rejected by Judge Pauley in In re American Express Company Securities Litigation, a case that Plaintiffs attempt, but are unable, to distinguish. No. 02 Civ. 5533, 2008 WL 4501928, at *7 (S.D.N.Y. Sept. 26, 2008) (Opp. Br. at 44-45). Significantly, in American Express, plaintiffs alleged that confidential witnesses presented information to those responsible for making the public statements at issue, but the court dismissed such allegations because plaintiffs did not allege those responsible for making public statements failed to take that information into account. Id. at *7 (S.D.N.Y. Sept. 26, 2008). Here, Plaintiffs make no such allegations, merely asserting that the Individual Defendants should have known adverse facts (Opp. Br. at 39-41), which is insufficient to create a strong inference of scienter. See Am. Express, 2008 WL 4501928, at *6 (that defendant "ought to have known" adverse facts was insufficient to allege recklessness (internal quotation marks omitted)).[9]

Finally, contrary to Plaintiffs' claim (see Opp. Br. at 43-44), SG did not argue that all of Plaintiffs' confidential witnesses had to be at SG for the entire class period. However, few of the so called witnesses were supposedly aware of what was going on at SG over the course of the lengthy class period, and none of the so called witnesses alleges that any supposed problems with regard to CDO and RMBS valuations occurred earlier than late-2006. Thus, there is simply no way the purported confidential witness allegations can create a strong inference of fraud dating back to August 1, 2005, the beginning of the purported class period.

[9] Plaintiffs' contention that American Express is of "questionable value" because it "relies" on the Seventh Circuit's opinion in Higginbotham v. Baxter Int'l Inc., 495 F.3d 753 (7th Cir. 2007) (Opp. Br. at 45), is mistaken. Judge Pauley did not adopt Higginbotham's analysis of confidential witness allegations. See American Express, 2008 WL 4501928, at *7.

(c) The confidential witness allegations display at most a difference of opinion as to how to value highly complex securities

Failing to raise cogent or compelling inferences of scienter, Plaintiffs' confidential witnesses merely assert, at most, differences of opinion as to what factors SG should have taken into account in valuing its highly complex CDO and RMBS securities. (Opp. Br. at 40-41.) For example, Plaintiffs argue that SG's valuation models "failed to reflect reality," (Opp. Br. at 12 (CW2)) that SG's CDOs were a "train wreck," (Opp. Br. at 39 (CW2)), that its CDOs were "crap," (Opp. Br. at 16 (CW5)) that it was "common knowledge SG's CDO assets had become illiquid," (id. (CW5)) and that "the [CDO] valuations were wrong" (Opp. Br. at 33.)[10]

This difference of opinion is not actionable fraud. Not only are these opinions entirely vague, but given the "multitude of factors that may appropriately be taken into account, alleging disagreement with some of [SG's] valuations does not equate to alleging fraud." In re Allied Capital Corp. Sec. Litig., No. 02 Civ. 3812, 2003 WL 1964184, at *4 (S.D.N.Y. Apr. 25, 2003);[11] see also In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009) (viewing Citigroup's subprime exposure in hindsight, a "Court [cannot] properly evaluate whether corporate decision-makers made [the] 'right' or 'wrong' decision"); In re Axonyx, 2009 WL 812244, at *3-4 (that clinical trials were "defective" amounted to inactionable opinion).[12]

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[10] CW5 also alleges there were "many complaints from investors/clients who purchased SocGen RMBS and were upset the RMBS were falling in price." (Am. Compl. ¶ 226.) However, customer complaints made in the wake of a market downturn do not create a strong inference of scienter. In re Versant Object Tech. Corp. Sec. Litig., No. C 98-00299, 2001 WL 34065027, at *6 (N.D. Cal. Dec. 4, 2001) ("[C]ustomer complaints . . . which are received by every company, do not give rise to a strong inference of deliberate recklessness.")

[11] Unable to distinguish this Court's decision in Allied Capital, Plaintiffs incorrectly assert that it is merely about a "disagreement over accounting principles" (Opp. Br. at 42 n.22).

[12] Plaintiffs' repeated attempts to limit this Court's holdings in In re Salomon Analysts Level 3 Litig., 373 F. Supp. 2d 248 (S.D.N.Y. 2005), and Podany v. Robertson Stephens, Inc., 318 F. Supp. 2d 146 (S.D.N.Y. 2004) to analyst opinions (Opp. Br. at 31, 41 n.21) are unsupportable. The reasoning in *(cont'd)*

Plaintiffs' confidential witness arguments as to the ABX index (Opp. Br. at 2, 3, 12, 15, 40-41) are particularly deficient. Plaintiffs continue to press an unsupportable inference that SG's CDO valuations were overstated because the ABX index declined by a greater amount, claiming merely that "[t]he ABX index is a widely used modeling index for RMBS and CDO market valuations." (Opp. Br. at 12 n.7.) Yet, it is more cogent and compelling to infer that SG management believed at the time that the ABX index was not a proper means or direct proxy to value CDOs, particularly for the super-senior AAA-rated tranches of CDOs possessed by SG. (Motion to Dismiss ("MTD") at 30-32.)

The fact that other models such as the ABX index may have given different values from SG's own models does not render SG's use of its models deliberately or recklessly false and misleading. See Axonyx, 2009 WL 812244, at *4 (difference of opinion between defendant's CEO and advisory board "offers no basis for a finding of scienter"); PXRE, 2009 WL 539864, at *27 (fact that other reinsurers were getting more extreme loss estimates in their models than PXRE was inactionable). Nor do any of the confidential witnesses claim that they have any firsthand knowledge as to whether, why or how SG officials in Paris may have considered the ABX index or why they may have not used it directly in their models.

Indeed, the ABX index tracks credit default swaps on mortgage-backed securities (not CDOs) and includes only a tiny fraction of the trillion dollar asset backed securities market. Plaintiffs do not and cannot allege that SG's CDOs were made up of the same handful of Mortgage-Backed Securities included in the ABX, nor do they allege facts showing that it would

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these cases that valuation models are opinions applies equally here, and it has been applied outside of the analyst opinion context to the valuation of assets such as those at issue here. See Good Hill Partners L.P. v. WM Asset Holdings Corp., 583 F. Supp. 2d 517, 520 (S.D.N.Y. 2008) (Rakoff, J.) (applying Salomon).

have been appropriate for SG to mark down its portfolio based solely on movements in the ABX index. Indeed, it is a more compelling and cogent inference that – rather than committing securities fraud, as Plaintiffs allege – SG management believed, as the ABX's creators said, the ABX index "was not designed to be uncritically extrapolated to the broader [Asset Backed Securities] market, and it was certainly not designed as a valuation tool for individual securities." (See Musoff Decl. Ex. 39.)

3. Plaintiffs' Opposition Brief fails to explain how SG's statements about overall risk management were recklessly made because of Kerviel's rogue trading

Plaintiffs' argument that SG's statements regarding its overall risk management were false and misleading when made as early as August 2005 fails under Dynex as well. Plaintiffs fail to sufficiently allege that Mr. Bouton or any other senior SG official responsible for making public statements about risk management knew or recklessly disregarded a single "red flag" having to do with Kerviel, let alone as early as August 2005. (Opp. Br. at 36.) The one notice that supposedly reached an SG official responsible for public statements (a letter addressed to Mr. Bouton) is insufficient to establish knowledge or reckless disregard because, as Defendants argue in their moving brief (MTD at 41, n.14), this letter had nothing to do with Kerviel (or his trading desk), nor did it put SG on notice that anyone had circumvented internal controls or committed fraud, and certainly not to the magnitude of Kerviel.

Rather, this letter addressed to SG's Chairman and then-CEO allegedly notified SG, as part of a routine report on general risk management a year and a half into the class period, that certain procedures in SG's extensive derivatives division (unspecific as to any particular group or desk) were supposedly "wanting." (Opp. Br. at 37; see also Opp. Br. at 24.) Plaintiffs are entirely vague as to what "wanting" means and, more significantly, do not allege that anyone at SG believed that this notification contradicted any contemporaneous statements that overall

risk throughout SG was "under control."[13] There can be no inference of scienter for alleged "serious deficiencies" (Opp. Br. at 38) in risk management. See Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) (securities laws do not regulate "'corporate mismanagement.'" (citation omitted)); Field v. Trump, 850 F.2d 938, 948 (2d Cir. 1988) (allegations requiring court "to distinguish between conduct that is 'reasonable' and 'unreasonable' or 'informed' and 'uninformed' . . . are the hallmark of state fiduciary law" and do not state a securities claim).[14]

Indeed, the weakness of Plaintiffs' allegations of recklessness as to Kerviel are confirmed by the fact that no source relied on by Plaintiffs concludes that SG officials responsible for public statements knew about any of Kerviel's activities. (MTD at 39); see also PXRE, 2009 WL 539864, at *28 (cannot draw unsupported inferences from newspaper articles). Rather, many of these very same sources, and others of which the Court may take judicial notice, actually support the more compelling competing inference that SG management was not aware of any internal control deficiencies, the extent of Kerviel's fraud or the extraordinary lengths he went to to circumvent internal controls (MTD at 16 n.9, 37-39, 41).

All that Plaintiffs are left with is Kerviel himself, a fraudster facing prison for his actions, "who now likens his trading duties to that of playing a video game" (Opp. Br. at 6), self-servingly claiming that he could not believe that his managers had no idea what he was doing (Opp. Br. at 4), and that what he was doing was "not at all sophisticated." (Opp. Br. at 8). But

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[13] Similarly, an internal report referenced by Plaintiffs (Opp. Br. at 37) merely concluded at the end of 2007 that SG needed more resources to anticipate operational risks. But Plaintiffs fail to allege, as Dynex requires, that any SG officials responsible for public statements were aware of these conclusions or believed at the time that they could lead to the Kerviel rogue trading, let alone the magnitude of what resulted, especially as early as the beginning of the class period in 2005.

[14] Goldman v. Belden (Opp. Br. at 25), is inapposite, having not addressed issues of corporate management but rather the defendant's purported motive for his stock sales. 754 F.2d 1059, 1070-71 (2d Cir. 1985). In re Scholastic Corp. Securities Litigation (Opp. Br. at 25) addressed supposed known trends under Item 303 of Regulation S-K, 17 C.F.R. § 229.303 (2008), which are not at issue here. 252 F.3d 63, 70, 74 (2d Cir. 2001).

not even Kerviel himself claims that any of the Individual Defendants knew of his activities or believed that internal controls were seriously deficient.[15] Even the French Finance Minister's report, selectively quoted by Plaintiffs, "made no specific criticism of management, accepting its explanation that the losses were the work of a lone trader." (Musoff Decl. Ex. 46 (source cited at Am. Compl. ¶ 232)). Thus, the more cogent and compelling inference, as discussed in Defendants' moving brief, is that senior management did not know of Kerviel's activities and did not believe that internal controls were lacking in such a way as to render SG's statements regarding risk management false and misleading when made as early as August 2005.

4. Plaintiffs' stock sale arguments are insufficient to infer motive

Plaintiffs' Opposition Brief fails to adequately explain how the purported insider sales by the Individual Defendants were unusual in either timing or amount. See Acito v. IMCERA Group, Inc., 47 F.3d 47, 54 (2d Cir. 1995) (sales must be unusual in timing or amount to infer motive).[16]

(a) Plaintiffs have not sufficiently alleged that any of the stock sales were suspicious in amount

Plaintiffs attempt to infer motive by asserting that the Individual Defendants purportedly reaped large profits from stock sales.[17] Yet, Plaintiffs concede that the Individual

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[15] While Plaintiffs argue SG held an "emergency meeting" regarding Kerviel (Opp. Br. at 36), it is not alleged that any SG officials responsible for making public statements attended this meeting or were briefed about it. Similarly, while a former SG inspector speculates that management must have known about internal control deficiencies (Opp. Br. at 10), this person left SG before the class period even began. (MTD at 39.)

[16] Robert Day's alleged stock sales are addressed in his reply brief, and, to the extent applicable, are incorporated by reference herein.

[17] None of Plaintiffs' cases supporting their claims of motive based on gross profits is on point. In In re MTC Elec. Techs. S'holders Litig., 898 F. Supp. 974, 978 (E.D.N.Y. 1995) vacated in part on reconsideration, 993 F. Supp. 160 (E.D.N.Y. 1997) (Opp. Br. at 55 n.29), there were no allegations as to the percentage of stock sold by the defendant in question, but instead only an allegation as to gross *(cont'd)*

Defendants all increased their stock holdings over the class period, which counters any inference of motive.[18] While Plaintiffs argue this trend is irrelevant because of purportedly high intra-year trading, they offer no support for their claim that supposedly high intra-year trading supports an inference of fraud, especially when overall holdings increased. (Opp. Br. at 57.) To the contrary, high intra-year trading or not, the increasing size of the Individual Defendants' holdings indicates their interests were aligned with SG's shareholders over the class period and negates any inference of fraud.[19]

(b) Plaintiffs do not sufficiently allege that any of the stock sales were suspicious in their timing

Plaintiffs concede that none of the Individual Defendants sold stock after June 15, 2007, more than seven months before the end of the class period, despite alleging that many of

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(cont'd from previous page)

profits, which the Second Circuit has since held is insufficient. See In re Scholastic, 252 F.3d at 75 (dollar amounts cannot be considered in isolation) (Opp. Br. at 53 n.26); see also In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 275 (S.D.N.Y. 2008); In re eSpeed, Inc. Sec. Litig., 457 F. Supp. 2d 266, 290 (S.D.N.Y. 2006); In re BISYS Sec. Litig., 397 F. Supp. 2d 430, 444 (S.D.N.Y. 2005).

[18] Indeed, this Court held in Burstyn v. Worldwide Xceed Group, Inc. (Opp. Br. at 52) that stock sale allegations were insufficient to infer motive, precisely because large percentages of stock were retained and individual defendant's stock sales increased. No. 01 Civ. 1125(GEL), 2002 WL 31191741, at *5 (S.D.N.Y. Sept. 30, 2002). Rather, this Court inferred motive from artificial stock inflation to acquire other companies, which is not alleged here. See also Rothman v. Gregor, 220 F.3d 81, 93-94 (2d Cir. 2000) (alleged motive was to complete corporate acquisitions) (Opp. Br. at 51). The Second Circuit in Rothman found one defendant's alleged $20 million return on stock sales was not sufficiently unusual to infer motive. Rothman, 220 F.3d at 95.

[19] While Plaintiffs allege each Individual Defendant sold large percentages of stock over the class period, Plaintiffs' percentage calculations are not based on any factual allegations. For example, Plaintiffs claim that Daniel Bouton sold 255,715 shares over the class period, allegedly 65% of his available holdings. (Am. Compl. ¶ 257.) But Plaintiffs fail to indicate the total amount of holdings this sale was from, and indeed claim that some of this information was unavailable until March 2006 (Opp. Br. at 56 n.31), so their alleged high percentages of sales are entirely baseless. See Malin v. XL Capital Ltd., 499 F. Supp. 2d 117, 151 (D. Conn. 2007) (holding that it was "impossible" to determine whether stock sales were unusual in timing and amount where plaintiffs only provided information concerning the number of shares sold, the share price on the date of sale, and the gross profit realized), aff'd, No. 07-3749-CV, 2009 WL 481897 (2d Cir. Feb. 26, 2009). Plaintiffs do not indicate whether the total held takes into account vested options, see In re eSpeed, 457 F. Supp. 2d at 290-91, despite claiming Mr. Bouton dumped vested options. (Opp. Br. at 53.)

the purportedly false statements were made after that date, including the allegedly false statement that SG's subprime exposure was "limited," "very limited," "negligible," "under control" or "low." (See Opp. Br. at 13, 26; Am. Compl. ¶¶ 141, 143, 145, 146-47, 152.)[20] This fact refutes any inference of motive.

Plaintiffs posit the erroneous assertion that Mr. Bouton made statements about the credit crisis in "early 2007" when he purportedly sold shares. (Opp. Br. at 54.) However, Plaintiffs allege that Mr. Bouton did not make any statements as to the severity of the impact of the looming credit crisis until August 2007 (Opp. Br. at 13), two months after the last supposed stock sale by an Individual Defendant. Thus, Plaintiffs cannot assert that any Individual Defendant attempted to reap the benefit of a falsely positive statement that would artificially inflate the price of SG stock they were selling. See Bausch & Lomb, Inc. Sec. Litig., 592 F. Supp. 2d 323, 344 (W.D.N.Y. 2008).[21]

Ignoring the authority cited by Defendants that repurchases refute an inference of fraud, Plaintiffs' argument is premised entirely on In re Countrywide Financial Corp. Securities Litigation, 588 F. Supp. 2d 1132, 1188 (C.D. Cal. 2008). However, that decision actually

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[20] Unlike here, the court in In re Oxford Health Plans, Inc. Securities Litigation (Opp. Br. at 55 n.29) found motive in part because large trades were made during a government investigation into accounting irregularities and shortly before announcement of a significant loss. In re Oxford, 187 F.R.D. 133, 139 (S.D.N.Y. 1999). In In re Scholastic, (Opp. Br. at 53 n.26) a defendant made large trades just days before disclosure, where no trades had happened for years prior. 252 F.3d at 75; see also Rubenstein v. Collins, 20 F.3d 160, 169-70 (5th Cir. 1994) (insider sales occurred less than one month before a corrective disclosure) (Opp. Br. at 55 n.29).

[21] The court in In re Openwave Sys. Securities Litigation (Opp. Br. at 56-57) held that a CEO's sales were not suspicious where they were sold at times where the stock was "well below the class-period high." 528 F. Supp. 2d 236, 251 (S.D.N.Y. 2007). Similarly, while this Court in Global Crossing, Ltd. Securities Litigation (Opp. Br. at 52) stated, in dicta, that selling shares while prices are artificially high may infer motive, the motive in that case was the auditor's alleged desire to increase its non-audit practice and to "please clients." 322 F. Supp. 2d 319, 345-46 (S.D.N.Y. 2004).

supports Defendants' position here, as Countrywide was allegedly financing the repurchase of shares with outside capital. As the court stated:

> [C]ompanies generally repurchase their undervalued stock with their own cash (or other assets) because they believe its own stock will yield a better return than other investments. That is, repurchases signal to the market that a company believes its stock is undervalued. Repurchases therefore might contribute to a price increase, propping up the prices insiders receive. But Countrywide's rationale may have been different: rather than investing its own money, Countrywide raised capital from outside investors to finance at least part of the repurchases.
>
> Again, as insiders were selling, Countrywide was buying – with newly raised capital rather than existing cash reserves.

Id. at 1187-88 (citation omitted) (footnote omitted). Here, in direct contrast, as Plaintiffs themselves must concede, the repurchase was done with company funds (Opp. Br. at 55) and not outside capital.[22]

Finally, Plaintiffs fail to refute the nonfraudulent inferences as to the exercise of vested options by the Individual Defendants, or that sales on the same day indicate a trading window. Nor do Plaintiffs cite any Second Circuit law that supports their assertion that a predetermined trading plan can only be raised as an affirmative defense. See, e.g., In re IAC/InterActiveCorp Sec. Litig., 478 F. Supp. 2d 574, 604 (S.D.N.Y. 2007) (giving no indication that sales pursuant to predetermined plan can only be raised as an affirmative defense) (citing Fishbaum v. Liz Claiborne, Inc., No. 98-9396, 1999 WL 568023, at *4 (2d Cir. July 27, 1999)).

[22] In re Cardinal Health, Inc. Sec. Litigs., 426 F. Supp. 2d 688, 731 (S.D. Ohio 2006) (Opp. Br. at 56) is not on point, as that case did not involve a corporation's repurchase of its own stock.

5. Plaintiffs' core operations and corporate scienter arguments fail to raise a cogent and compelling inference of scienter

Plaintiffs argue that the Court should infer scienter as to risk management because it supposedly is a "core" part of SG's business and of "critical importance." (Opp. Br. at 37.) While risk management is obviously of great importance to any bank, including SG, it does not follow that "risk management" is a core operation under the case law that has permitted such an inference. (See MTD at 43.) In Dynex, the court hypothetically noted an inference of fraud where, for example, GM falsely stated it had "sold one million SUVs in 2006, and that actual number was zero." Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc., 531 F.3d 190, 195-96 (2d Cir. 2008).[23] GM's core business is selling cars; SG's core business is not risk management. As Plaintiffs themselves allege, SG is organized around three core businesses: retail banking, investment banking ("SGCIB"), and investment management and services. (Am. Compl. ¶ 49.)

Plaintiffs do not and cannot allege this is the "one million SUVs" scenario, as not only is risk management not a "core operation" under the case law that permits such an inference, but Plaintiffs do not and cannot allege that the risk management issues alleged here are of the same significance. Here, Plaintiffs do not and cannot allege that all risk management failed. Rather, it is alleged that risk management only supposedly failed in one section of SGCIB

[23] In In re Atlas Air Worldwide Holdings, Inc. Securities Litigation, 324 F. Supp. 2d 474, 489-92 (S.D.N.Y. 2004) (Opp. Br. at 35), the court found the core operations inference existed given an impairment in the value of cargo planes that resulted in the company operating at a loss, imputing scienter to the company's CFO as a result. In In re Alstom, as Plaintiffs admit (Opp. Br. at 35), knowledge of the loans in question was imputed to officers, where the extensive loans to companies in its fastest growing division were a "disproportionately high and very significant amount of the company's overall debt," and officers allegedly knew of the unstable financial position of companies receiving the loans. 406 F. Supp. 2d 433, 459 n.20 (S.D.N.Y. 2005); see also In re Regeneron Pharms., Inc. Securities Litigation, No. 03 Civ. 3111 (RWS), 2005 WL 225288, at *3 (S.D.N.Y. Feb. 1, 2005) ("make-or-break" product) (Opp. Br. at 35 n.20.)

responsible for at most 1% of its revenue in a highly diversified entity (and involving complex, judgment-based valuation rather than a fungible product), and as to a single junior trader in SG's broad equity derivatives practice. See, e.g., In re Federated Dep't Stores, Inc. Sec. Litig., No. 00 Civ. 6362 (RCC), 2004 WL 444559, at *5 (S.D.N.Y. Mar. 11, 2004) (rejecting core operations inference because financial controls over subsidiary representing 10% of assets of corporation were not essential to corporation's survival).

In any event, courts within the Second Circuit have cast doubt on the continuing validity of a core operations inference after the PSLRA. See In re eSpeed, Inc. Sec. Litig., 457 F. Supp. 2d 266, 294 n.209 (S.D.N.Y. 2006) (disputing continued viability of inference after PSLRA (rejecting Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir. 1989), cited in Opp. Br. at 35 n.20, 37).) Even the Ninth Circuit, which has gone the furthest in accepting this inference, had held it is applicable only in "exceedingly rare" cases. South Ferry LP, #2 v. Killinger, 542 F.3d 776, 785 n.3 (9th Cir. 2008); see also Pittleman v. Impac Mortgage Holdings, Inc., No. SACV 07-0970, 2009 WL 648983, at *3 (C.D. Cal. Mar. 9, 2009) (rejecting core operations inference as to loan underwriting for subprime lender); N.Y. State Teachers' Retirement Sys. v. Fremont Gen. Corp., No. 2:07-CV-05756, 2008 WL 4812021, at *5 & n.3 (C.D. Cal. Oct. 28, 2008) (same).

6. None of Plaintiffs' remaining inferences of scienter is cogent or compelling

Plaintiffs' additional challenges to Defendants' competing inferences are insufficient under Tellabs. They cite no law opposing the principle that pre-announcement of a loss undercuts an inference of scienter. (See MTD at 25, 49; Opp. Br. at 38-39.) Plaintiffs' claim that the close proximity of a purportedly false statement and a corrective disclosure infers fraud

is also not supported by case law from within the Second Circuit. (See Opp. Br. at 45-46; MTD at 51.)[24]

There is also no support offered for the argument that incorrect financial statements, accounting violations or even a restatement (which is argued only as to Kerviel, not subprime losses), standing alone, create a strong inference of scienter. (See Opp. Br. at 46-48.) Plaintiffs instead argue that all the law cited by Defendants on this issue (see MTD at 46-47) is inapplicable because Plaintiffs are using international accounting standards instead of GAAP. (Opp. Br. at 47-48.) Yet, using international accounting standards does not change this well-accepted legal principle, and indeed it does not and should not. See In re Allied Capital Corp. Sec. Litig., No. 02 Civ. 3812, 2003 WL 1964184 at *4 (S.D.N.Y. Apr. 25, 2003) ("[a]lleging violations of GAAP or other accounting irregularities is not itself sufficient to state a claim for fraud" (emphasis added)).[25]

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[24] Helwig v. Vencor, Inc., 251 F.3d 540 (6th Cir. 2001), abrogated in part by Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) (Opp. Br. at 45-46) relied on Greebel v. FTP Software, Inc., 194 F.3d 185, 196 (1st Cir. 1999), for its "close proximity" factor. Helwig, 251 F.3d at 552. However, the First Circuit in Greebel recognized that its approach to scienter, applied in previous cases such as Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1209 (1st Cir. 1996), superseded in part by statute, Private Securities Litigation Reform Act of 1995, Pub L. No. 104, 67, 109 Stat. 737 (Opp. Br. at 45), was at odds with the Second Circuit's approach to scienter. Greebel, 194 F.3d at 196. Moreover, Greebel recognized that Shaw was superseded by the PSLRA, as having applied a "reasonable inference" standard to scienter as opposed to the "strong inference" the PSLRA requires. Greebel, 194 F.3d at 196-97. In Plotkin v. IP Axess Inc., (Opp. Br. at 46) it was not that only eight months had elapsed between the time a small company's first big deal was announced and its bankruptcy, but rather that the "big deal" collapsed so fast that it inferred "something was amiss at the outset." 407 F.3d 690, 698 (5th Cir. 2005). Conversely, the alleged fraud here is purported to have continued for almost two and one half years, which in itself is a competing nonfraudulent inference.

[25] It is ironic that Plaintiffs attempt to draw this distinction between GAAP and IFRS, as Plaintiffs' claim that AICPA recognizes the ABX as an example of an input for valuation (Opp. Br. at 4) was done in the context of GAAP, not IFRS. (See Am. Compl. ¶ 315 (quoting Measurements of Fair Value in Illiquid (or Less Liquid) Markets, available at http://www.aicpa.org/caq/download/WP_Measurements_of_FV_in_Illiquid_Markets.pdf.).)

The magnitude of a purported fraud does not raise a strong inference of scienter, especially as Plaintiffs vaguely characterize the subprime losses as "enormous." (Opp. Br. at 48.) See PXRE, 2009 WL 539864, at *31 (80% difference between estimated and actual losses did not raise cogent or compelling inference of fraud); In re Aegon N.V. Sec. Litig., No. 03 Civ. 0603 (RWS), 2004 WL 1415973, at *6-7, *9 (S.D.N.Y. June 23, 2004) (allegations regarding size of accounting charge for losses in bond portfolio, majority of which were rated "A" and above, amounted to impermissible fraud by hindsight).[26]

Nor do the allegations of government investigations raise a strong inference of scienter (Opp. Br. at 49), especially where, as here, those investigations have not revealed that anyone at SG – other than Kerviel himself – acted intentionally or knowingly. See In re Ceridian Corp. Sec. Litig., 542 F.3d 240, 247 (8th Cir. 2008) (ongoing investigations did not infer scienter, particularly where investigation uncovered no evidence of fraud and those responsible for problems were fired). Indeed, as discussed above, some of these investigations concluded precisely the opposite: that senior management was not aware of Kerviel's activities.[27]

Finally, Plaintiffs fail to refute the authority holding that corporate restructuring such as terminating certain employees, dissolving certain groups and reducing budgets (Opp. Br.

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[26] This Court's opinion in In re Global Crossing, 322 F. Supp. 2d 319 (Opp. Br. at 48), is distinguishable because the magnitude of the accounting fraud there supported an inference of recklessness as to an accounting firm's involvement in the purported scheme. Similarly, in In re Scholastic, 252 F.3d at 77 (Opp. Br. at 48), it was inferred the company knew its return rate had cost it $24 million, as having increased 150% from the previous year, a fact supported by hard data.

[27] Consequently, Hall v. Children's Place Retail Stores, Inc., 580 F. Supp. 2d 212 (S.D.N.Y. 2008) (Opp. Br. at 49), is distinguishable because in Hall it was not the existence of an SEC investigation that created a strong inference of scienter, but rather that the SEC investigation concluded that defendants knew of material weaknesses in internal controls. Id. at 233; see also No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp., 320 F.3d 920, 941-43 (9th Cir. 2003) (Opp. Br. at 37) (FAA investigation indicated defendants knew of ongoing maintenance problems). Similarly, in In re Syncor Int'l Corp. Securities Litigation, 327 F. Supp. 2d 1149, 1162 (C.D. Cal. 2004), aff'd in part, rev'd in part, 239 F. App'x 318 (9th Cir. 2007) (Opp. Br. at 49), the court addressed an SEC investigation that resulted in a cease and desist order, which is not at issue here.

at 15, 39, 50) do not create a strong inference of scienter. (MTD at 47-48.)[28] Nor do Plaintiffs offer any law to support their "noise" theory, which attempts to manufacture scienter from the fact that SG announced the Kerviel and fourth quarter and additional subprime losses at the same time. (See Opp. Br. at 50-51.)

B. Plaintiffs have failed to allege loss causation

Plaintiffs argue they have sufficiently alleged loss causation because they say they have alleged the existence of a corrective disclosure and a causal link (controlling for other factors). (Opp. Br. at 60-62.) Plaintiffs argue that "any corrective event" is sufficient. (Opp. Br. at 62.) But under Second Circuit precedent, the corrective event has to be causally connected to the loss, revealing facts alleged to have been concealed. Lentell v. Merrill Lynch & Co., 396 F.3d 161, 175 n.4 (2d Cir. 2005). Here, Plaintiffs claim the falsity of SG's prior statements as to risk management and CDO and RMBS valuation based on the announcement of the Kerviel and subprime losses. (Am. Compl. ¶ 403.) Plaintiffs' argument fails to plead loss causation because this disclosure says nothing about risk management, matters which was not addressed until after the end of the class period. See In re Ramp Corp. Sec. Litig., No. 05 Civ. 6521, 2006 WL 2037913 at *10 (S.D.N.Y. July 21, 2006) (finding loss causation had not been plead, where disclosure of corporate officer accepting gifts did not reveal company's management "'lacked integrity generally'" (citation omitted)) As to subprime, Plaintiffs do not dispute that in order to be a corrective disclosure, the purported dishonesty of an opinion, such as about valuation, has to be disclosed to the market. (MTD at 61.) As discussed above with respect to Plaintiffs'

[28] In In re Adaptive Broadband Securities Litigation, No. C 01-1092, 2002 WL 989478, at *7, *14 (N.D. Cal. Apr. 2, 2002) (Opp. Br. at 50), the company discontinued severance payments to personnel who were fired after internal investigation into alleged fraud, which is not alleged here. In Kaltman v. Key Energy Servs., Inc., 447 F. Supp. 2d 648, 664 (W.D. Tex. 2006) (Opp. Br. at 50), the court found that the employee in question was terminated for cause, also not alleged here.

valuation arguments, they have not challenged the competing inference that SG's valuations were opinions that Plaintiffs never sufficiently argue were objectively or subjectively false, but rather changed due to the worsening of the credit crisis, as SG advised they might.[29]

C. Plaintiffs have failed to allege falsity

Plaintiffs argue that they have established falsity on the basis of facts allegedly known regarding risk management and subprime exposure rendering SG's public statements false. (Opp. Br. at 22.) Since falsity is premised on alleged knowledge of undisclosed facts at the time the statements at issue were made, Plaintiffs' falsity and scienter arguments meld. See In re JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595, 625 (S.D.N.Y. 2005). For the reasons discussed above, Plaintiffs fail to raise the inference of scienter necessary under Tellabs. But Plaintiffs' falsity arguments fail for additional reasons, primarily because the Second Circuit recently held that many of the statements Plaintiffs challenge about risk management are inactionable. See ECA v. JP Morgan Chase Co., 553 F.3d 187, 205-06 (2d Cir. 2009) (holding statements regarding good risk management were puffery, even in light of JP Morgan's loans to Enron).

Plaintiffs have done nothing to show the statements they challenge are any different. Compare, e.g., In re JP Morgan, 363 F. Supp. 2d at 612 ("'[t]raders and others

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[29] In the alternative, Plaintiffs argue that they do not have to allege that a corrective disclosure was in fact made, and instead can now argue loss causation on the basis of the materialization of risk or foreseeability. (Opp. Br. at 62-65.) However, allegations supporting the materialization of risk theory and foreseeability are not found in the Amended Complaint. In addition, the corrective disclosures in Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc., 343 F.3d 189, 192 (2d Cir. 2003) (Opp. Br. at 62), Catton v. Defense Tech. Sys., Inc., 457 F. Supp. 2d 374, 384 (S.D.N.Y. 2006) (Opp. Br. at 64), and In re Parmalat Securities Litigation, 376 F. Supp. 2d 472, 510 (S.D.N.Y. 2005) (Opp. Br. at 63), were about schemes to defraud (not adequately alleged here), with the courts holding that risk materialized when the scheme was disclosed. In Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 98 (2d Cir. 2001) (Opp. Br. at 63), it was foreseeable that a highly sophisticated investment strategy would collapse if guided by an unskilled executive. Here, as in Lentell, unlike in Emergent and Suez, "[t]his case is therefore sharply distinguishable from cases in which some or all of the risk that materialized was clearly concealed by a defendant's misstatements or omissions." Lentell, 396 F.3d at 177.

responsible for managing risk positions were accountable for identifying potential "worst-case" losses and estimating the probability of loss'" and the bank was able to "'identify material risks and potential earnings vulnerabilities that might not be captured by statistical methodologies'") (alteration in original) (citations omitted), with Opp. Br. at 22 ("'highly sophisticated control systems which have already proved their worth in extreme situations.'") Compare also In re N.Y. Cmty. Bancorp, Inc. Sec. Litig., 448 F. Supp. 2d 466, 478-79 (E.D.N.Y. 2006) (statement that "risk-averse . . . strategy permeates every decision the company makes" was inactionable), with Opp. Br. at 23 n.14 ("[R]isk management is an integral part of our derivatives activity"), and Opp. Br. at 9-10 ("'robust and efficient framework of risk management.'")[30]

In addition, Plaintiffs view the allegedly false statements based entirely on hindsight, rather than contemporaneously, as is required. See San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 812 (2d Cir. 1996). Indeed, Plaintiffs sum up their approach to the Kerviel allegations by stating, "[h]ad SocGen's 'internal controls and risk management functions' been 'in place and followed,' . . . Kerviel never would have been able to bet €50 billion on the stock market." (Opp. Br. at 24 (citations omitted)).

For example, Plaintiffs argue the statements that SG had "'highly sophisticated control systems'" made on August 1, 2005, and "'strong expertise in the management of risks linked to derivatives'" made in February 2006 (Opp. Br. at 22, 23 n.13) are false because of

[30] The statement cited by Plaintiffs from In re Bayer AG Securities Litigation, No. 03 Civ. 1546 (WHP), 2004 WL 2190357, at *13 (S.D.N.Y. Sept. 30, 2004) (Opp. Br. at 26), is much more specific as to historical facts than anything alleged here about SG's opinions regarding its subprime exposure. Similarly, in the pre-PSLRA case of Newman v. Rothschild, 662 F. Supp. 957, 958-59 (S.D.N.Y. 1987) (Opp. Br. at 26), defendant made a guarantee as to a 20-30% return on investment with no risk to principal, whereas SG is never alleged to have represented its CDO investments would not lose money. Plaintiffs out of context references to "guarantees" relating to permanent supervision of transactions at the "local" or "operational" level are not alleged (nor can it be alleged) to be addressed to Kerviel's proprietary trading strategies. (Opp. Br. at 10, 38). Moreover, Plaintiffs do and not and cannot allege that senior management did not believe such disclosures were accurate when made.

Kerviel's activities. However, Plaintiffs do not argue that anyone at SG knew of Kerviel's activities in a manner that would render these statements false until February 2007 at the earliest, when unnamed persons at SG purportedly received the first supposed "red flag." (Opp. Br. at 6, 36.) Indeed, Plaintiffs do not argue that any SG official responsible for public statements knew of Kerviel's activities at any time prior to the end of the class period. (Opp. Br. at 6.)

Similarly, while Plaintiffs argue the French Finance Minister concluded that Kerviel had been engaging in unauthorized trades as early as 2005, this conclusion is beside the point. The Finance Minister's conclusion was not made until 2008 and did not suggest that senior management was aware of Kerviel's unauthorized trades or even any weaknesses in internal controls. (Musoff Decl. Ex. 46.) Similarly, while Plaintiffs allege false statements regarding internal controls and risk management in SG's 2007 Registration Statement, which contains information as of December 31, 2006, those statements are only alleged to be false based on conclusions reached in 2008 regarding conduct alleged to have occurred in 2007. (Am. Compl. ¶ 133.)[31]

[31] Thus, Atlas Air (Opp. Br. at 25) is inapposite because in that case plaintiffs sufficiently alleged defendants acknowledged that statements made during the class period were false when made. See 324 F. Supp. 2d at 487. Shapiro v. UJB Fin. Corp., 964 F.2d 272, 283 (3d Cir. 1992) (Opp. Br. at 23) and Ballan v. Wilfred Am. Educ. Corp., 720 F. Supp. 241, 245 (E.D.N.Y. 1989) (Opp. Br. at 23) are similarly distinguishable, because in each of those cases, which both predate the PSLRA, defendants acknowledged facts known during the class period regarding ongoing criminal activity (Ballan, 720 F. Supp. at 249-50) and lax loan practices (Shapiro, 964 F.2d at 282-84) that contradicted their public statements. In both Vivendi (Opp. Br. at 27) and Oxford (Opp. Br. at 27), the court held that plaintiffs had alleged falsity because they had plead facts defendants knew that were contradictory to their statements, precisely what Plaintiffs fail to do here. See In re Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 180-82 (S.D.N.Y. 2003) ("financially solid" held false because of knowledge of debt rating downgrade); In re Oxford Health Plans, Inc. Sec. Litig., 187 F.R.D. 133, 140-41 (S.D.N.Y. 1999) (statements regarding computer problems held to be affirmative misrepresentations as to contemporaneous, known facts regarding profitability); see also PXRE, 2009 WL 539864, at *24 (distinguishing Oxford as involving defendants being directly informed of the alleged deficiencies).

Plaintiffs' arguments with respect to alleged misstatements regarding subprime exposure suffer from similar deficiencies. For instance, Plaintiffs argue, in effect, that since SG took a €230 million writedown when other banks wrote down more, SG's writedown was false. (Opp. Br. at 26.) But Plaintiffs offer no basis to conclude SG's exposure was as great as that of other firms, nor do they account for the effects of the deepening global financial crisis, which, as discussed below, are both proper subjects for judicial notice. Similarly, Plaintiffs allege that SG's indication that it would not make further writedowns was false. (Opp. Br. at 13.) However, as Plaintiffs admit, this was based on a disclosed total cumulative industry loss assumption of 15%, and SG disclosed that it "could change [its] assumption if conditions actually deteriorate." (Am. Compl. ¶ 161.) As discussed below, the court may take judicial notice of the fact that the situation deteriorated significantly.

Plaintiffs also allege that "[b]y late 2006 and early 2007, according to CW5, [SocGen] was experiencing greater difficulty in finding buyers for its CDO [and RMBS] products," which somehow "demonstrate[s] the falsity of Defendants' statements regarding [SocGen's] subprime exposure." (Opp. Br. at 28.) However, Plaintiffs do not argue that SG made any statements regarding subprime exposure at that time. Likewise, Plaintiffs fail to indicate how switching to mark to model valuation in "mid-2007" or not using the ABX indicates that anything SG was saying at the time about its CDO and RMBS exposure was false. Rather, the first time Plaintiffs contend SG made a supposed misstatement about subprime exposure was in August 2007 (Opp. Br. at 13), SG's third quarter, the same quarter when SG announced its first writedown, and seven months after CW5 left SG.[32]

[32] These allegedly false statements included that SG had "'low exposure to the current credit market crisis,'" that the credit crisis was "'under control'" and that it would have only a "'limited impact'" on SG. (Opp. Br. at 13.) Moreover, as discussed in Defendants' moving brief, the "'"limited impact"'" *(cont'd)*

Next, Plaintiffs claim that statements which are "technically true" or "literally true," such as that CDOs only represented 1% of SGCIB revenue, or that SG's subprime exposure was "'limited,'" are still actionable because they leave a false impression implicating a duty to disclose. (Opp. Br. at 29-30). This "impression" approach predates the PSLRA and has been heavily criticized since. See Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1070-71 (9th Cir. 2008) (claim that statements created "false impression" that defendants ran business properly insufficient under PSLRA); Resnik v. Swartz, 303 F.3d 147, 153-54 (2d Cir. 2002) (rejecting argument that challenged statement "misleadingly minimize[d]" compensation scheme by creating "false impression" that stock option plans had no value until date of exercise); In re AXIS Capital Holdings Ltd. Sec. Litig., 456 F. Supp. 2d 576, 589-90 (S.D.N.Y. 2006) ("false impression" approach of In re Par Pharm., Inc. Sec. Litig., 733 F. Supp. 668, 677-78 (S.D.N.Y. 1990) was "misplaced" (Opp. Br. at 30)); AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC, 254 F. Supp. 2d 373, 382 n.2 (S.D.N.Y. 2003) ("overall impression" approach does not meet pleading requirements).[33] Thus, Plaintiffs have failed to allege how SG had a duty

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Mr. Bouton saw as to the credit crisis in December 2007 (Opp. Br. at 14, 26) was on French banks in general, not SG in particular. (See MTD at 53.)

[33] None of the cases Plaintiffs cite to support their "impression" approach warrants a different result. McMahan & Co. v. Wherehouse Entm't Inc., 900 F.2d 576 (2d Cir. 1990) (Opp. Br. at 29), predates the PSLRA and was an appeal from summary judgment. Lapin v. Goldman Sachs Group, Inc., 506 F. Supp. 2d 221, 228-31 (S.D.N.Y. 2006) (Opp. Br. at 29), addressed biased research practices that were publicly reported and contradicted defendant's statements as to their objectivity. Here, there are no allegations to contradict SG's statements about CDOs representing 1% of SGCIB revenue, and Plaintiffs concede that Defendants have no duty to characterize their investments pejoratively. Likewise, In re Nat'l Golf Props. Inc. Securities Litigation, No. CV 02-1383, 2003 WL 23018761, at *5 (C.D. Cal. Mar. 19, 2003) (Opp. Br. at 30), involved an alleged credit risk concentration that included a $27 million note defendants knew the borrower could not repay and which represented 28% of National Golf's assets, compared to the 1% exposure at issue here. In re Van der Moolen Holding N.V. Securities Litigation, 405 F. Supp. 2d 388, 393 (S.D.N.Y. 2005) (Opp. Br. at 30), involved acknowledged illegal proprietary trading that was the basis for the company's disclosed success.

to disaggregate and disclose any specific information about any of its proprietary CDO investments (See Opp. Br. at 17) in its financial statements. See In re Canandaigua Sec. Litig., 944 F. Supp. 1202, 1211 (S.D.N.Y. 1996) (courts generally "have been sensitive about forcing a company to damage its own interests as well as those of its shareholders by revealing competitive information").

Finally, Plaintiffs argue that the PSLRA's safe harbor does not apply because certain of SG's statements are not forward-looking. (Opp. Br. at 25-26.) However, this argument ignores that VaR – "which measures the potential market risk exposure of [SocGen's] RMBS and CDO portfolios" (Opp. Br. at 6 (emphasis added)) and has nothing to do with Kerviel (Opp. Br. at 10 n.6) – is subject to the SEC's Regulation S-K, Item 305, Quantitative and Qualitative Disclosures About Market Risk. Item 305 expressly provides that such market risk disclosures are deemed to be forward-looking statements under the PSLRA. See 17 C.F.R. § 229.305(d) (2009); 15 U.S.C. § 78u-5(i)(1)(C) ("statement[s] of future economic performance" are forward-looking).

D. Plaintiffs' group pleading allegations are insufficient

Plaintiffs argue that they do not have to plead statements made by Mr. Citerne or Mr. Alix because of the so-called group pleading doctrine, which allows an inference that certain corporate insiders are responsible for group published information such as financial statements. (Opp. Br. at 66.)[34] However, Plaintiffs' "bare allegation[s]," see In re GeoPharma, Inc. Securities Litigation, 399 F. Supp. 2d 432, 445 (S.D.N.Y. 2005), as to the Individual Defendants' direct

[34] While the court in Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986) (Opp. Br. at 32), recognized group pleading prior to the enactment of the PSLRA, the court held the allegations did not satisfy Rule 9(b). Id. at 54. In SEC v. Espuelas, (Opp. Br. at 68) the court's group pleading discussion was largely dicta, as the court noted the SEC did not "explicitly" make a group pleading argument. 579 F. Supp. 2d 461, 472-73 (S.D.N.Y. 2008). Moreover, certain group pleading allegations were rejected in Espuelas for merely alleging a "wholly unspecified 'role'" in the transaction at issue.

involvement in the day-to-day activities of SG (Am. Compl. ¶ 78) are insufficient for the group pleading doctrine to apply. See In re Flag Telecom Holdings, Ltd. Sec. Litig., 308 F. Supp. 2d 249, 266 n.7 (S.D.N.Y. 2004). But even if Plaintiffs had sufficiently group pleaded as to Citerne or Alix, as discussed herein, Plaintiffs have failed to allege scienter on the part of either defendant. See Am. Fin. Int'l Group-Asia, LLC v. Bennett, No. 05 Civ. 8988 (GEL), 2007 WL 1732427, at *8 (S.D.N.Y. June 14, 2007) (Lynch, J.) (holding scienter cannot be inferred solely from executive managerial position).[35]

II. PLAINTIFFS FAIL TO ALLEGE SCHEME LIABILITY UNDER RULES 10(b)-5(a) OR (c)

Plaintiffs argue that they have alleged a scheme to manipulate the price of SG shares through SG's share repurchase programs and insider trading by Individual Defendants, in addition to having alleged false and misleading statements. (Opp. Br. at 68-71.) However, Plaintiffs ignore Second Circuit authority holding that where, as here, the alleged scheme is based on supposedly false statements, there is no scheme liability. See Lentell, 396 F.3d at 177. In fact, in Alstom (Opp. Br. at 69), the court held that only those defendants not alleged to have made any misstatements, and who therefore could not be liable under Rule 10b-5(b), could possibly face scheme liability under Rules 10b-5(a) or (c). See In re Alstom SA Sec. Litig., 406 F. Supp. 2d 433, 476 (S.D.N.Y. 2005). But even the purported scheme, involving SG's repurchase of its stock, is supposedly based on alleged misrepresentations. (Am. Compl. ¶ 262.)[36]

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[35] While Plaintiffs also assert that the group pleading doctrine applies to Alix because he is an inside director of SG (Opp. Br. at 67), Plaintiffs do not and cannot allege he was anything other than an officer.

[36] This is not a case like Dietrich v. Bauer, 76 F. Supp. 2d 312, 338-39 (S.D.N.Y. 1999) (Opp. Br. at 69), which involved recognized manipulative practices (wash or matched sales) independent of any alleged false statements. Nor is this a case like In re Sterling Foster & Co. Securities Litigation, 222 *(cont'd)*

III. PLAINTIFFS FAIL TO ALLEGE CONTROL PERSON LIABILITY UNDER SECTION 20(a)

Having failed to state a primary violation, the Section 20(a) claim must also fail. See In re Refco, Inc. Sec. Litig., No. 05 Civ. 8626, 2009 WL 724378, at *13 (S.D.N.Y. Mar. 17, 2009). But even assuming, arguendo, that Plaintiffs have stated a primary violation, Plaintiffs' Section 20(a) claim must also be dismissed for failing to allege, with specificity, how the Individual Defendants culpably participated in the alleged fraud, other than by mere virtue of their positions. (See Am. Compl. ¶¶ 78, 81; Opp. Br. at 73.)[37] Plaintiffs also fail to allege control by Mr. Citerne or Mr. Alix, merely characterizing the Individual Defendants as the "most-senior officers" in the company (Opp. Br. at 72), which is insufficient for control person liability. See In re Digital Island Sec. Litig., 223 F. Supp. 2d 546, 561 n.9 (D. Del. 2002) ("[E]ven a CEO is not automatically a 'controlling person' under Section 20(a)."), aff'd, 357 F.3d 322 (3d Cir. 2004).

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F. Supp. 2d 216, 269-70 (E.D.N.Y. 2002) (Opp. Br. at 69), which involved a secret agreement to manipulate the market.

[37] In In re Indep. Energy Holdings PLC Securities Litigation, 154 F. Supp. 2d 741, 772-73 (S.D.N.Y. 2001) (Opp. Br. at 72), the court held that allegations of culpable participation against officers and directors were insufficient as "conclusory and speculative." In In re Bristol Myers Squibb Co. Securities Litigation, 586 F. Supp. 2d 148, 171-72 (S.D.N.Y. 2008) (Opp. Br. at 73), the court found culpable participation had been pleaded with particularity where the defendants assigned blame for losses to each other. The decision in In re Parmalat Securities Litigation, 497 F. Supp. 2d 526, 532 (S.D.N.Y. 2007) (Opp. Br. at 71), holding that culpable participation is not a necessary element of a 20(a) claim, is contrary to Second Circuit law. See Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998); SEC v. First Jersey Sec. Inc., 101 F.3d 1450, 1472 (2d Cir. 1996). It also must be alleged with particularity, which Plaintiffs have failed to do. See In re Global Crossing, Ltd. Sec. Litig., No. 02 Civ. 910, 2005 WL 2990646, at *7 (S.D.N.Y. Nov. 7, 2005) ("A heightened pleading requirement applies to the 'culpable participation' element; the plaintiff 'must plead with particularity facts giving rise to a strong inference that the controlling person knew or should have known that the primary violator, over whom that person had control, was engaging in fraudulent conduct.'" (citation omitted)).

IV. PLAINTIFFS HAVE FAILED TO ALLEGE CIVIL INSIDER TRADING LIABILITY UNDER SECTION 20A

Plaintiffs argue that they satisfied Section 20A because they alleged that certain Plaintiffs bought stock contemporaneously with a sale of stock by Bouton. (Opp. Br. at 74.) Plaintiffs ignore the fact that the sale by a defendant has to be before a purchase by plaintiff. See In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 311 n.51 (S.D.N.Y. 2008). Plaintiffs misconstrue Take-Two (Opp. Br. at 74 n.41), where the court rejected a restrictive definition of contemporaneous that requires trading on the same day, id. at 311 n.51, but, relying on O'Connor & Assocs. v. Dean Witter Reynolds, Inc., 559 F. Supp. 800, 803 (S.D.N.Y. 1983), stated that defendants "may not be held liable for purchases Lead Plaintiffs carried out before the alleged insider trading in question." Take-Two, 551 F. Supp. 2d at 311 n.51 (emphasis added).

Moreover, Plaintiffs rely on law from outside the Second Circuit for the proposition that the contemporaneous trading requirement is "'tangential'" to a Section 20A claim (Opp. Br. at 75 (quoting In re Qwest Commc'ns Int'l, Inc. Sec. Litig., 396 F. Supp. 2d 1178, 1201 (D. Colo. 2004))). However, the contemporaneous trading requirement is in the statute, see 15 U.S.C. § 78t-1, has been held to be a requirement by the Second Circuit, see Wilson v. Comtech Telecomms. Corp., 648 F.2d 88, 94-95 (2d Cir. 1981), and has been recognized by this Court, see In re Refco, Inc. Securities Litigation, 503 F. Supp. 2d 611, 664 (S.D.N.Y. 2007). Even the case cited by Plaintiffs enforces the contemporaneous trading requirement. See, e.g., In re Musicmaker.com Sec. Litig., No. CV 00-2018 CAS (MANX), 2001 WL 34062431, at *27 (C.D. Cal. June 4, 2001) (holding contemporaneous trading requirement not met, as sale and purchase were four months apart) (Opp. Br. at 75).

V. THERE IS NO SUBJECT MATTER JURISDICTION OVER FOREIGN PURCHASERS OF SG SHARES ON FOREIGN EXCHANGES

A. Plaintiffs cannot utilize the conduct test to establish subject matter jurisdiction

Plaintiffs assert no basis for this Court to exercise subject matter jurisdiction over the claims of foreign investors who purchased SG shares on foreign exchanges. Plaintiffs' arguments (Opp. Br. at 85-86) based on the so-called "conduct test" for subject matter jurisdiction are wholly inadequate in light of the Second Circuit's recent decision in Morrison. Application of Morrison here mandates dismissal of claims by foreign purchasers of SG shares on foreign exchanges because their claims are premised on allegedly false statements made abroad.

Plaintiffs effectively concede that Kerviel's trading did not involve any U.S. conduct, and they do not even address this failure in their Opposition Brief. Rather, the primary basis for Plaintiffs' assertion of subject matter jurisdiction under the conduct test is SG's alleged valuation activities in the U.S. related to CDOs and RMBS. (Opp. Br. at 80, 81.) However, under Morrison, these activities are considered preparatory to any purported fraud because Plaintiffs do not argue investors relied directly on these alleged activities – as distinguished from SG's financial disclosures – which Plaintiffs do not and cannot allege occurred anywhere other than in France. See Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008) ("The responsibilities of NAB's Australian corporate headquarters, on the other hand, included overseeing operations, including those of the subsidiaries, and reporting to shareholders and the financial community."), petition for cert. filed, 77 U.S.L.W. __ (U.S. Mar. 23, 2009) (No. 08-1191). Indeed, the jurisdictional link in the "causal chain" (Opp. Br. at 85) is even weaker here than in Morrison because it is alleged here that the review of daily reports (see Am. Compl. ¶ 360), VaR calculations (see Am. Compl. ¶¶ 360-62) and the statements themselves were done in

France. See Morrison, 547 F. 3d at 171 (U.S. subsidiary prepared financial statements incorporated wholesale into parent's disclosures to investors).

Perhaps recognizing the limitations imposed by Morrison, Plaintiffs assert purported U.S.-based activities, such as Frederic Oudea's September 10, 2007 presentation at a Lehman Brothers conference in New York. (Opp. Br. at 80.) However, this single presentation is not enough for subject matter jurisdiction, especially where the purported fraud was supposedly masterminded abroad over a two and one half-year period. See City of Edinburgh Council ex rel. Lothian Pension Fund v. Vodafone Group Pub. Co., No. 07 Civ. 9921 (PKC), 2008 WL 5062669, at *4 (S.D.N.Y. Nov. 24, 2008) (no subject matter jurisdiction where defendant's conduct in U.S. was incidental and limited to a pair of presentations by an individual defendant in N.Y.); In re SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 565 (S.D.N.Y. 2008) (citing SEC v. Berger, 322 F.3d 187, 194 (2d Cir. 2003)). Additional U.S. activities, such as an audit committee meeting, Jean-Pierre Mustier's purported visits to New York, and a supposed short-selling scheme with Magnetar (Opp. Br. at 80-81) do not allege any communications on which foreign investors purportedly relied. As to conference calls (Opp. Br. at 83), there is no allegation these calls originated in the U.S. Thus, these activities fail under Morrison as well.

The one case Plaintiffs rely on to support their unjustified reading of the conduct test after Morrison, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 592 F. Supp. 2d 608 (S.D.N.Y. 2009) (Opp. Br. at 81), is entirely distinguishable from the present case. In that case, while false statements were allegedly disseminated from abroad, the

claim was premised on reliance on fraudulent advice by a fund manager given in New York and not those purportedly false statements. Montreal Pension Plan, 592 F. Supp. 2d at 620-21.[38]

Finally, Plaintiffs advocate for jurisdiction under the conduct test based on acts in the U.S. causing harm to all investors globally. (Opp. Br. at 85-86.) This "global fraud on the market" theory has been squarely rejected out of concern it would stretch the reach of the securities laws too far. See In re AstraZeneca Sec. Litig., 559 F. Supp. 2d 453, 466 (S.D.N.Y. 2008); In re China Life Sec. Litig., No. 04 Civ. 2112 (TPG), 2008 WL 4066919, at *9 (S.D.N.Y. Sept. 3, 2008) ("[A]bsent clear guidance from the Second Circuit, the court declines to adopt this [global fraud on the market] theory.").[39]

B. There is no basis for subject matter jurisdiction over foreign plaintiffs under the effects test

Plaintiffs argue that because Defendants have not contested at this time subject matter jurisdiction over U.S. investors, they have somehow conceded an effect on foreign investors as well. (Opp. Br. at 78.) This argument is neither accurate nor consistent with clearly stated precedent. The effects test concerns the impact of overseas activities on U.S. investors and U.S. markets, not foreign purchasers of foreign company stock on foreign exchanges. See,

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[38] In Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) (Opp. Br. at 82-83), the court found plaintiffs had relied on conduct by U.S.-based investment managers in making investment decisions. In Cromer, plaintiffs alleged a fraudulent scheme involving multiple entities "tied together through their connection to the single scheme which was the fraud committed by Berger in New York." Cromer Fin. Ltd. v. Berger, No. 00 Civ. 2284 DLC, 2003 WL 21436164, at *4 (S.D.N.Y. June 23, 2003) (Opp. Br. at 77; MLS at 3); see also SEC v. Berger, 322 F.3d 187, 193 (2d Cir. 2003) (fraud masterminded in New York) (Opp. Br. at 79).

[39] In In re Gaming Lottery Securities Litigation, 58 F. Supp. 2d 62, 74-75 (S.D.N.Y. 1999) (Opp. Br. at 86 n.45), the court held that plaintiffs had alleged several acts in the United States that were more than merely preparatory but instead were alleged to have directly caused plaintiffs injuries, including illegal operation of a U.S. subsidiary on U.S. soil and deception of a U.S. regulatory commission. As Plaintiffs' claim is premised on alleged misstatements emanating from outside the U.S., Gaming Lottery is inapposite. To the extent it could be read more broadly, Defendants respectfully disagree with its holding as not in accordance with Morrison.

e.g., Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998). As the court in Alstom held in words equally applicable here: "[t]he Court does not agree with Lead Plaintiffs that the foreign purchasers of [the company's] shares listed on exchanges abroad may piggyback on the harm caused by the alleged fraud to investors and markets in the United States and thus bring their claims in United States courts." In re Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005) (Opp. Br. at 77).

The two cases Plaintiffs cite to support their effects test argument are inapposite because in each the plaintiff was not distinctly foreign. In A.I.G. Asian Infrastructure Fund, L.P. v. Chase Manhattan Asia Ltd., No. 02-CV-10034 (KMW), 2004 WL 3095844, at *2 (S.D.N.Y. Mar. 25, 2004), aff'd, 122 F. App'x 541 (2d Cir. 2005) (Opp. Br. at 78), the court found an effect on U.S. investors because the foreign partnership plaintiff had U.S. limited partners. In Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) (Opp. Br. at 78; MLS at 3 n.2), where the court accepted an "admixture" approach to subject matter jurisdiction, combining the effects and conduct test, the foreign plaintiff was the subsidiary of a company that had 50% of its shares held by American investors who would ultimately bear the loss. As the instant claims are brought on behalf of two distinct classes of plaintiffs, there is no basis for applying the approach used in Itoba here. See also SCOR Holding, 537 F. Supp. 2d at 562 ("[C]onsideration of the effects test alongside the conduct test is unlikely to provide any additional benefit to foreign plaintiffs in a class action lawsuit who purchased a foreign company's stock on a foreign exchange.").[40]

[40] Contrary to Plaintiffs' contention, Morrison did not "eclipse[]" law on the effects test (Opp. Br. at 79), as it did not address the effects test at all. Nor did Morrison apply an "admixture" approach to subject matter jurisdiction. (Opp. Br. at 79.) Indeed, all U.S. plaintiffs had previously been dismissed for failure to state a claim, and the appeal was pressed solely on behalf of foreign purchasers. See Morrison, 547 F.3d at 170 n.3.

VI. PLAINTIFFS PROVIDE NO BASIS FOR THE COURT TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANTS CITERNE AND ALIX

Plaintiffs premise personal jurisdiction as to Messrs. Citerne and Alix on their roles at SG. (Opp. Br. at 88.) However, even cases cited by Plaintiffs hold that personal jurisdiction does not exist solely on the basis of being an officer, director or control person of a company with a U.S. presence. See, e.g., In re Alstom, 406 F. Supp. 2d at 399 ("[Defendant]'s status as a Board Member in itself, even if he in some respect oversaw [the alleged fraud] . . . is too tenuous a connection to plausibly claim that this status alone directly and foreseeably gave rise to the effects complained of by the plaintiffs.") (Opp. Br. at 86);[41] see also Sedona Corp. v. Ladenburg Thalmann & Co., No. 03 CIV 3120 (LTS) (THK), 2006 WL 2034663, at *9 (S.D.N.Y. July 19, 2006) ("'If an individual is sued in his individual capacity, but only had contact with [the forum] as an officer of a corporation acting within the scope of his employment, that individual is not subject to personal jurisdiction.'") (citation omitted); In re Parmalat Sec. Litig., 376 F. Supp. 2d 472, 474, 516-17 (S.D.N.Y. 2005) (status as control person insufficient for personal jurisdiction).

The exercise of personal jurisdiction over Messrs. Citerne and Alix would offend due process because of their lack of contacts with the U.S. Courts must give "significant weight" to the "unique burdens" placed "upon one who must defend oneself in a foreign legal system." Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameris, No. 03 Civ. 1681(LAP), 2004 WL 2199547, at *16 (S.D.N.Y. Sept. 29, 2004). Plaintiffs do not argue their alleged role

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[41] Plaintiffs' reliance on Alstom is misplaced (Opp. Br. at 89), because in Alstom certain foreign defendants were alleged to have signed registration documents containing false statements. Plaintiffs argue nothing like that as to Messrs. Citerne or Alix. See Charas v. Sand Tech. Sys. Int'l, Inc., No. 90 Civ. 5638 (JFK), 1992 WL 296406, at *5 (S.D.N.Y. Oct. 7, 1992) (no personal jurisdiction over foreign director where he neither entered the U.S., transacted business in U.S. in connection with company, nor signed registration documents).

with regard to the facts at issue bears any causal nexus to the U.S. Messrs. Citerne and Alix have no "contacts, ties, or relations" to this forum, so it would not comport with "traditional notions of fair play and substantial justice" to exercise personal jurisdiction over them. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996).[42]

VII. THE COURT SHOULD DENY THE MOTION TO LIFT THE PSLRA STAY OF DISCOVERY TO ALLOW JURISDICTIONAL DISCOVERY

Plaintiffs argue that the Court should lift the automatic stay of discovery imposed by the PSLRA to allow "jurisdictional discovery." (Opp. Br. at 86.) The PSLRA stay can only be lifted to preserve evidence or to prevent undue prejudice. See 15 U.S.C. § 78u-4(b)(3)(B). Because Plaintiffs do not allege they are requesting the court to lift the stay for either reason, their motion should be denied.

Even if lifting the PSLRA stay was appropriate, jurisdictional discovery is only warranted where a party has made a prima face showing of jurisdiction. As discussed above, Plaintiffs have failed to make a prima facie showing that the Court has personal jurisdiction over Messrs. Citerne or Alix, or subject matter jurisdiction over claims by foreign purchasers of SG stock on foreign exchanges.[43] See In re Rhodia S.A. Sec. Litig., 531 F. Supp. 2d 527, 539-42

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[42] In re Amaranth Natural Gas Commodities Litig., 587 F. Supp. 2d 513, 536 (S.D.N.Y. 2008) (Opp. Br. at 89), does not support the proposition Plaintiffs use it for, namely, that a company's "vast presence" in the U.S. is sufficient for personal jurisdiction over the Individual Defendants. There, the court held personal jurisdiction was reasonable as to Amaranth's head natural gas trader for natural gas transactions he conducted on the U.S. commodities markets, something not alleged as to Messrs. Citerne or Alix.

[43] In re Vivendi Universal S.A., No. 02 Civ. 5571 (RJH), 2004 WL 2375830, at *7-8 (S.D.N.Y. Oct. 22, 2004) (Opp. Br. at 76; MLS at 2), is inapposite. In that case, Plaintiffs had alleged as a basis for jurisdiction that two of the individual defendants had moved to the U.S. during the class period to oversee the operations at issue. In Leonard v. Garantia Banking, Ltd., No. 98 Civ. 4848 (LMM), 1999 WL 944802, at *3-4 (S.D.N.Y. Oct. 19, 1999), aff'd, 213 F.3d 626 (2d Cir. 2000) (table decision) (MLS at 1 n.1), the court addressed subject matter jurisdiction over foreign purchasers of ADRs, not foreign purchasers of shares of a foreign company on a foreign exchange. In Tese-Milner v. De Beers Centenary A.G., No. 04 Civ. 5203 (KMW), 2009 WL 186198, at *10 (S.D.N.Y. Jan. 23, 2009) (MLS *(cont'd)*

(S.D.N.Y. 2007) (holding plaintiffs failed to make prima facie showing of subject matter jurisdiction, in that U.S. activities were merely preparatory, or personal jurisdiction, where it was based solely on two corporate officers' purported status as control persons); Best Van Lines, Inc. v. Walker, No. 03 Civ. 6585 (GEL), 2004 WL 964009, at *1, *8 (S.D.N.Y. May 5, 2004) (Lynch, J.) (denying jurisdictional discovery where Plaintiff failed to demonstrate a prima facie case of personal jurisdiction), aff'd, 490 F.3d 239 (2d Cir. 2007); see also APWU v. Potter, 343 F.3d 619, 627 (2d Cir. 2003) (denying request for jurisdictional discovery) (Opp. Br. at 86); Gudavadze v. Kay, 556 F. Supp. 2d 299, 309 (S.D.N.Y. 2008) (denying request for jurisdictional discovery, where party did not sufficiently demonstrate that the discovery sought would be material to or bear upon a disputed jurisdictional fact in the case) (MLS at 3).[44]

The true purpose for Plaintiffs' request for discovery is apparent from the overly broad nature of the submitted requests. (MLS at 6.) Rather than narrowly tailored toward jurisdictional issues, the submitted requests are broad enough to encompass much of what would

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at 4), the issue was whether the jurisdictional contacts of a non-moving defendant could be attributed to a moving defendant, again, not at issue here.

[44] In each of the cases cited by Plaintiffs, the court allowed for jurisdictional discovery because sufficient U.S. activity by each defendant was alleged. See Cromer Fin. Ltd. v. Berger, 137 F. Supp. 2d 452, 483 (S.D.N.Y. 2001) (defendants had offices or attended meetings in New York) (Opp. Br. at 76, 77); Credit Lyonnais Sec., Inc. v. Alcantara, 183 F.3d 151, 154 (2d Cir. 1999) (brokerage account located in NY) (Opp. Br. at 87); A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 81 (2d Cir. 1993) (guarantee to perform financial services in NY) (Opp. Br. at 87); Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 900-01 (2d Cir. 1981) (two visits to NY where defendant made allegedly false statements, which were the subject of suit) (MLS at 5); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 676 (D.C. Cir. 1996) (bank had issued loans in DC) (MLS at 5); Filus v. Lot Polish Airlines, 907 F.2d 1328, 1330, 1332-33 (2d Cir. 1990) (substantial commercial activities in U.S. sufficient under Foreign Sovereign Immunities Act) (Opp. Br. at 86; MLS at 3). Inv. Props. Int'l, Ltd. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972) (Opp. Br. at 76; MLS at 3) predates the PSLRA by over 20 years and involved a preliminary injunction and writ of mandamus. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, No. 05 Civ. 9016 (SAS), 2006 WL 708470, at *6 (S.D.N.Y. Mar. 20, 2006) (Opp. Br. at 76, 86; MLS at 1, 2, 5) involved jurisdictional discovery to determine the relationship between two corporations, only one of which conducted business in the U.S., which is not an issue here.

be merits discovery. (Id. (requesting discovery as to "SocGen's valuations of subprime-related assets in the United States.")) In any event, even assuming the Court could find jurisdictional discovery necessary to resolve the jurisdictional bases for dismissal, there is no need to permit Plaintiffs to launch their merits-based discovery until the Court first determines if the Amended Complaint even satisfies the PSLRA and states a claim for relief.

VIII. THIS COURT SHOULD DENY PLAINTIFFS' MOTION TO STRIKE

Plaintiffs argue that the Court should strike Defendants' reference to materials not explicitly referred to in the Amended Complaint, asserting that these materials were improperly submitted for the truth of the matter asserted. (MTS at 4-8.)[45] There are several reasons why Plaintiffs' Motion to Strike must be denied.

As an initial matter, a motion to strike is not procedurally proper because Fed. R. Civ. P. 12(f) provides no basis for a court to strike documents other than pleadings. See Sierra v. U.S., No. 97 Civ. 9329 (RWS), 1998 WL 599715, at *9 (S.D.N.Y. Sept. 10, 1998) ("[T]he filing of a motion to strike . . . is not a proper way to challenge a motion to dismiss."); see also Polite v. Dougherty County Sch. Sys., No. 07-14108, 2008 WL 3272131, at *3 n.7 (11th Cir. Aug. 11, 2008) (per curiam) (motion to strike affidavit inappropriate); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Hicks, Muse, Tate & Furst, Inc., No. 02 CIV. 1334(SAS), 2002 WL 1313293, at *7 (S.D.N.Y. June 15, 2002) ("Declarations and affidavits are not pleadings."); Locksley v. United States, No. 05 Civ. 2593(JGK), 2005 WL 1459101, at *4 (S.D.N.Y. June 10, 2005)

[45] While Plaintiffs argue that "Defendants do not even request that the Court take judicial notice" of certain documents (MTS at 3), Plaintiffs fail to indicate that a request for judicial notice must be formalized rather than incorporated into moving papers. (See MTD at 8 n.2.)

(motion to strike reply brief inappropriate). In reality, the so-called motion to strike is really an improper supplemental argument in opposition to Defendants' motion to dismiss.[46]

Second, each of the materials submitted by Defendants is properly the subject of judicial notice. The Court may take judicial notice where the materials at issue "serve . . . to indicate what was in the public realm at the time, not whether the contents . . . were in fact true." Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P., 435 F.3d 396, 401 n.15 (3d Cir. 2006); See In re Salomon Analyst Winstar Litig., No. 02 Civ. 6171 (GEL), 2006 WL 510526, at *4 n.6 (S.D.N.Y. Feb. 28, 2006) (taking judicial notice of fact that newspaper articles were published as well as their "evident purpose and immediate effect") (MTS at 8).

A. The court may take judicial notice of the economic phenomenon of the credit crisis

Courts often take judicial notice of economic phenomena. See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 770 (2d Cir. 1994) (real estate market downturn); Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991) (junk bond market collapse); SEC v. Universal Express, Inc., 546 F. Supp. 2d 132, 137 n.7 (S.D.N.Y. 2008) (Lynch, J.) (taking judicial notice of "the widespread decline in property values over the past year."); In re Merrill Lynch & Co. Research Reports Sec. Litig., 289 F. Supp. 2d 416, 421 n.6 (S.D.N.Y. 2003) (taking judicial notice of "the internet bubble and its subsequent crash").

None of Defendants' materials on the credit crisis (Exs. 1, 7-19, 21) is being submitted to argue the cause of SG's writedowns (MTS at 5), but rather simply for the facts that reflect the onset, and continuing worsening of, the credit crisis, an undisputed event that occurred

[46] In addition to seeking to strike certain exhibits, Plaintiffs look to strike Gerard Gardella's affidavit offered in support of Defendants' personal and subject matter jurisdiction arguments. Yet courts routinely consider supporting affidavits in determining jurisdictional motions. See In re Rhodia S.A. Sec. Litig., 531 F. Supp. 2d 527, 542 (S.D.N.Y. 2007).

in the market during the relevant time period. For example, Plaintiffs cannot contend that an article stating that BNP Paribas froze assets in certain funds linked to U.S. subprime mortgages (Ex. 9) is being offered for the truth as to whether the credit crisis occurred, but rather that on that date, an undisputed event having to do with investments linked to subprime mortgages occurred.

Similarly, in weighing competing inferences, the Court may take judicial notice that no other financial institution had disclosed writedowns on its CDO and RMBS positions earlier than Q3 2007 (when SG did) to refute the unfounded allegation that "[SocGen's] competitors began to announce writeoffs for their CDO and RMBS assets" in "mid-2007." (Opp. Br. at 27.) Plaintiffs also acknowledge that the extent of SG's writedowns was based on estimates of cumulative industry loss that could change "if conditions actually deteriorate" (Am. Compl. ¶ 161), so the Court may also take judicial notice of the fact that economic conditions indeed deteriorated between Q3 2007 and 2007 year-end.

B. After Tellabs, courts may take judicial notice of facts in weighing competing inferences

Nothing in Tellabs requires the court to turn a blind eye to judicially noticeable facts in weighing inferences. Indeed, even before Tellabs, courts routinely considered matters outside of the pleadings to aid their analysis. See Fadem v. Ford Motor Co., 352 F. Supp. 2d 501, 520, 522-23 (S.D.N.Y. 2005) (considering articles submitted by defendants that portrayed an alleged technology breakthrough as less certain, where plaintiffs' scienter argument "hinge[d] on defendants' knowledge of future technology validation"), aff'd, 157 F. App'x 398 (2d Cir. 2005); In re StockerYale Sec. Litig., 453 F. Supp. 2d 345, 348 (D.N.H. 2006) (strictly factual information in market commentary exhibits is "probably" subject to judicial notice but only if defendants show how such information is relevant) (MTS at 7).

After Tellabs, courts have been even more pronounced in taking judicial notice of matters for the purpose of weighing competing inferences. In Bausch & Lomb, the court took judicial notice of documents – not referenced in the complaint – for the purpose of determining whether defendants' competing inferences as to fraudulent intent were more cogent and compelling than plaintiffs'. The documents included a chain of e-mails submitted for the purpose of raising a competing inference as to defendants' knowledge of adverse facts, which the court held was "integral" to the complaint, and a transcript of a video interview submitted "to show inferences of defendants' non-culpable conduct." In re Bausch & Lomb, Inc. Sec. Litig., 592 F. Supp. 2d 323, 338-39 (W.D.N.Y. 2008).

Plaintiffs argue that "the ABX index is a widely used modeling index for RMBS and CDO market valuations." (Opp. Br. at 12 n.7.) Thus, Plaintiffs have referenced the ABX index. The challenged materials (Exs. 36-39) merely explain what the ABX index is, and what a reasonable person at the time might believe as to its effectiveness in valuing CDOs, so that the court can appropriately weigh inferences. It is beyond dispute that certain statements as to the ABX were made, regardless of whether those statements are right or wrong. It is merely a more cogent and compelling competing inference that an individual working for Markit, the company that created the ABX (Opp. Br. at 12 n.7), stated certain facts regarding the ABX contrary to facts put forth by the Plaintiffs. See Bausch & Lomb, 592 F. Supp. 2d at 338-39 (taking judicial notice of documents "integral" to complaint).

Similarly, Plaintiffs have put at issue the extent to which SG's senior management knew about or recklessly disregarded Kerviel's fictitious trades. The two challenged articles as to the Kerviel losses (Exs. 27 and 28) merely report on public findings, indicating that there are facts in existence which challenge Plaintiffs' proffered inferences. This, again, is precisely why

the court in Bausch & Lomb took judicial notice of a transcript of an interview, "to show inferences of defendants' non-culpable conduct." 592 F. Supp. 2d at 338-39.

* * * * * * * * * *

Plaintiffs' alternative request that the Court convert the motion to dismiss into a motion for summary judgment and grant them discovery should be denied because the Court may simply disregard materials not subject to judicial notice in determining the motion. See, e.g., In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 262 n.4 (S.D.N.Y. 2008) (disregarding extrinsic materials not deemed judicially noticeable or relevant); In re Astea Int'l Inc. Sec. Litig., No. 06-1467, 2007 WL 2306586, at *8 (E.D. Pa. Aug. 8, 2007) (granting motion to strike, yet granting motion to dismiss without converting into motion for summary judgment) (MTS at 7); cf. Atlas v. Accredited Home Lenders Holding Co., 556 F. Supp. 2d 1142, 1161 n.7 (S.D. Cal. 2008) (refusing to consider submitted documents; deciding motion to dismiss, denying motion to strike as moot) (MTS at 7).[47]

[47] In Chambers v. Time Warner, Inc., 282 F.3d 147, 154 (2d Cir. 2002), the court held that considering extraneous materials in judging the sufficiency of a complaint is at odds with liberal pleading standards of Fed. R. Civ. P. 8(a)(2), not the heightened pleading standards of Fed. R. Civ. P. 9(b) and the PSLRA. (MTS at 3.) Nor did Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 156 (2d Cir. 2006) (MTS at 2), Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971) (MTS at 3 n.3) or O'Keefe v. Ogilvy & Mather Worldwide, Inc., No. 06 Civ. 6278 (SHS), 2006 WL 3771013, at *1 (S.D.N.Y. Dec. 18, 2006) (MTS at 8), involve a claim under the Exchange Act subject to the heightened pleading requirements of Rule 9(b), the PSLRA, or the Supreme Court's holding in Tellabs.

CONCLUSION

For the foregoing reasons, and those set forth in the opening memorandum of law, the Amended Complaint should be dismissed with prejudice and Plaintiffs' Motion to Strike and Motion to Lift the PSLRA stay should be denied.

Dated: New York, New York
April 6, 2009

/s/ Scott D. Musoff

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