UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CENTERLINE HOLDING COMPANY SECURITIES LITIGATION	))))	**Consolidated C.A. No. 08-CV-00505 (SAS)**

LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

PRELIMINARY STATEMENT. 1

STATEMENT OF FACTS. 3

ARGUMENT.. 6

I. STANDARDS ON A MOTION TO DISMISS. 6

II. BASED ON THE WELL PLEADED ALLEGATIONS OF THE COMPLAINT, DEFENDANTS HAD A DUTY TO DISCLOSE MATERIAL FACTS ABOUT THE "TRANSFORMATIONAL TRANSACTION" THAT WAS "IN THE WORKS". 7

A. The Concealed Information Rendered Defendants' Public Statements Materially Misleading and Gave Rise to a Duty to Disclose.. 7

1. The Undisclosed Facts About Project Spinnaker Were Material. 9

2. Defendants Had a Duty to Disclose Facts Necessary to Make Their Statements Regarding the Tax-Exempt Bond Portfolio, The Dividend, and the Company's Liquidity Position Complete and Accurate. 14

3. The Existence of SEC Regulations Does Not Relieve Defendants Of Their Obligation To Speak Truthfully.. 15

4. The Absence of a Binding Agreement With Freddie Mac Does Not Relieve Defendants of Their Obligation To Tell the Truth When Speaking About the Bond Portfolio and the Dividend. 17

5. Even a Statement That Is Literally True May Be Misleading. 20

III. LEAD PLAINTIFF HAS MORE THAN ADEQUATELY PLED SCIENTER. 22

A. Standards For Pleading Scienter. 22

B. Lead Plaintiff Pleads Specific Facts that Constitute Strong Evidence of Defendants' Conscious Misbehavior or Recklessness. 23

1. Lead Plaintiff Specifically Alleges Defendants' Knowledge of Facts or Access To Information Contradicting Their Public Statements. 23

2. Defendants' Admission That the Sale of the Tax-Exempt Bond Portfolio Was a "Transformational Transaction" That Had Been "In the Works" Since at Least Early 2007 Compels a Strong Inference of Scienter. 25

3. The Tax-Exempt Bond Portfolio and Project Spinnaker Were at the Core of Centerline's Business, and the Magnitude of the Sale to Freddie Mac Gives Rise to a Strong Inference of Scienter. 26

C. The Complaint Alleges Defendants' Motive to Commit Fraud.. 29

IV. LEAD PLAINTIFF ADEQUATELY PLED LOSS CAUSATION.. 33

A. The Standard for Pleading Loss Causation. 33

B. Lead Plaintiff Has Sufficiently Alleged that the Price of Centerline Stock Declined After the Disclosure of Previously Hidden Facts. 34

V. THE COMPLAINT ALLEGES CONTROL PERSON LIABILITY AGAINST THE INDIVIDUAL DEFENDANTS. 38

CONCLUSION. 38

TABLE OF AUTHORITIES

CASES

60223 Trust v. Goldman Sachs,
540 F. Supp. 2d 449 (S.D.N.Y. 2007). 37

In re AIG Advisor Group Sec. Litig.,
2007 WL 1213395 (E.D.N.Y. Apr. 25, 2007). 16

In re AOL Time Warner, Inc. Sec. Litig.,
503 F. Supp. 2d 666 (S.D.N.Y. 2007). 37

ATSI Communs., Inc. v. Shaar Fund, Ltd.,
493 F.3d 87 (2d Cir. 2007).. 7

Acito v. IMCERA Group,
47 F.3d 47 (2d Cir. 1995).. 32

Ackerman v. Schwartz,
947 F.2d 841 (7th Cir. 1991). 17

Aldridge v. A.T. Cross Corp.,
284 F.3d 72 (1st Cir. 2002). 24, 25, 26

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 433 (S.D.N.Y. 2005). 9

In re American Express Co. Sec. Litig.,
2008 WL 4501928 (S.D.N.Y. Sept. 26, 2008).. 27

In re Ashanti Goldfields Sec. Litig.,
184 F. Supp. 2d 247 (E.D.N.Y. 2002). 27

In re Ashanti Goldfields Sec. Litig.,
2004 WL 626810 (E.D.N.Y. March 30, 2004). 32

Atlantic Gypsom Co., Inc. v. Lloyds International Corp.,
753 F. Supp. 505 (S.D.N.Y. 1990).. 31

In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.,
324 F. Supp. 2d 474 (S.D.N.Y. 2004). 24, 27

Basic Inc. v. Levinson,
485 U.S. 224 (1988). 2, 18, 19

Bay Harbour Management LLC v. Carothers,
2008 WL 2566557 (2d Cir. June 24, 2008). 32

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955 (2007). 7

Benzon v. Morgan Stanley Distributings,
420 F.3d 598 (6th Cir. 2005). 16

Berson v. Applied Signal Technology, Inc.,
527 F.3d 982 (9th Cir. 2008). 27

Blanchard v. Edgemark Finance Corp.,
1999 U.S. Dist. LEXIS 1096 (N.D. Ill. Feb. 3, 1999). 19

In re Bristol-Myers Squibb Co. Sec. Litig.,
2008 WL 3884384 (S.D.N.Y. Aug. 20, 2008). . . . . passim

Brodsky v. Yahoo! Inc.,
2008 WL 4531815 (N.D. CA. Oct. 7, 2008). 9

Brumbaugh v. Wave System Corp.,
416 F. Supp. 2d 239 (D. Mass. 2006). 14

Caiola v. Citibank, N.A.,
295 F.3d 312 (2d Cir. 2002). 8, 9

Caremark, Inc., v. Coram Healthcare Corp.,
113 F.3d 645 (7th Cir. 1997). 12, 13

Castellano v. Young & Rubicam, Inc.,
257 F.3d 171 (2d Cir. 2001). 10, 21

In re China Life Sec. Litig.,
2008 WL 4066919 (S.D.N.Y. Sept. 3, 2008). 38

In re Columbia Sec. Litig.,
155 F.R.D. 466 (S.D.N.Y. 1994). 8

In re Columbia Sec. Litig.,
747 F. Supp. 237 (S.D.N.Y. 1990).. 18

Communs. Workers of America Plan for Emples. Pensions & Death Bens. v. CSK Automobile Corp.,
525 F. Supp. 2d 1116 (D. Ariz. 2007). 22

In re Converium Holding AG Sec. Litig.,
2007 U.S. Dist. LEXIS 67660 (S.D.N.Y. Sept. 14, 2007). 13, 26, 35

Cosmas v. Hassett,
886 F.2d 8 (2d Cir. 1989) 27

In re Credit Suisse First Boston Corp. Securities Litig.,
1998 U.S. Dist. LEXIS 16560 (S.D.N.Y. Oct. 19, 1998). 8

Davidoff v. Farina,
2005 WL 2030501 (S.D.N.Y. Aug. 22, 2005). 31

Dura Pharmaceuticals, Inc. v. Broudo,
544 U.S. 336 (2005).. . . . . 33, 36

In re eSpeed, Inc. Sec. Litig.,
457 F. Supp. 2d 266 (S.D.N.Y. 2006). 31, 35

Emergent Capital Management, LLC v. Stonepath Group, Inc.,
343 F.3d 189 (2d Cir. 2003).. 35

Flamm v. Eberstadt,
814 F.2d 1169 (7th Cir. 1987). 19

Fogarazzo v. Lehman Brothers, Inc.,
341 F. Supp. 2d 274 (S.D.N.Y. 2004). 20

Ganino v. Citizens Utilities Co.,
228 F.3d 154 (2d Cir. 2000).. 10

Garber v. Legg Mason,
537 F. Supp. 2d 597 (S.D.N.Y. 2008). 38

Geiger v. Solomon-Page Group,
933 F. Supp. 1180 (S.D.N.Y. 1996).. 25

Glazer v. Formica Corp.,
964 F.2d 149 (2d Cir. 1992).. . . . . 8, 20

Glidepath Holding B.V. v. Spherion Corp.,
2007 WL 2176072 (S.D.N.Y. July 15, 2007). 31

Greebel v. FTP Software, Inc.,
194 F.3d 185 (1st Cir. 1999). 32

Greenberg v. Crossroad System,
364 F.3d 657 (5th Cir. 2004). 36

Guerra v. Teradyne, Inc.,
2004 WL 1467069 (D. Mass. Jan. 16, 2004). 35

Hall v. Children's Place Retail Stores, Inc.,
2008 WL 2791526 (S.D.N.Y. July 18, 2008). 24

Hampshire Equity Partners II, L.P. v. Teradyne, Inc.,
2005 U.S. Dist. LEXIS 5261 (S.D.N.Y. Mar. 30, 2005). 33

Hershfang v. Citicorp,
767 F. Supp.1251 (S.D.N.Y. 1991). 14

In re Initial Public Offering Sec. Litig.,
241 F. Supp. 2d 281 (S.D.N.Y. 2003). 6

Internet Law Library, Inc. v. Southridge Capital Management, LLC,
223 F. Supp. 2d 474 (S.D.N.Y. 2002). 31

In re JPMorgan Chase Sec. Litig.,
363 F. Supp. 2d 595 (S.D.N.Y. 2005). 27

Joffee v. Lehman Brothers, Inc.,
2005 WL 1492101 (S.D.N.Y. June 23, 2005). 37, 38

Katz v. Image Innovations Holdings, Inc.,
542 F. Supp. 2d 269 (S.D.N.Y. 2008). 28

Kronfeld v. TransWorld Airlines, Inc.,
832 F.2d 736 (2d Cir. 1987).. 18

Lapin v. Goldman Sachs Group, Inc.,
506 F. Supp. 2d 221 (S.D.N.Y. 2006). 14

Lattanzio v. Deloitte & Touche LLP,
476 F.3d 147 (2d Cir. 2007).. 37

Lentell v. Merrill Lynch & Co.,
396 F.3d 161 (2d Cir. 2005).. . . . . 33, 35, 37

In re MCI WorldCom, Inc., Sec. Litig.,
93 F. Supp. 2d 276 (E.D.N.Y. 2000). 21

Makor Issues & Rights, Ltd. v. Tellabs, Inc.,
513 F.3d 702 (7th Cir. 2008). 6, 22, 27

Manavazian v. ATEC Group, Inc.,
160 F. Supp. 2d 468 (E.D.N.Y. 2001). 19

McMahan & Co. v. Wherehouse Entertainment,
900 F.2d 576 (2d Cir. 1990).. . . . . 8, 20, 21

In re Medimmune, Inc. Sec. Litig.,
873 F. Supp. 953 (D. Md. 1995). 21

Medis Investor Group v. Medis Technologies, Ltd.,
2008 WL 3861364 (S.D.N.Y. Aug. 18, 2008).. 28

In re Merrill Lynch & Co. Research Reports Sec. Litig.,
568 F. Supp. 2d 349 (S.D.N.Y. 2008). 37

In re Merrill Lynch & Co. Research Reports Sec. Litig.,
2008 WL 2324111 (S.D.N.Y. June 4, 2008). 37

Metzler Investment GMBH v. Corinthian Colleges, Inc.,
540 F.3d 1049 (9th Cir. 2008). 9

In re Morgan Stanley & Van Kampen Mutual Fund Securities Litig.,
2006 WL 1008138 (S.D.N.Y. Apr. 18, 2006). 24

Nanopierce Technologies, Inc. v. Southridge Capital Management LLC,
2002 WL 31819207 (S.D.N.Y. Oct. 10, 2002). 31

In re Nortel Networks,
238 F. Supp. 2d 613 (S.D.N.Y. 2003). 29

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000).. . . . . 23, 24, 29

In re Openwave System Sec. Litig.,
528 F. Supp. 2d 236 (S.D.N.Y. 2007). 35

In re Par Pharms. Inc. Sec. Litig.,
733 F. Supp. 668 (S.D.N.Y. 1990).. 87

In re Parmalat Sec. Litig.,
376 F. Supp. 2d 472 (S.D.N.Y. 2005). 33, 38

Press v. Quick & Reilly, Inc.,
218 F.3d 121 (2d Cir. 2000).. 16

In re Quintel Entertainment, Inc. Sec. Litig.,
72 F. Supp. 2d 283 (S.D.N.Y. 1999). 14

In re Read-Rite Corp. Sec. Litig.,
335 F.3d 843 (9th Cir. 2003). 25

Reiss v. Pan America World Airways, Inc.,
711 F.2d 11 (2d Cir. 1983).. 19

Riggs v. Termeer,
2004 WL 540490 (S.D.N.Y. March 17, 2004). 21

Robbins v. Moore Medical Corp.,
788 F. Supp. 179 (S.D.N.Y. 1992).. 31

Roeder v. Alpha Industries, Inc.,
814 F.2d 22 (1st Cir. 1987). 14, 16

Rothman v. Gregor,
220 F.3d 81 (2d Cir. 2000).. 28

Rubinstein v. Collins,
20 F.3d 160 (5th Cir. 1994). 8

SEC v. Geon Industrial, Inc.,
531 F.2d 39 (2d Cir. 1976).. 18

San Leandro Emergency Medical Group Profit Sharing Plan v. Phillip Morris Cos.,
75 F.3d 801 (2d Cir. 1996).. 20

Santa Fe Industrial, Inc. v. Green,
430 U.S. 462 (1977).. 19

In re Sara Lee Corp. Sec. Litig.,
2006 WL 1980199 (N.D. Ill. July 10, 2006). 38

In re Scholastic Corp. Sec. Litig.,
252 F.3d 63 (2d Cir. 2001).. 25

In re Scottish Re Group Sec. Litig.,
524 F. Supp. 2d 370 (S.D.N.Y. 2007). 28

In re Sears, Roebuck & Co. Sec. Litig.,
291 F. Supp. 2d 722 (N.D. Ill. 2003). 27

Semerenko v. Cendant Corp.,
223 F.3d 165 (3d Cir. 2000).. 18

Shields v. Citytrust Bancorp,
25 F.3d 1124 (2d Cir. 1994).. . . . . 23, 32, 33

Sloman v. Presstek, Inc.,
2007 WL 2740047 (D.N.H. Sept. 18, 2007). 22

South Ferry LP, Number 2 v. Killinger,
542 F.3d 776 (9th Cir. 2008). 27

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
127 S. Ct. 2499 (2007).. . . . . 6, 22, 26, 27, 29

In re The Warnaco Group Sec. Litig.,
388 F. Supp. 2d 307 (S.D.N.Y. 2005). 37

In re Time Warner Inc., Sec. Litig.,
9 F.3d 259 (2d Cir. 1993).. . . . . passim

Transit Rail, LLC v. Marsala,
2007 U.S. Dist. LEXIS 52822 (W.D.N.Y. July 20, 2007). 26

In re Veeco Instruments, Inc., Sec. Litig.,
235 F.R.D. 220 (S.D.N.Y. 2006). 24

Ventry v. Sands (In re Canandaigua Sec. Litig.,
944 F. Supp. 1202 (S.D.N.Y. 1996).. 20

In re Vivendi Universal, S.A. Sec. Litig.,
2004 U.S. Dist. LEXIS 7015 (S.D.N.Y. April 22, 2004).. 25

Weiner v. Quaker Oats Co.,
129 F.3d 310 (3d Cir. 1997).. . . . . 13, 17, 19, 21

Wilson v. Bernstock,
195 F. Supp. 2d 619 (D.N.J. 2002). 32

In re WorldCom, Inc. Sec. Litig.,
294 F. Supp. 2d 392 (S.D.N.Y. 2003). 9, 21, 35

In re Xcel Energy, Inc. Securities, Derivative & ERISA Litig.,
286 F. Supp. 2d 1047 (D. Minn. 2003). 10, 15

In re Xerox Corp. Sec. Litig.,
165 F. Supp. 2d 208 (D. Conn. 2001). 14, 24

STATUTES

17 C.F.R. § 240.10b-5. 7

Fed. R. Civ. P. 15 (a). 38

INTRODUCTION

Lead Plaintiff Centerline Investor Group (J. Michael Fried, Joseph A. Braddock, Norman Millman, and Ed Friedlander, Trustee) ("Lead Plaintiff") hereby submits this Memorandum in Opposition to Defendants' Motion to Dismiss the Consolidated Class Action Complaint.[1] For the reasons set forth below, Lead Plaintiff respectfully requests that Defendants' motion be denied.

PRELIMINARY STATEMENT

As Defendants[2] ultimately admitted on December 28, 2007, the "transformational transaction" to sell Centerline's tax-exempt bond portfolio, slash the dividend, eject Centerline's income-oriented investors and change the Company's basic investment premise – an undertaking known throughout the Company as "Project Spinnaker" – had "***been in the works for close to a year.***" ¶19 (emphasis added). However, neither the sale of the tax-exempt bond portfolio nor the planned reduction in dividend were disclosed to shareholders until they were a *fait accompli*. Instead, throughout the Class Period from March 12, 2007 through December 28, 2007 ("Class Period"), Defendants repeatedly led investors to believe that Centerline would retain its tax-exempt bond portfolio and would continue paying substantial dividends which were largely tax-exempt for the foreseeable future. This high tax-exempt dividend, coupled with relatively little price volatility, attracted risk-averse investors seeking tax-exempt income. To such investors, Centerline's tax-

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[1] References to the Consolidated Class Action Complaint ("Complaint") are cited as ¶__ and ¶¶___.

[2] Defendants are Centerline Holding Company ("Centerline" or the "Company"), Chief Executive Officer Marc D. Schnitzer ("Schnitzer"), Chief Financial Officer Robert L. Levy ("Levy"), Chairman of the Board of Trustees Stephen M. Ross ("Ross"), and Managing Trustee Jeff T. Blau ("Blau") (collectively, the "Individual Defendants" and together with Centerline, "Defendants").

exempt bond portfolio and the revenue it generated were the basis for their investment in Centerline. ¶4.

Despite the obvious materiality of the information that was concealed, and notwithstanding Defendants' numerous false and incomplete Class Period statements regarding these subjects, often in response to direct questions by analysts, Defendants contend that none of them had a duty to disclose anything ***ever*** until the sale of the bond portfolio to The Federal Home Loan Mortgage Corp. ("Freddie Mac") and the sweetheart deal with a company controlled by Defendants Ross and Blau "became the subject of definitive agreements on December 28, 2007."[3] Defendants are wrong. ***Even where persons are "under no duty to disclose" they are "under the ever-present duty not to mislead."*** *Basic Inc. v. Levinson*, 485 U.S. 224, 241 (1988) (emphasis added). Once Defendants chose to speak publicly about the Company's business strategy, including the tax-exempt bond portfolio, the dividend and its large tax-exempt component, and Centerline's liquidity position, Defendants had a duty to speak the whole truth – including the true facts about the "transformational transaction" then "in the works" which was intended to change the basic investment premise of the Company.

Lead Plaintiff does ***not*** allege that SEC regulations required Defendants to disclose the specific agreement Centerline had with Freddie Mac or the details of negotiations associated with this transaction prior to the time the agreement was finalized. Instead, Lead Plaintiff's position, supported by well-established legal authority, is that once Defendants raised the subject of the Company's business strategy, including with respect to the bond portfolio and the dividend, they

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[3] Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Consolidated Complaints, cited as "Def. Br. at __."

were required – but failed – to disclose that the sale of the tax-exempt bond portfolio was a "transformational" transaction which had been "in the works" since early 2007, and that the sale would inevitably and necessarily include a reduction of the dividend and its tax-exempt component. Given this knowledge, and the highly material nature of Project Spinnaker to investors, ***Defendants' repeated statements about Centerline's business and plans gave rise to a duty to disclose all material facts on those subjects. Accordingly, the date of an "enforceable" agreement with Freddie Mac is irrelevant.***

Thus, Lead Plaintiff and the Class of investors who purchased Centerline stock during the Class Period in order to obtain the substantial, largely tax-exempt dividend were misled by Defendants' false and misleading statements which omitted material facts about the "transformational" change in the core aspects of Centerline's business strategy and basic investment premise. Defendants' motion to dismiss should be denied in its entirety.

STATEMENT OF FACTS

At the start of the Class Period, Centerline described its business as "a full service investing and finance company with a core focus on real estate." Centerline's business segment which managed its tax-exempt affordable housing bond portfolio comprised primarily of tax-exempt first mortgage bonds generated the major part of the Company's total revenues. ¶3. Based upon the revenue earned from the tax-exempt bond portfolio, Centerline historically paid large, primarily tax-

exempt dividends.[4] This is why risk-averse, income-oriented investors bought Centerline stock during the Class Period. ¶4.

Unbeknownst to the Class, in early 2007, Defendants put into action a strategic plan to transform Centerline into an alternative asset management company by selling its tax-exempt bond portfolio. The sale would remove the tax-exempt bonds from Centerline's balance sheet and eliminate much of Centerline's tax-exempt revenue stream, leaving the Company with revenue derived from fees earned from the Company's asset management services. According to Confidential Witness No. 2 ("CW 2"), a former asset manager with Centerline, the transaction was referred to as Project Spinnaker within the Company. ¶5.

Throughout the Class Period, Defendants were well aware that the sale of Centerline's tax-exempt bond portfolio would change the fundamental nature of Centerline's business and its investment premise. Indeed, according to Centerline's December 28, 2007 Investor Presentation, Defendants viewed the sale as a ***"transformational transaction that positions Centerline as an alternative asset manager."*** (Emphasis added.) ¶6. Defendants knew that the sale of the tax-exempt bond portfolio would greatly decrease the Company's ability to pay high, primarily tax-exempt dividends, which would change the essential investment premise of the Company and would be contrary to the long-standing expectations of Centerline's risk-averse, income-oriented investors. Defendants were well aware that the sale of the bond portfolio and reduction of the dividend would cause the price of Centerline's common stock to plummet and would punish and drive away its

[4] In 2004 the Company paid a dividend of $1.57 per share, representing a 6.4% yield, of which 90.6% was tax-exempt. In 2005, the Company paid a dividend of $1.63 per share, representing a 7.8% yield, of which 88.4% was tax-exempt, and in 2006, it paid a dividend of $1.68, representing a 7.8% yield, of which 74% was federally tax-exempt. ¶4.

income-oriented investor base. Indeed, in their December 28, 2007 Investor Presentation, Defendants touted as one of the strategic benefits of the sale the ability to ***"[a]ttract [an] investor base with growth versus income focus."*** ¶7.

However, when asked specifically by an analyst on November 8, 2007 if Defendants had considered removing the tax-exempt bonds from Centerline's balance sheet, defendant Schnitzer evasively stated that ***"it's something that we've thought of from time to time."*** This response concealed the material fact that Defendants were then nearing the end of a year-long process to sell the tax-exempt bond portfolio that was expected to close before the end of 2007 and change the essential investment premise of the Company. Defendant Schnitzer also explicitly denied any plans to change the dividend, yet a reduction of the dividend was an integral part of the strategic plan which Defendants had been and were then executing. ¶12.

On December 28, 2007, Centerline shocked the financial markets with the announcement that the Company had sold its "$2.8 billion tax-exempt affordable housing bond portfolio" to Freddie Mac and, in the process, completely changed the Company's business model overnight to a pure asset management firm. As a result of this transaction, the Company disclosed that it would be slashing its annual dividend from $1.68 per share to only $0.60 per share. Defendants also announced that Centerline was entering into a related party transaction with Related Special Assets LLC ("Related), an affiliate of the Related Companies, L.P. ("TRCLP"), owned by defendants Ross and Blau, whereby TRCLP would provide Centerline with $131 million in financing, in exchange for 12.2 million shares of newly-issued convertible preferred stock that would pay these insiders an 11% dividend. ¶17. During the December 28, 2007 analyst conference call, Defendant Schnitzer

stated that "[t]his capital is needed immediately. ... [W]e didn't have the luxury to continue to test a very unstable market and we needed the capital. The capital is critical to our growth plans." ¶125.

During that conference call, Defendant Schnitzer also admitted that the Company had been planning this institutional metamorphosis for nearly a year, stating: "This morning, ***we announced the closing of a transformational transaction that has been in the works for close to a year***...." (Emphasis added.) ¶19. A securities analyst observed that this "transformational transaction" had changed the entire basis for investing in Centerline and characterized it as "punishing" Centerline's investors. ¶20.

Defendants' disclosure that Centerline had sold its tax-exempt bond portfolio and had changed its business model to an asset management company that would be unsuitable for risk-averse investors seeking largely tax-exempt income from dividends, as well as the revelations regarding the sweetheart deal with the company controlled by defendants Ross and Blau, revealed to the market the falsity of the Company's Class Period statements and caused the price of Centerline stock to plummet from $10.27 per share on December 27, 2007, to close at $7.70 per share on Friday, December 28, 2007, representing a 25% single-day decline, on unusually heavy trading volume of 4,152,688 shares. ¶22. By contrast, the stock market, as reflected by the Dow Jones Industrial Average, went up on December 28, 2007. ¶144.

ARGUMENT

I. STANDARDS ON A MOTION TO DISMISS

The PSLRA did "not change the standard of review for a motion to dismiss." *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 332 (S.D.N.Y. 2003). A court must still "accept all factual allegations in the complaint as true," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct.

2499, 2509 (2007), and construe all reasonable inferences in the plaintiff's favor. *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). As the Supreme Court recently explained, "we do not require heightened fact pleading of specifics," and a court should not dismiss a complaint if the plaintiff has alleged enough facts to state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974-75 (2007). The Complaint easily meets these standards.

II. BASED ON THE WELL PLEADED ALLEGATIONS OF THE COMPLAINT, DEFENDANTS HAD A DUTY TO DISCLOSE MATERIAL FACTS ABOUT THE "TRANSFORMATIONAL TRANSACTION" THAT WAS "IN THE WORKS"

A. The Concealed Information Rendered Defendants' Public Statements Materially Misleading and Gave Rise to a Duty to Disclose

The law is clear that "the plain language of Rule 10b-5" makes it "impermissible 'to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" *In re Bristol-Myers Squibb Co. Sec. Litig.*, 2008 WL 3884384, *9 (S.D.N.Y. Aug. 20, 2008) (quoting 17 C.F.R. § 240.10b-5). Thus, courts recognize that a duty to disclose material facts arises when a corporation has made inaccurate, incomplete, or

misleading disclosures.[5] ***In fact, the Second Circuit has long followed the well-settled rule that a duty to speak the full truth arises when a defendant undertakes to speak at all***.[6]

The Complaint details numerous instances where Defendants chose to speak, but did not speak fully and truthfully concerning their ongoing activity to sell the tax-exempt bond portfolio, cut the dividend, change Centerline's basic investment premise and abandon Centerline's historic investor base, among other things. *See, e.g.,* ¶¶71-118 and Exh. A, attached hereto (chart juxtaposing Defendants' public statements with alleged facts which render those statements materially false and

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[5] *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992) ("'[W]hen a corporation does make a disclosure – whether it be voluntary or required – there is a duty to make it complete and accurate.'") (citations omitted); *In re Par Pharms. Inc. Sec. Litig.,* 733 F. Supp. 668, 675 (S.D.N.Y. 1990) ("Under this provision [Rule 10b-5], even though no duty to make a statement on a particular matter has arisen, once corporate officers undertake to make [such] statements, they are obligated to speak truthfully and to make such additional disclosures as are necessary to avoid rendering the statements made misleading."). *See also, e.g., In re Time Warner Inc.*, *Sec. Litig.,* 9 F.3d 259, 268 (2d Cir. 1993) ("A duty to disclose arises whenever secret information renders prior public statements materially misleading."); *McMahan & Co. v. Wherehouse Entm't,*, 900 F.2d 576, 579 (2d Cir. 1990) ("Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors. For that reason, the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers").

[6] *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2d Cir. 2002) ("Upon choosing to speak, one must speak truthfully about material issues. Once [a company] chose to discuss its hedging strategy, it had a duty to be both accurate and complete") (citations omitted); *Bristol-Myers,* 2008 WL 3884384, at *9 ("Once a corporation has elected to speak...Rule10b-5 mandates that its speech must be truthful, accurate, and complete"); *In re Credit Suisse First Boston Corp. Secs. Litig.*, 1998 U. S. Dist. LEXIS 16560, *17 (S.D.N.Y. Oct. 19, 1998) ("Silence, or omission to state a fact, is proscribed...where the defendant has revealed some relevant, material information even though he had no duty (*i.e.* a defendant may not deal in half-truths)"); *In re Columbia Sec. Litig.,* 155 F.R.D. 466, 482 n.7 (S.D.N.Y. 1994) (("[E]ven when corporate representatives have no duty to disclose information regarding a particular matter, when such an individual chooses to speak, his or her statements must be truthful and complete, and not materially misrepresent the facts existing at the time of the announcement"); *see also Rubinstein v. Collins*, 20 F.3d 160, 170 (5th Cir. 1994) ("[A] duty to speak the full truth arises when a defendant undertakes a duty to say anything'") (citation omitted).

misleading.).[7] "This alleged deception, in itself, gave rise to the duty to disclose." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 454 (S.D.N.Y. 2005).

1. The Undisclosed Facts About Project Spinnaker Were Material

Defendants' voluntary statements obligated them to disclose the true facts about Project Spinnaker, because those facts were undeniably material in light of Defendants' specific, repeated statements regarding the tax-exempt bond portfolio, the dividend, Centerline's business strategy, and the Company's liquidity. *In re WorldCom, Inc. Sec. Litig.,* 294 F. Supp. 2d 392, 428 (S.D.N.Y. 2003) ("When a person speaks, but chooses to omit information, the liability for that omission will be judged by its materiality.") (citing *Halperin v. eBankerUSA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002)).[8] "Material facts include those that affect the probable future of the company and [that] may

[7] The cases cited by Defendants do not support their argument that the Complaint fails to allege false statements. In *Brodsky v. Yahoo! Inc.*, 2008 WL 4531815 (N.D. CA. Oct. 7, 2008), the court noted that plaintiffs' 209 page complaint was "poorly organized and difficult to follow." *Id.* at *3. In contrast, Lead Plaintiff's 76 page complaint states with particularity each allegedly false and misleading statement, followed by facts establishing why such statement was false and misleading. In *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1070-71 (9th Cir. 2008), plaintiffs alleged that virtually every statement relating to Corinthian's financial results during the Class Period was false and misleading as a result of the Company-wide scheme to inflate school enrollment figures in order to misappropriate federal financial aid funding. The court held that the complaint's explanation of how and why the statements were false was vague and lacked particularity. In contrast, Lead Plaintiff here does not allege that every statement Defendants made during the Class Period was misleading, but, rather, alleges specifically, among other things, that Defendants' statements regarding the Company's bond portfolio and tax-exempt dividend were false and/or misleading because they omitted the material facts that Defendants were in the process of selling their bond portfolio and cutting the dividend.

[8] "To fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Caiola,* 295 F.3d at 329 (quoting *Basic*, 485 U.S. at 231-32) (internal quotation marks omitted). "At the pleading stage, a plaintiff satisfies the materiality requirement ...by alleging a statement or omission that a reasonable investor would have considered significant in making investment decisions." *Ganino v. Citizens Utils. Co.,* 228 F.3d 154, 161 (2d Cir. 2000).

affect the desire of investors to buy, sell, or hold the company's securities." *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 180 (2d Cir. 2001) (citation omitted).

There can be no doubt that the undisclosed information about Project Spinnaker – a major transaction Defendants themselves called "transformational" – was material to investors. ***The sale of the Company's bond portfolio and the concomitant reduction in the dividend, among other facts, directly and inevitably "affect[ed] the probable future of the company," and plainly "affect[ed] the desire of investors to buy, sell, or hold the company's securities."*** *Castellano*, 257 F.3d at 180 (emphasis added). *See also Ganino v. Citizens Utils. Co.,* 228 F.3d at 162 (material facts include any that 'in reasonable and objective contemplation might affect the value of the corporation's stock or securities").[9]

2. Defendants Had a Duty to Disclose Facts Necessary to Make Their Statements Regarding the Tax-Exempt Bond Portfolio, The Dividend, and the Company's Liquidity Position Complete and Accurate

The Complaint identifies in detail the numerous materially false and misleading statements and omissions made by Defendants in SEC filings, press releases, analyst conference calls and other means during the Class Period. ¶¶71-118. *See* Exh. A. Defendants' misstatements and omissions were designed to and did create the false impression for investors who bought Centerline stock during

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[9] Defendants do not seriously dispute that the undisclosed information was material, aside from a half-hearted attempt to downplay the sale of Centerline's bond portfolio as merely something "investors would have liked to have known." *See* Def. Br. at 17 n. 11. As described in the Complaint, however, the materiality of this information was well known to Defendants, and was confirmed by investors immediately following the disclosure of the sale on the last day of the Class Period, when the price of Centerline stock dropped swiftly and substantially and analysts and investors expressed surprise and "disgust" at the belatedly revealed news. *See* ¶¶127-129. *See, e.g., In re Xcel Energy, Inc. Securities, Derivative & ERISA Litig.*, 286 F. Supp.2d 1047, 1055 (D. Minn. 2003) (commentary of analysts following corrective disclosures, together with "the reaction of the market" demonstrated that undisclosed information was "highly material").

the Class Period that Centerline would retain its tax-exempt bond portfolio and continue to pay out large annual, primarily tax-exempt dividends for the foreseeable future. ¶¶14, 73, 86, 95, 109, 118b. Defendants, however, hid critical information regarding these issues, including the facts that the sale of the bond portfolio was a "transformational" transaction that had been "in the works" since early 2007, and that the reduction of the dividend and its tax-exempt component was a necessary and inevitable part of Project Spinnaker. ¶118.[10] ***Thus, Defendants were in the process of changing Centerline's basic investment premise, but did not tell investors who were then buying Centerline stock on that basis.***

It is well settled that incomplete or misleading statements about major corporate transactions, agreements, business plans or strategies can give rise to a duty to disclose all material facts on those

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[10] Specifically, Defendants intentionally failed to disclose the material facts that: i) Centerline had embarked upon Project Spinnaker – an admittedly "transformational" transaction specifically designed to remove the Company's tax-exempt bond portfolio from the balance sheet -- approximately ***one year*** before it was announced; ii) an essential and inevitable result of the sale of the tax-exempt bond portfolio was the reduction in the dividend and its large tax-exempt component; (iii) Defendants intended to abandon Centerline's longstanding income-oriented shareholder base and instead focus on a growth-oriented investor base; and (iv) Centerline had a liquidity problem. *See, e.g.*, ¶¶ 23, 118. These material, undisclosed facts stand in stark contrast to Defendants' Class Period statements. For example, throughout the Class Period, Defendants were telling investors that a corporate re-engineering and re-organization had been "completed," and that they were "very comfortable" with this "new story" about Centerline as an "investment manager...as opposed to a bond fund." ¶¶72, 105. Defendant Schnitzer explained that the public market should come to see the Company as "more of an investment manager" because "we see today a company with $17 billion of assets under management, ***only $2.8 billion of which*** [*i.e.,* the tax-exempt bond portfolio] ***reside on our balance sheet*** and are done with our own capital." ¶105 (emphasis added). Defendant Schnitzer also called the Company's bond business "a cyclical business rather than an business that's destined to shrink,"and said the bond portfolio was "a living, breathing portfolio." ¶¶104, 106. *See* Exh. A.

Defendants specifically rejected suggestions that the dividend might be reduced, while remaining completely silent about the material fact that Project Spinnaker – a plan to radically transform the Company by selling the tax-exempt bond portfolio and reducing the dividend -- was well underway. ¶¶93, 102, 113. For example, on November 8, 2007, in response to a direct question from an analyst about whether Defendants had "ever considered...taking the bonds off your balance sheet or letting them roll into some other sort of vehicle," Defendant Schnitzer answered, misleadingly, that "it's something that we've thought of from time to time." ¶113. This statement concealed the material fact that the bond portfolio was already in the process of being sold, as Defendants well knew.

subjects. *See, e.g., Time Warner,* 9 F. 3d at 268*; Caremark*, *Inc.*, *v. Coram Healthcare Corp.*, 113 F.3d 645, 650 n.7 (7th Cir. 1997). The Second Circuit's thorough and well-reasoned analysis in *Time Warner* is directly on point. In *Time Warner*, the plaintiffs alleged that the company's public statements concerning its intention to raise capital by forming international "strategic partnerships" were materially false or misleading when, in fact, the company was also considering, but did not disclose, a new stock offering. When this offering did occur, it resulted in a substantial dilution of the interests of existing shareholders. The Second Circuit unanimously found that Time Warner's prior statements about strategic alliances put the company under a duty to disclose its active consideration of the stock offering:

> ***[W]e hold that when a corporation is pursuing a specific business goal and announces that goal as well as an intended approach for reaching it, it may come under an obligation to disclose other approaches to reaching the goal when those approaches are under active and serious consideration.*** Whether consideration of the alternate approach constitutes material information, and whether nondisclosure of the alternate approach renders the original disclosure misleading, remain questions for the trier of fact.

9 F.3d at 268 (emphasis added).

Here, Lead Plaintiff alleges that the Company not only had "under active and serious consideration" a change in its announced business strategy, which included plans to sell the Company's bond portfolio and cut the dividend and its tax-exempt component, but that such a change would fundamentally alter the structure of the company, and ***was already "in the works"*** by the beginning of the Class Period, as Defendants have ***admitted***. ¶¶19, 123. As the Second Circuit

explained, where, as here, such "secret information" makes a company's prior public statements materially misleading," there is a duty to disclose. *Time Warner,* 9 F.3d at 268.[11]

Other courts agree that the duty not to mislead through incomplete or inaccurate disclosure applies to major corporate transactions and business strategies. For example, in *Caremark*, 113 F.3d at 650 n. 7, the Seventh Circuit held that a corporation could be liable under Rule 10b-5 where it represented "that its business strategy was to focus on its 'core business' and to divest 'non-strategic businesses,'" even though it was negotiating to buy what was allegedly a non-core business. As the court emphasized, "[h]aving thus undertaken to disclose its plans regarding future acquisitions, [the company] had a duty to do so truthfully." *Id.* Similarly, in *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 315-18 (3d Cir. 1997), the court held that a company's statement of its guideline for debt-to-capitalization ratio was rendered misleading by the undisclosed fact that it was negotiating toward a merger that would alter the ratio.[12] Likewise, here, Lead Plaintiff alleges that based on Defendants' Class Period statements designed to reassure investors that there was no plan to change the nature of Centerline's business, sell the tax-exempt bond portfolio or reduce the dividend, it would have been

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[11] The Second Circuit's analysis of the duty to disclose in *Time Warner* is conspicuously absent from Defendants' fourteen-page long argument on the issue. Defendants only mention *Time Warner* in passing (*see* Defs. Br. at 17 n.11), and even then completely overlook the critical point that a duty arises to disclose "secret information" where, as here, the "secret information" rendered Defendants' public statements materially misleading. *See Time Warner,* 9 F.3d at 268.

[12] The court in *Quaker Oats* specifically found that while "[n]one of [the defendants'] statements was actually incorrect at the time of its publication[,]" those statements, in which Quaker described its debt-to-capitalization ratio policy, "could indeed have induced a reasonable investor to expect ... that the ratio guideline would remain" in the range defendants had previously announced, and therefore defendants had a duty to disclose that as a result of the merger, Quaker would have to raise the ratio. 129 F.3d at 317. The court noted that while literally true, "the statements were not made in isolation," and that by repeating facts about the debt-to-capitalization ratio, Quaker "may well have created the reasonable understanding among investors that the ratio guideline was a number to which Quaker attached considerable significance." *Id.*

"entirely reasonable" for investors to assume that if Defendants' plans "would soon change significantly, the company would have said so." *See id.*[13]

Moreover, and contrary to Defendants' contention (*see* Def. Mem. at 18 n.12), statements about the continuation of dividends are in no way exempt from the duty to tell the whole truth on a subject, once raised.[14] For example, in *In re Xcel Energy, Inc. Sec. Derivative & "Erisa" Litig.*, 286 F. Supp. 2d 1047 at 1058-59 (D. Minn. 2003), the court held that the defendants' statements regarding

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[13] Courts have repeatedly held that incomplete statements about corporate transactions, including major contracts and corporate restructurings, are actionable when the undisclosed facts are material. *See, e.g., Bristol-Myers,* 2008 WL 3884384, at *10 (defendants' statements regarding settlement of patent litigation gave rise to a duty to disclose material information about the nature of the settlement negotiations and the actual terms of the settlement agreement); *In re Quintel Entm't, Inc. Sec. Litig.,* 72 F. Supp.2d 283, 292-93 (S.D.N.Y. 1999) (defendants had a duty to disclose that AT&T was modifying its partnership with Quintel where the company "publicly hyped" that partnership); *Brumbaugh v. Wave Sys. Corp.,* 416 F. Supp. 2d 239 (D. Mass. 2006) (where Wave Systems, a small, unprofitable company entered into agreements with Intel and IBM, but failed to disclose that the agreements required no minimum payment to Wave, the court held that "[b]y volunteering 'relevant, material information' regarding the lucrative nature of impending agreements, Defendants assumed an obligation, in announcing Wave's new relationship with Intel, to convey 'the whole truth.'") (citing *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 26 (1st. Cir. 1987)); *In re Xerox Corp. Sec. Litig.*, 165 F. Supp. 2d 208, 217 (D. Conn. 2001) (where defendants spoke publicly about cost savings from restructuring, they had a duty to disclose the material negative impact that the restructuring was having on the company's operations and revenue). Since it is actionable not to disclose additional material facts about publicly disclosed agreements and corporate restructurings, the failure to disclose the very existence of a major, "transformational" initiative is plainly actionable.

[14] *Hershfang v. Citicorp*, 767 F. Supp.1251, 1252-53 (S.D.N.Y. 1991), the sole case Defendants cite in support of their argument that there can be never be a duty to disclose facts regarding the continuation of dividends, (*see* Def. Br. at 18 n.11), here does not even mention disclosure duties under the securities laws. Moreover, Defendants' statements here about the continuation of the dividend were hardly mere expressions of opinion, as was the case in *Hershfang*, where there was "no fact alleged in the complaint to suggest that defendants did not actually hold the views they expressed." Even if Defendants' statements regarding the dividend did amount to "opinion," the Complaint sets forth in great detail all the facts establishing that Defendants could not have reasonably believed such statements at the time they were made because the reduction of the dividend was an essential part of the plan to sell the bond portfolio. *See, e.g.* ¶¶5-8, 43, 58-66, 148. *Lapin v. Goldman Sachs Group, Inc.,* 506 F. Supp. 2d 221, 239 (S.D.N.Y. 2006) ("[O]ptimistic statements may be actionable upon a showing that the defendants did not genuinely or reasonably believe the positive opinions they touted [i.e., the opinion was without a basis in fact or the speakers were aware of facts undermining the positive statements], or that the opinions imply certainty") (citing cases). The Complaint alleges that Defendants were aware of Project Spinnaker and its implications for the dividend and its tax-exempt component and asserts that Defendants neither genuinely nor reasonably believed in the truth of their statements.

Xcel's "commitment to the historical dividend" gave rise to a duty to disclose the possible impact of undisclosed credit arrangements that placed the continuation of the dividend in jeopardy.[15]

3. The Existence of SEC Regulations Does Not Relieve Defendants Of Their Obligation To Speak Truthfully

Defendants devote a majority of their brief to arguing that they had no duty to disclose anything at all about Project Spinnaker – including the planned sale of the bond portfolio, which was already "in the works" by the beginning of the Class Period, and the reduction in the dividend, which Defendants knew would be a necessary and inevitable result of the "transformative" Project Spinnaker – until the sale to Freddie Mac "was the subject of a definitive, enforceable agreement." Def. Br. at 13. Defendants rely principally on the existence of SEC rules regarding the timing of disclosure for "material definitive agreements" and other matters. *See* Def. Br. at pp. 9-14.

Defendants miss the point. ***Defendants knew, from the time they embarked upon Project Spinnaker, that it would transform the Company by reducing Centerline's cash flows from the bond portfolio and requiring a reduction in the dividend and its tax free component and would change the basic investment premise of the Company.*** *See* ¶¶5-7, 43, 67. ***The date of an "enforceable" agreement with Freddie Mac is irrelevant.***

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[15] In *Xcel*, the plaintiffs alleged that Xcel "frequently referred to its ongoing commitment to dividend performance," yet failed to disclose that cross default provisions in Xcel's credit facilities posed a risk to the dividend. *Id.* at 1054. When the cross default provisions were finally disclosed, Xcel was forced to agree to review its dividend policy as part of the renegotiation of its credit facilities with its lenders, and Xcel's directors ultimately cut the annual dividend in half, from $1.50 to $0.75. *Id.* The court held that defendants had a clear "duty to give complete information on a subject once raised," and that defendants' specific statements about the dividend, among other things, "created a duty to disclose sufficient material information to create a complete picture." *Id.* As the court emphasized, "[e]ven where a party does not otherwise have an affirmative duty to disclose certain information, once a material topic has been broached, the party has an affirmative duty to disclose sufficient additional information to prevent the original disclosure from being misleading." *Id.* at 1057.

Defendants' suggestion that SEC regulations are the sole source of any duty to disclose is incorrect. It is well-established that an affirmative duty to disclose can arise in at least ***four*** different ways: (1) where an insider trades on the basis of non-public information; (2) where a statute or regulation requires disclosure; and (3) ***where the omitted fact is necessary to prevent some affirmative statement from being false, inaccurate, incomplete or misleading***. *See Roeder v. Alpha Industries, Inc.,* 814 F.2d 22, 27 (1st Cir. 1987); *Time Warner*, 9 F.3d at 267. In addition, the fourth situation in which a disclosure duty arises is when Defendants have a duty to correct or revise prior statements, even if true when made, which have become misleading. *Time Warner*, 9 F.3d at 267 (noting issuer's "duty to update" statements "which have become misleading as the result of intervening events"). Thus, ***the existence of certain SEC disclosure requirements did not in any way relieve Defendants of the obligation to speak truthfully once they broke their silence and explicitly raised the subjects of the tax-exempt bond portfolio, the dividend, and the Company's business strategy.***[16]

[16] The authorities Defendants cite confirm that where "[c]urrent SEC regulations do not impose a disclosure obligation" with respect to certain information, there is "no duty to disclose that information ***unless it was necessary to make another statement not misleading.***"). *Benzon v. Morgan Stanley Distribs.*, 420 F.3d 598, 612 (6th Cir. 2005) (emphasis added) (cited at Def. Br. p.9). *See also Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 132 n. 12 (2d Cir. 2000) ("the disclosure requirements of Rule 10b-5 still apply to those categories of information not specifically covered by Rule 10b-10"); *In re AIG Advisor Group Sec. Litig.*, 2007 WL 1213395, *9 (E.D.N.Y. Apr. 25, 2007) ("even if defendants are correct that they fully complied with their Form N1-A disclosure obligations, it does not follow that their failure to disclose the AIG Brokers' alleged conflict of interest is necessarily immaterial."). Furthermore, Defendants do not seriously challenge Lead Plaintiff's allegations that the statements and omissions regarding Centerline's liquidity problems were materially false and misleading. Instead, Defendants rehash their argument that no disclosure was required because there was no final agreement with TRCLP. *See* Def. Br. at 18. That argument fails for the reasons set forth herein.

4. The Absence of a Binding Agreement With Freddie Mac Does Not Relieve Defendants of Their Obligation To Tell the Truth When Speaking About the Bond Portfolio and the Dividend

Defendants' assertion that "courts are in agreement that no duty to disclose arises prior to the completion of a binding agreement or the completion of the transaction" (Def. Br. at 15), is also mistaken. Defendants once again misapprehend the nature of Lead Plaintiff's claims. ***Lead Plaintiff does not allege that the precise terms of the agreement with Freddie Mac were determined and required to be disclosed by the beginning of the Class Period, but instead alleges that regardless of the terms of the agreement, Defendants knew by the beginning of the Class Period that the Company had already begun working on Project Spinnaker, and therefore knew that selling the bond portfolio was already "in the works," which meant that Defendants were also planning to reduce the dividend, along with its tax-exempt component and change the Company's basic investment premise.*** ¶¶5-7, 43, 67. As the Seventh Circuit stated in *Ackerman v. Schwartz*, 947 F.2d 841, 848 (7th Cir. 1991) (emphasis added), ***"[u]nder Rule 10b-5, ...the lack of an independent duty [to reveal merger negotiations] does not excuse a material lie."*** In this case, as was true in *Ackerman*, Defendants may have had "no duty to issue a press release," but since they chose to speak, they were obligated – but completely failed -- to "tell the truth about material issues." *Id.*

The Third Circuit in *Quaker Oats,* 129 F.3d at 317-18, rejected an argument identical to the one Defendants proffer here. In *Quaker Oats*, the court reversed the district court's holding that "[t]o require Quaker to disclose the possibility it might seek loans to finance an acquisition is tantamount to requiring the disclosure of the acquisition negotiations." *Id.* As the Third Circuit explained:

> We recognize that it is quite likely that Quaker and Snapple had not yet agreed on the precise terms of their merger by the beginning of August 1994, or indeed even until shortly before the deal was announced on November 2 of that year. But plaintiffs do not allege that the terms of the agreement were set by the opening of the proposed

> class period in early August. ***Instead, they urge that, whatever the terms of the agreement may have been by the time of the purported false or misleading statements, it must by then have been clear to defendants that the merger would compel Quaker to take on sufficient additional debt to raise the total debt-to-total capitalization ratio to a level far higher than the "upper-60 percent range. We think that a reasonable fact finder could so find.***

Id. at 318 (emphasis added). Similarly, in this case, whatever the terms of the agreement with Freddie Mac may have been at the time of Defendants' false or misleading statements, Lead Plaintiff alleges that Defendants knew that Project Spinnaker involved selling the tax-exempt bond portfolio, reducing the dividend and its tax-exempt portion and changing the basic investment premise of the Company. *See* ¶¶5-8.[17]

Defendants' argument that requiring any disclosure of "contingencies and hypothetical transactions" would necessarily result in "information overload" and "destroy" a company's competitive advantage is also unpersuasive. *See* Def. Br. at 16. First, Project Spinnaker was not a

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[17] Defendants' attempt to apply a "bright line" test to argue that information regarding contingent future events is never required to be disclosed is completely at odds with the holding of *Basic*, 485 U.S. at 234-36, where the Supreme Court squarely rejected such an approach and mandated a case-by-case approach. Indeed, following *Basic*, the courts have overwhelmingly held that misleading statements relating to contingencies may be material. For example, in *Semerenko v. Cendant Corp.*, 223 F.3d 165, 177 (3d Cir. 2000), the Third Circuit explained that "[i]t is well established that information concerning a tender offer or a proposed merger may be material to persons who trade in the securities of the target company, despite the highly contingent nature of both types of transactions." As the court in *Cendant* held, "[i]f it may be reasonable for an investor to find information concerning a tender offer or a merger important when making an investment decision, we see no reason why the conditional nature of those transactions should necessarily prevent the investor from reasonably relying on that information as well." *Id.* at 180. *See also, e.g., Time Warner*, 9 F.3d at 268; *Kronfeld v. TransWorld Airlines, Inc.*, 832 F.2d 736, 737 (2d Cir. 1987) (failure to disclose contemplated termination of relationship between parent and subsidiary); *SEC v. Geon Indus., Inc.,* 531 F.2d 39 (2d Cir. 1976) ("Since a merger in which it is bought out is the most important event that can occur in a small corporation's life, to wit, its death, we think that inside information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions – and this even though the mortality rate of mergers in such formative stages is doubtless high"); *In re Columbia Sec. Litig.*, 747 F. Supp. 237, 243 (S.D.N.Y. 1990) (under *Basic,* a transaction does not have to be more probable than not to be material). In fact, Defendants agree that the "transformational" nature of Project Spinnaker was akin to "events and transactions, such as mergers...which are 'the most important event that can occur in a small corporation's life[.]'" *See* Def. Br. at 15.

"contingent" or "hypothetical" transaction, but was instead an initiative that was already "in the works" by the beginning of the Class Period. Second, as Defendants themselves point out, and Lead Plaintiff agrees, the securities laws do not require disclosure of every insignificant detail of a corporation's business. *See Time Warner*, 9 F.3d at 267 (cited in Def. Br. at p. 17 n.10). However, it is beyond dispute that the securities laws do not permit a corporation or its officers to hide material information about major "transformational" corporate developments, once they have chosen to speak about such topics, simply because such disclosures might be "'bad for business.'" *Basic*, 485 U.S. at 234.[18]

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[18] The Supreme Court has repeatedly stressed that the fundamental policy of the federal securities laws is complete and accurate disclosure. As the Court held in *Basic*:

> There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy...This Court repeatedly has described the fundamental purpose of the Act as implementing a philosophy of full disclosure.

485 U.S. at 230 (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977)). Accordingly, "the Supreme Court has made clear that it is not the role of the courts to interfere with the policy of disclosure 'chosen and recognized' in the securities laws." *Quaker Oats*, 129 F.3d at 318 (citing *Basic*,485 U.S. at 234). Indeed, the Court in *Basic* unequivocally rejected the policy arguments Defendants here advocate in their brief: "[W]e think that creating an exception to a regulatory scheme founded on a prodisclosure legislative philosophy, because complying with the regulation might be 'bad for business,' is a role for Congress, not this Court." 485 U.S. at 234.

That Defendants are forced to rely on pre-*Basic* cases to support their "no duty to disclose" argument underscores the flawed nature of Defendants' motion. For example, the views adopted in both *Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir. 1987), and *Reiss v. Pan Am. World Airways, Inc.*, 711 F.2d 11, 14 (2d Cir. 1983), that merger discussions do not become material until the merger partners have agreed in principle as to price and structure, were explicitly rejected in *Basic*. *See* Def. Br. at 16 (citing *Flamm* and *Reiss*). Instead, the Supreme Court clearly stated that the materiality of statements involving merger negotiations required a "fact-specific" inquiry that "depends on the significance the reasonable investor would place on the...misrepresented information." *Basic*, 485 U.S. at 239. Here, as noted above, the materiality of the undisclosed information is beyond dispute given the dramatic reaction in price and the trading volume of Centerline stock when the sale to Freddie Mac and reduction of the dividend were finally announced. *See, e.g., Manavazian v. ATEC Group, Inc.,* 160 F. Supp. 2d 468, 483 (E.D.N.Y. 2001) ("A dramatic change in the value of a company's stock following a company announcement regarding the prospects of a merger supports the materiality of the announcement"); *Blanchard v. Edgemark Fin. Corp.*, 1999 U.S. Dist. LEXIS 1096, at *34-35 (N.D. Ill. Feb. 3, 1999) (rejecting defendants' argument that "speculative" merger

5. Even a Statement That Is Literally True May Be Misleading

The law is clear that "even an entirely truthful statement may provide a basis for liability if material omissions related to the content of the statement make it – or other statements made – materially misleading." *Bristol-Myers, at *9.* Therefore, ***even if Defendants' statements were in some sense "literally accurate,...the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective investors."*** *McMahan v. Wherehouse Entm't, Inc.,* 900 F.2d at 579 (emphasis added).[19]

Defendants argue that they did not technically lie, *(see* Def. Br. at 19), but there can be little doubt that Defendants went out of their way to mislead the investing public about the Company's ongoing plans to sell the tax-exempt bond portfolio, reduce the dividend and its tax-exempt portion and change the basic investment premise of the Company. *See* ¶¶71-118. Thus, there is no merit to Defendants' argument that the Company's Form 10K for 2006 contained "accurate historical statements" and therefore could not possibly create any misleading impression. *See* Def. Br. at 19.[20]

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discussions were immaterial where "it is clear that the merger had a dramatic impact on the value of the stock....").

[19] Defendants' statements in this case "bec[a]me, through their context and manner of presentation, devices which misle[]d investors." *Id.*; *see also Time Warner*, 9 F.3d at 268; *Fogarazzo v. Lehman Bros., Inc.*, 341 F. Supp.2d 274, 294 (S.D.N.Y. 2004) ("A statement can also be misleading, though not technically false, if it amounts to a half-truth by omitting some material fact.").

[20] The additional cases Defendants cite clearly do not, as Defendants suggest, provide a blanket immunity from 10b-5 liability for a failure to disclose major corporate events, even when those events are "contingent." *See* Def. Br. at pp. 15-16. Instead, as Defendants recognize, these cases confirm that while there is no general duty to disclose potential corporate transactions, where "'a corporation does make a disclosure – whether voluntary or required – there is a duty to make it complete and accurate.'" *Glazer*, 964 F.2d at 157 (citation omitted). That is, "'Rule 10b-5 imposes...a duty to disclose only when silence would make other statements misleading or false.'" *Id.* (citation omitted). Thus, in *Glazer*, for example, unlike the instant case, there was not "any suggestion" that the defendants made false or misleading statements. *Id.* The other authorities Defendants cite are also inapposite. *See also*, *e.g.*, *Ventry v. Sands (In re Canandaigua Sec. Litig.)*, 944 F. Supp. 1202, 1208 (S.D.N.Y. 1996) (no duty to disclose where "plaintiffs do not specify a single statement within Canandaigua's corporate filings or press releases that was untrue"); *San Leandro*

Defendants' related argument – that statements regarding the purported "completion" of Centerline's "corporate re-engineering" cannot be false because they did not mention the tax-exempt bond portfolio or the revenues derived therefrom (*see* Def. Br. at 20) – fares no better. Once again, Defendants simply disregard the allegations of the Complaint, which makes clear that Defendants' statements were materially false and misleading in light of the facts that, *inter alia*, a major "transformation" of the Company was then ***"in the works,"*** as Defendants knew at the time they made those statements, and that selling the bond portfolio and reducing the dividend were central to the transformation ¶¶5-7, 43, 67. Thus, Defendants' Class Period statements regarding the "corporate re-engineering" are directly related to Centerline's "future plans regarding the bond portfolio," and Defendants' arguments to the contrary should be rejected. *See* Def. Br. at 20. Defendants' argument also discounts the extensive case law holding that on a motion to dismiss, "the context and meaning of each alleged misrepresentation must be considered, not in isolation, but in light of all the representations made and the surrounding circumstances." *Riggs v. Termeer*, 2004 WL 540490, *1 (S.D.N.Y. March 17, 2004).[21]

Emergency Med. Group Profit Sharing Plan v. Phillip Morris Cos., 75 F.3d 801, 810-11 (2d Cir. 1996) (no duty to disclose where plaintiffs relied on a "sole comment regarding the company's intent to focus on profits" and other statements were predictions and "puffery," not statements of existing facts, as Plaintiffs allege here); *In re Medimmune, Inc. Sec. Litig.*, 873 F. Supp. 953, 968 (D. Md. 1995) (upholding statements that "could possibly have misled an investor").

[21] *See also, e.g., McMahan*, 900 F.2d at 579. Moreover, even if the statements about the re-engineering were not directly related to the omissions about Project Spinnaker, there is ample precedent holding that disclosure on one subject triggers a duty for more complete information even if not squarely related to the subject of the original disclosure. For example, in *Castellano,* 257 F.3d at 180-82, the primary event was an employee shareholder's decision to resign and accept certain benefits; the omission found to be actionable involved failed merger negotiations and an infusion of outside capital through corporate restructuring. In *Quaker Oats*, 129 F.3d at 315-18, the primary event was a merger; the omission found to be actionable involved the indirect but related question of the company's debt-to-capitalization ratio. Similarly, in *In re MCI WorldCom, Inc., Sec. Litig.*, 93 F. Supp.2d 276, 278-83 (E.D.N.Y. 2000), the primary event was a merger; the omission found to be actionable involved the indirect but related question of the registration of an internet domain name.

III. LEAD PLAINTIFF HAS MORE THAN ADEQUATELY PLED SCIENTER

A. Standards For Pleading Scienter

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2505 (2007), the Supreme Court held that in order to plead a strong inference of scienter in a securities fraud case under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the facts alleged in a complaint must give rise to an inference of scienter that is cogent and at least as compelling as any opposing inference of nonfraudulent intent suggested by defendants. The Court defined the "strong inference" standard as follows: "[W]hen the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" *Id.* at 2511.[22]

Thus, under *Tellabs*, scienter is adequately pleaded where the inference of fraud is *equally* as likely as any non-culpable explanation of defendants' alleged conduct. *Id.* "In other words, a tie now goes to the plaintiff." *Sloman v. Presstek, Inc.,* 2007 WL 2740047, at *7 (D.N.H. Sept. 18, 2007); *see also, e.g., Communs. Workers of Am. Plan for Emples. Pensions & Death Bens. v. CSK Auto Corp.*, 525 F. Supp. 2d 1116, 1120 (D. Ariz. 2007) ("The Supreme Court has now made clear, however, that a tie goes to the Plaintiff").

In the Second Circuit, post-*Tellabs*, a plaintiff may satisfy this standard by alleging facts that: (1) constitute strong circumstantial evidence of conscious misbehavior or recklessness" or (2) "show the defendants had both motive and opportunity to commit the fraud." *In re Top Tankers, Inc. Sec.*

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[22] *Tellabs* requires courts to take the Complaint's allegations as true, to view them "holistically," and to deny a motion to dismiss where the inference of fraud is *at least as likely* as any opposing inference of innocent behavior that may be drawn from the facts alleged. *Id.* at 2511. Contrary to Defendants' piecemeal attack on the Complaint's scienter allegations, the Supreme Court explicitly held that the proper inquiry for determining whether scienter is adequately pled is "whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter." *Id.* at 2502 (emphasis in the original). The Court further held that "[t]he inference that the defendant[s] acted with scienter need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even 'the most plausible of competing inferences.'" *Id.* at 2510.

Litig., 2007 WL 4563930, at *6 (S.D.N.Y. Dec. 18, 2007) (citing *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). Accordingly, a plaintiff sufficiently pleads the recklessness of defendants when he specifically alleges "that a defendant knew facts or had access to information suggesting that their public statements were not accurate." *In re Converium Holding AG Sec. Litig.,* 2007 WL 2684069, at *2 (S.D.N.Y. Sept. 14, 2007) (quoting *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000) (internal citations omitted)). The Complaint easily satisfies these standards.

B. Lead Plaintiff Pleads Specific Facts that Constitute Strong Evidence of Defendants' Conscious Misbehavior or Recklessness

1. Lead Plaintiff Specifically Alleges Defendants' Knowledge of Facts or Access To Information Contradicting Their Public Statements

As Lead Plaintiff has alleged, Defendants knew or should have known of their obligation to speak truthfully about Centerline's business, including with respect to the bond portfolio, the dividend, the Company's liquidity position and the change in the Company's basic investment premise. *See* ¶¶5-7, 148.[23] "[T]he fact that the defendants published statements when they knew

[23] Specifically, Lead Plaintiff alleges that (i) Defendant Schnitzer admitted that the sale of the bond portfolio, a "transformational transaction," had been "in the works" for "close to a year," (¶148(a)); (ii) Defendants intended to change the investor profile and the investment thesis of the Company (¶148(b)); (iii) Defendants Ross and Blau increased their voting control over Centerline from approximately 17% to almost 30% as a result of their "sweetheart" deal (¶148(c)); (iv) the tax-exempt bond portfolio and the income it generated were core to Centerline's business and the Individual Defendants were among the Company's most senior officers and trustees (¶148(d)); (v) Defendant Schnitzer directs the day-to-day operations of the Company and is responsible for corporate development and strategic planning (¶148(e)); (vi) Defendants Ross and Blau control Centerline (¶148(f)); (vii) the magnitude of the transaction costs of $89 million for the sale of the bond portfolio raise a strong inference of scienter (¶148(g)); (viii) before the sale of the bond portfolio, Defendant Ross spoke to investment bankers about taking Centerline private and spoke to them again after the sale, when he could buy the Company at a "bargain-basement" price (¶148(h)); (ix) confidential witnesses confirmed that employees at various levels were working on Project Spinnaker at the times that Defendants were making false and misleading public statements (¶148(i)); and (x) a confidential witness stated that Defendants closed the blackout window after the August 9, 2007 earnings announcement to prevent Centerline employees from trading Centerline stock during the existence of a material non-public transaction (¶148(j)). Defendant Levy was the Chief Financial Officer, ¶31, and was the head of Centerline's Capital Markets Group, which would normally actively participate in the sale. ¶63.

facts suggesting the statements were inaccurate or misleadingly incomplete is classic evidence of scienter." *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002).[24]

Defendants' statements regarding the tax-exempt bond portfolio, the dividend, and Centerline's business strategy and liquidity position were contradicted by available facts, giving rise to an inference that they "had intimate knowledge of those facts or should have known of them." *In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F. Supp. 2d 474, 489 (S.D.N.Y. 2004). Defendants do not even bother to contest the Complaint's numerous facts demonstrating Defendants' conscious misbehavior or recklessness, relying instead on the faulty suggestion that even if they had a duty to disclose information about Project Spinnaker, "the SEC rules or case law providing to the contrary...negate any inference that defendants knew they had to disclose (or were reckless in failing to disclose) those matters prior to that date." Def. Br. at 23. In essence, Defendants protest that they did not know the federal securities laws required them to tell the truth – an absurd proposition, particularly in view of the Complaint's extensive allegations showing Defendants' actual knowledge or reckless disregard of the facts. Moreover, in this case, unlike the cases Defendants cite, Defendants' repeated statements were designed to and did give investors a false and misleading portrayal of the true facts, and unlike those cases, there is no question here about the materiality of the information that was concealed. *See In re Morgan Stanley & Van Kampen Mut. Fund Secs. Litig.*,

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[24] *See also, e.g., Novak* v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2000) (defendants were allegedly aware of or disregarded the need to write down inventory); *Hall v. Children's Place Retail Stores, Inc.*, 2008 WL 2791526, *5-*6 (S.D.N.Y. July 18, 2008) (same); *In re Veeco Instruments, Inc., Sec. Litig.*, 235 F.R.D. 220, 232 (S.D.N.Y. 2006) (stating that "the Second Circuit has held that securities fraud claims typically have sufficed to state a claim based on recklessness 'when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements.'") (citing *Novak*); *In re Xerox Corp. Secs. Litig.*, 165 F. Supp. 2d at 223 (finding scienter allegations adequately pleaded where "members of the company's sales force personally communicated to the individual defendants" information that contradicted their public representations).

2006 WL 1008138, at *7-8 (S.D.N.Y. Apr. 18, 2006) (scienter not alleged where defendants were under no duty to disclose because omissions were not material); *Geiger v. Solomon-Page Group*, 933 F. Supp. 1180, 1191 (S.D.N.Y. 1996) (no scienter where omissions were not material).

2. Defendants' Admission That Project Spinnaker Was a "Transformational" Initiative That Had Been "In the Works" Since Early 2007 Compels a Strong Inference of Scienter

Lead Plaintiff specifically alleges that Defendant Schnitzer's December 28, 2007 statement that "[t]his morning we announced the closing of a ***transformational transaction that has been in the works for close to a year***,"constituted an admission – *i.e.*, direct evidence – of Defendants' guilty knowledge during the Class Period. ¶¶8, 123 (emphasis added). Courts regularly consider Post-Class Period statements to determine what defendants knew during the class period.[25] Here, Schnitzer brushed off public inquiries about a potential sale of the bond portfolio as late as November 8, 2007. *See* ¶113. Just seven weeks later, Schnitzer ***admitted both*** that the transaction had been "in the works" for close to one year – *i.e.*, from the very beginning of the Class Period, if not earlier – ***and*** that the transaction was so significant and dramatic that it qualified as a "transformational transaction." ¶¶8, 43.

There is only one reasonable inference to be drawn from Schnitzer's admissions – that he, as the Chief Executive Officer of the Company, knew from the inception of Project Spinnaker that Defendants had already determined to sell the tax-exempt bond portfolio, and that this

[25] *See, e.g., In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) ("Any information that sheds light on whether class period statements were false or materially misleading is relevant"); *In re Vivendi Universal, S.A. Sec. Litig.*, 2004 U.S. Dist. LEXIS 7015, at *22 (S.D.N.Y. April 22, 2004) (noting that "plaintiffs may rely on post-class period data to confirm what a defendant should have known during the class period"); *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 846 (9th Cir. 2003) (requirement for pleading scienter may be satisfied by "relying on post-class period admissions, which allegedly indicate Defendants' 'contemporaneous knowledge about these subjects during the Class Period when they made the false and misleading statements'") (internal citations omitted).

"transformational" transaction, which would inevitably result in a reduction in the dividend, was expected to close before the end of 2007. *See* ¶¶5-7, 86, 148. *See Aldridge*, 284 F.3d at 80. As was the case in *Aldridge*, Defendants' nondisclosures "could hardly have been inadvertent," and these admissions provide "strong inferences" of Defendants' scienter. *Id.* Tellingly, Defendants do not offer a single opposing inference, much less a plausible one, to be drawn from Schnitzer's admissions. Under *Tellabs*, since Defendants have failed to provide any plausible non-culpable explanation for their conduct, the Court must find that Lead Plaintiff has alleged a "cogent and compelling" inference of scienter.[26]

3. The Tax-Exempt Bond Portfolio and Project Spinnaker Were at the Core of Centerline's Business, and the Magnitude of the Sale to Freddie Mac Give Rise to a Strong Inference of Scienter

Defendants do not dispute that the Company's tax-exempt bond portfolio – which had assets of approximately $2.8 billion, as well as the income it generated and the tax-exempt dividends that were made possible by it – were core to Centerline's business and investment premise. Indeed, Defendant Schnitzer's admission that the sale to Freddie Mac was a "transformational transaction" also confirms that the bond portfolio and plans to sell that portfolio through Project Spinnaker were central to the Company's frequently touted goal of becoming "more of an investment manager." Therefore, the Individual Defendants, who were among the Company's most senior officers and trustees, knew or were reckless in not knowing about the plan to sell the bond portfolio and the impact of this transaction on the Company and its shareholders, including slashing its annual dividend from

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[26] *See Transit Rail, LLC v. Marsala*, 2007 U. S. Dist. LEXIS 52822, at *34-35 (W.D.N.Y. July 20, 2007). *See also In re Converium Holding AG Sec. Litig.*, 2007 U.S. Dist. LEXIS 67660, at *7-9 (S.D.N.Y. Sept. 14, 2007) (denying defendants' motion to dismiss and holding that a defendant's purported good faith reliance on an accountant is not a plausible non-culpable explanation for defendant's conduct that creates a "compelling" opposing inference that would warrant dismissal of the complaint).

$1.68 per share to $0.60 per share and materially reducing the tax-exempt benefits. *See* ¶¶ 5-7, 43, 63-66, 148(d).

Defendants ignore the extensive case law holding what should be common sense – namely, that officers and directors of corporations are charged with awareness of facts and events "at the core of [a company's] business." *In re JPMorgan Chase Sec. Litig.*, 363 F. Supp.2d 595, 628 (S.D.N.Y. 2005). As the Ninth Circuit recently explained, "[a]llegations regarding management's role in a corporate structure and the importance of the corporate information about which management made false or misleading statements may also create a strong inference of scienter when made in conjunction with detailed and specific allegations about management's exposure to factual information within the company." *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008).[27]

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[27] *See also, e.g., Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989) (strong inference of scienter pled where plaintiffs alleged "facts from which one can reasonably infer that sales to [customers in China] were to represent a significant part of [the company's] business"); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 988 (9th Cir. 2008) (finding scienter adequately alleged as to Company's CEO and CFO because their responsibilities for the day-to-day operations made it "hard to believe that they would not have known about stop-work orders"); *In re Atlas Air*, 324 F. Supp. 2d at 490 ("When a plaintiff has adequately alleged that the defendant made false or misleading statements, the fact that those statements concerned the core operations of the company supports the inference that the defendant knew or should have known that statements were false when made" and "if a plaintiff can plead that a defendant made false or misleading statements when contradictory facts of critical importance to the company either were apparent or should have been apparent, an inference arises that high-level officers and directors had knowledge of those facts by virtue of their positions with the company"); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 709 (7th Cir. 2008) ("The [products at issue] were Tellabs' most important products...That no member of the Company's senior management who was involved in authorizing or making public statements about the demand for the [products] knew they were false is very hard to credit"); *In re Sears, Roebuck & Co. Sec. Litig.*, 291 F. Supp. 2d 722, 727 (N.D. Ill. 2003) ("Logically, defendants in their positions would be expected to have knowledge of the facts regarding the credit card portfolio at the time they were making statements about the portfolio or signing off on SEC filings. Plaintiffs have sufficiently alleged facts leading to a 'strong inference' of scienter"); *In re Ashanti Goldfields Sec. Litig*, 184 F. Supp. 2d 247, 270 (E.D.N.Y. 2002) (defendant's public statements regarding company's investments demonstrates personal knowledge of those investments). *In re American Express Co. Sec. Litig.*, 2008 WL 4501928 (S.D.N.Y. Sept. 26, 2008), cited by Defendants, does not support their argument. The court held that conclusory allegations that defendants knew or should have known of the fraud because of their executive or managerial positions is not entitled to any weight. In this case, however, Defendant Schnitzer's admission that the "transformational" transaction

As Lead Plaintiff alleges, Defendants told investors during the Class Period that Defendant Schnitzer, the Company's CEO, President and Managing Trustee, "directs the day-to-day operations of the Company and is responsible for corporate development and strategic planning," and, therefore, the only reasonable inference is that he had actual knowledge of Project Spinnaker at all times throughout the Class Period. ¶¶63-66, 148(e). Defendant Levy was the CFO of the Company and also knew or should have known about the "transformational" transaction because he was the head of the Capital Markets Group, which normally would have been responsible for working on such a transaction. ¶¶31, 63-66. Furthermore, the facts alleged in the Complaint make clear that Defendants Ross and Blau controlled Centerline and therefore it can reasonably be inferred that they had knowledge of Project Spinnaker and the sale of the tax-exempt bond portfolio at all relevant times. ¶¶9-10, 68-70, 148(f). The magnitude of Project Spinnaker – including transaction costs on the sale to Freddie Mac of approximately $89 million, which virtually wiped out 2007 Cash Available for Distribution (CAD), and the complexity and duration of the one-year long project – is an additional indicator of Defendants' knowledge or reckless disregard of the facts. *See* ¶¶58-62, 66.[28]

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was "in the works" for "close to a year" raises a strong inference of scienter. *Medis Investor Group v. Medis Technologies, Ltd.*, 2008 WL 3861364 (S.D.N.Y. Aug. 18, 2008), is equally unhelpful to Defendants. In that case, the court held that fraudulent intent cannot be inferred merely because a public statement lacks detail and plaintiff alleges that defendants should have said more about a particular subject. The court explained that even though investors might have gained additional insight into the transaction in question if more details about it had been disclosed, "the non-disclosure of this information did not make anything in the actual Press Release false or misleading." *Id.* at *6. In contrast, here, Lead Plaintiff does not allege that Defendants should have given more detail about the bond portfolio and the dividend, but instead alleges that Defendants should have told the full truth about their ongoing activity to sell the portfolio, reduce the dividend and change the basic investment premise of the Company.

[28] *See Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000); *Katz v. Image Innovations Holdings, Inc.*, 542 F. Supp. 2d 269, 273 (S.D.N.Y. 2008) (finding the magnitude of the alleged fraud provides some additional circumstantial evidence of scienter). In *Rothman*, for example, the Second Circuit agreed that the "magnitude" of the company's write-off "renders less credible the proposition" that during the class period defendants believed that they were properly capitalizing certain expenses. 220 F.3d at 92. *See also In re Scottish Re Group Sec. Litig.*, 524 F. Supp. 2d 370, 394 (S.D.N.Y. 2007). Similarly, here, the magnitude of

C. The Complaint Alleges Defendants' Motive to Commit Fraud

Defendants disregard Lead Plaintiff's allegations establishing strong circumstantial evidence of Defendants' conscious misbehavior or recklessness, and instead attack Lead Plaintiff's motive allegations. Def. Br. at 24-28. However, as the Second Circuit has repeatedly and unequivocally held, and as Defendants concede, pleading "motive and opportunity" to commit fraud is just ***one*** of ***two distinct ways*** to establish a strong inference of fraudulent intent. *See, e.g., Novak*, 216 F.3d at 307. In *Tellabs*, the Supreme Court held that "motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, [but] absence of a motive allegation is not fatal," and furthermore, "the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint." *Tellabs*, 127 S. Ct. at 2511. ***Where, as here, a plaintiff has sufficiently pled that defendants knew their statements were materially misleading or otherwise acted with "conscious misbehavior or recklessness," "the Court need not reach the question of motive."*** *In re Nortel Networks*, 238 F. Supp. 2d 613, 630 (S.D.N.Y. 2003) (emphasis added).

Although a showing of motive and opportunity is not required at this stage, Lead Plaintiff has adequately alleged that the Individual Defendants had strong motives to commit fraud. Defendant Ross had compelling personal financial incentives for causing Centerline to sell the tax-exempt bond portfolio, including the opportunity to take Centerline private at a "bargain basement" price once the price of Centerline stock dropped, as Defendant Ross knew it would once the sale to Freddie Mac was

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the sale to Freddie Mac is enormous by any measure, and renders "less credible" both the idea that Defendants did not know about Project Spinnaker during the Class Period and the notion that they did not know they had a duty to disclose material facts about the project.

finally disclosed. ¶¶9-10, 68-70, 148(h).[29] In addition, Defendants Ross and Blau were motivated to engineer the sweetheart deal to invest $131 million in Centerline in exchange for 11% Cumulative Preferred Stock, which increased Defendant Ross' voting control of Centerline from almost 18% to almost 30%. ¶¶9-10, 68-70.

Defendants distort Lead Plaintiff's motive allegations when they maintain that it would be "irrational" for any of the Individual Defendants to do anything that would result in the suppression of Centerline stock prices because the TRCLP transaction would provide Defendants Ross and Blau with approximately 12.2 million new convertible preferred shares at $10.75 per share, an allegedly "'uneconomic'" proposition. *See* Def. Br. at 25. Defendants, however, miss the point once again. Any purported "uneconomic" aspect to the sweetheart deal with Centerline was far outweighed by its concrete benefits to Defendants Blau and Ross, who increased their voting control over Centerline from 18% to 30% and were able to divert the Company's income from public shareholders to themselves by obtaining an 11% preferred stock. As for Defendant Ross, the concrete financial

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[29] Prior to the December 28, 2007 announcement of the sale of the tax-exempt bond portfolio, the closing price of Centerline stock was $10.27 per share on December 27, 2007. At the beginning of the Class Period on March 12, 2007, the price of Centerline stock was $19.75. During the Class Period, the price of Centerline stock was as high as $17.39 on June 5, 2007. However, on December 28, 2007, after the announcement, the price dropped 25% to close at $7.70 per share. Since then, the price of Centerline stock has dropped steadily, closing at $1.70 on July 3, 2008. ¶68.

Prior to the sale of the tax-exempt bond portfolio, defendant Ross had spoken to investment bankers about the possibility of taking Centerline private. He controlled almost 18% of the voting shares of Centerline before the sweetheart deal with TRCLP and almost 30% after the deal. As alleged above, his partner in TRCLP, defendant Blau, controlled an additional 13% of Centerline. With the price of Centerline stock vastly diminished and his control of Centerline vastly enhanced, defendant Ross has resumed his contacts with investment bankers about taking Centerline private, but at a much lower price than he would have had to pay prior to the announcement of the sale of the tax-exempt bond portfolio. ¶69. Therefore, defendant Ross had a compelling personal and financial motivation for concealing the sale of the tax-exempt bond portfolio so that the price of Centerline stock would be driven down by the market's surprise and the flight of Centerline's income-oriented investors upon learning of this startling "transformational transaction." Defendant Ross stands to benefit directly from these events. ¶70.

benefits resulting from the opportunity to take Centerline private at a much lower price after the sale of the bond portfolio also greatly outweighed any uneconomic purported aspect of the Related transaction.[30]

In other words, ***"defendant's contention that they stood to profit from an increase in the stock prices of [Centerline] shares...does not foreclose the possibility that they stood to gain even more from a decline in the price of [Centerline] stock."*** *Internet Law Library*, *Inc. v. Southridge Capital Mgmt., LLC*, 223 F. Supp. 2d 474, 484 (S.D.N.Y. 2002) (emphasis added).[31] Thus, there was nothing "irrational" about Defendants' scheme, and, even if there were, the inference of scienter is not negated by the irrationality of a scheme, since "irrational schemes have as much potential to defraud investors as do rational schemes." *Robbins v. Moore Med. Corp.*, 788 F. Supp. 179, 191 n.8 (S.D.N.Y. 1992). Moreover, "it should go without saying that, at the motion to dismiss stage, it is rarely proper for a court to decide that a plaintiff's allegations make no sense." *In re eSpeed*, 457 F. Supp.2d at 288.[32]

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[30] *See, e.g., Glidepath Holding B.V. v. Spherion Corp.*, 2007 WL 2176072, *14 (S.D.N.Y. July 15, 2007) ("both *Cohen* and *Turkish* stand for the proposition that a business seeking to avoid a loss or induce a beneficial sale has sufficient motive to commit fraud to raise the requisite 'strong inference' of fraud under Rule 9(b).") (citing *Cohen v. Koenig*, 25 F.3d 1168, 1174 (2d Cir. 1994) and *Turkish v. Kasenetz*, 27 F.3d 23, 28 (2d Cir. 1994)).

[31] *See also Nanopierce Technologies, Inc. v. Southridge Capital Mgmt. LLC*, 2002 WL 31819207, *4 (S.D.N.Y. Oct. 10, 2002) (rejecting defendants' argument that 'they lacked any motive to manipulate downward the price" of the Company's stock, "because as stockholders (and holders of warrants to purchase additional shares) they stood to profit if the stock price went up"; court found that the "net economic effect" of a drop in the company's stock price could result in a financial benefit for defendants, and "[e]ven if it turns out that Defendants ultimately lost money on their investment, that fact might not be dispositive to a finding of scienter").

[32] The citations offered by Defendants are not to the contrary. In both *Davidoff v. Farina*, 2005 WL 2030501, at *11 & n.19 (S.D.N.Y. Aug. 22, 2005), and *Atlantic Gypsom Co., Inc. v. Lloyds Int'l Corp.*, 753 F. Supp. 505, 514 (S.D.N.Y. 1990), the plaintiffs' theories of scienter failed because they hinged on allegations that the defendants went out of their way to lose huge sums of money by investing in ventures they "knew would fail." The facts of these cases are not even remotely similar to Lead Plaintiff's allegations,

Nor is there any merit to Defendants' argument that the Individual Defendants' lack of stock sales during the Class Period negates the inference of scienter, *see* Def. Br. at 27, particularly in view of Lead Plaintiff's allegations that Defendants Ross and Blau increased their control of Centerline in preparation for taking the Company private. Courts have repeatedly rejected the argument that the failure of certain defendants to sell stock undercuts a finding of scienter. *See, e.g., In re Ashanti Goldfields Sec. Litig.*, 2004 WL 626810, at *5 (E.D.N.Y. March 30, 2004) ("when the claim is based on conscious misbehavior or recklessness," net purchases or sales of stock by defendants "do not necessarily negate an inference of scienter on a motion to dismiss")[33] These allegations, together with Lead Plaintiff's other motive allegations and allegations of Defendants' conscious misbehavior or recklessness,[34] lend further support to the strong inference of scienter.[35]

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which do not in any sense defy economic reason. To the contrary, as set forth in the Complaint, Lead Plaintiff's allegations are entirely consistent with the assumption that Defendants acted in their own economic self-interest.

[33] *See also, e.g., Greebel v. FTP Software, Inc.*, 194 F.3d 185, 197 (1st Cir. 1999) (stating that "the PSLRA neither prohibits nor endorses the pleading of insider trading as evidence of scienter," but instead only requires that plaintiffs "meet the 'strong inference' standard"); *Wilson v. Bernstock*, 195 F. Supp. 2d 619, 638 (D.N.J. 2002) ("[I]ndividual corporate defendant's retention or sale of his or her stock holdings does not conclusively negate any inference of scienter" and will instead only undermine scienter allegations in the absence of other scienter allegations).

[34] Lead Plaintiff also alleges that Defendants Schnitzer and Levy were beholden to Defendant Ross for their lucrative employment, and had compelling personal motivations to serve Defendant Ross' interests, even if his interests conflicted with those of public investors. *See* ¶¶149-153. As explained in detail in the Complaint, Defendants Schnitzer and Levy were highly motivated to protect and further Defendant Ross' personal interests – including his interest in taking Centerline private at a "bargain basement" price – in order to protect their high salaries, bonus compensation, equity awards, the promise of continued lucrative employment, and the fear of other retribution by defendant Ross and other entities affiliated with defendant Ross and TRCLP. ¶153.

[35] Defendants' reliance on cases such as *Bay Harbour Mgmt. LLC v. Carothers*, 2008 WL 2566557, at *2 (2d Cir. June 24, 2008), and *Acito v. IMCERA Group*, 47 F.3d 47, 54 (2d Cir. 1995), is misplaced. While those cases may stand for the proposition that financial incentives such as bonuses, *standing alone*, may be insufficient to raise a strong inference of scienter, these same cases recognize that executive compensation and similar incentives may be combined with other allegations of motive to raise a strong inference of scienter. *See, e.g., Acito,* 47 F.3d at 54 (holding that the existence, *without more*, of executive

In short, other than advancing purely generic excuses for their involvement in the alleged scheme, Defendants have failed to provide any plausible non-culpable explanation that is more plausible than Lead Plaintiff's factual allegations of scienter. Based on the allegations of the Complaint, taken as a whole, a reasonable person is compelled to infer that Defendants acted with scienter.[36]

IV. LEAD PLAINTIFF ADEQUATELY PLED LOSS CAUSATION

A. The Standard for Pleading Loss Causation

Loss causation is the causal link between the alleged fraudulent misconduct and the Class members' losses. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). The Second Circuit has held that loss causation is adequately pleaded "if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by a disappointed investor." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172-73 (2d Cir. 2005). Thus, to establish loss causation, a plaintiff need only allege "that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Id.* at 74. *See also In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 510 (S.D.N.Y. 2005) ("the loss causation requirement will be satisfied if such conduct had the effect of concealing the circumstances that bore on the ultimate loss.").

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compensation dependent upon stock value does not give rise to a strong inference of scienter) (emphasis added).

[36] The additional cases cited by Defendants are distinguishable. For example, Defendants cite to cases involving failures to predict unexpected events, such as *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1129 (2d Cir. 1994), where the scienter allegations were insufficient because the plaintiff did "not allege that the company's disclosures were incompatible with what the most current reserve reports showed at the time the disclosures were made." In *Hampshire Equity Partners II, L.P. v. Teradyne, Inc.*, 2005 U.S. Dist. LEXIS 5261, at *11-12 (S.D.N.Y. Mar. 30, 2005), the court found the complaint deficient where the *only* scienter allegation was that senior executives "were made aware of the false and fraudulent statements" made on defendants' behalf and was "unsupported by a single additional reference in the Complaint."

Lead Plaintiff alleges that, through Defendants' false and misleading statements and omissions about Centerline's ongoing business strategy, Defendants concealed the fact that Project Spinnaker, a "transformational" transaction which would change the very nature of Centerline's business, was actually "in the works" from the very beginning of the Class Period, and also concealed and misrepresented the future of the tax-exempt bond portfolio, the dividend, and the Company's need for capital. *See* ¶¶67, 129, 141-145. Lead Plaintiff specifically alleges that these misstatements and omissions resulted in the artificial inflation in Centerline's stock prices, and that "[a]s a direct and proximate result of the December 28, 2007 disclosures, Centerline's stock price fell from $10.27 per share on December 27, 2007, to close at $7.70 per share on Friday, December 28, 2007, representing a 25% single-day decline, on unusually heavy trading volume of 4,152,688 shares." ¶144. By comparison, "the stock market, as reflected in the Dow Jones Industrial average, ***went up*** on December 28, 2007, closing at 13,365.87 on modest holiday volume of 2,420,510,000 shares traded, as compared to its close on the previous trading day of 13,359.61." *Id.* (emphasis added). These allegations are more than sufficient to plead loss causation under *Dura*.

B. Lead Plaintiff Has Sufficiently Alleged that the Price of Centerline Stock Declined After the Disclosure of Previously Hidden Facts

Lead Plaintiff's loss causation allegations demonstrate that the Class member's damages were caused by Defendants' scheme to defraud, and negate any inference that Lead Plaintiff's damages were the result of "the credit crisis and external market conditions," as Defendants argue. *See* Def. Br. at 33 and n.29. Defendants' assertion that Lead Plaintiff cannot plead loss causation because "the deepening marketwide credit crisis" could have caused the decline in Centerline stock prices *(see* Def.

Br. at 32-33), is both factually and legally incorrect.[37] ***First,*** the only reasonable inference to be drawn from the allegations of the Complaint is that general market conditions did ***not*** cause the decline because Centerline stock plummeted on December 28, 2007, the day of the corrective disclosures, but on that date ***the market actually went up, not down***. *See* ¶144. Indeed, taken to its logical conclusion, Defendants' argument would mean that a plaintiff could never plead loss causation as long as general market conditions were negative – a ridiculous proposition. ***Second,*** Defendants' argument should not even be considered, to the extent it seeks to rely on evidence outside the Complaint.[38] ***Third,*** where, as here, a plaintiff shows that the corrective disclosures were related to the subject matter of the fraud, but defendants argue that some other event caused the stock drop, the disputed facts are inappropriate for resolution at the pleading stage, and the motion to dismiss should be denied.[39]

Defendants also contend that Lead Plaintiff should be required to separate as causal factors the disclosures about the sale to Freddie Mac, the reduction in the dividend, and the deal with TRCLP

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[37] As the Second Circuit confirmed in *Lentell*, the existence and effect of an industry-wide financial meltdown cannot be the basis for dismissal without expert discovery. *Lentell*, 396 F.3d at 175 ("'If the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation...is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss.'") (ellipsis in original) (quoting *Emergent Capital Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 198 (2d Cir. 2003). Furthermore, "a plaintiff is not required to plead that her economic loss was caused solely by the alleged fraudulent scheme." *In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d 266, 297 (S.D.N.Y. 2006) (emphasis added). *See also*, *In re Openwave Sys. Sec. Litig.*, 528 F. Supp. 2d 236, 253 (S.D.N.Y. 2007) (whether decline linked to alleged scheme "was attributable to some other cause...is a matter for proof at trial.").

[38] *See Guerra v. Teradyne, Inc.*, 2004 WL 1467069 (D. Mass. Jan. 16, 2004) (striking submission of stock index on motion to dismiss because "the state of the industry in general is not relevant to whether the complaint states a cause of action.").

[39] *See, e.g., Emergent Capital*, 343 F.3d 197; *Bristol-Myers*, 2008 WL 3884384, at *16; *In re Openwave Sys. Sec. Litig.*, 528 F. Supp. 2d at 256; *In re Converium Holding AG Sec. Litig.*, 2007 U.S. Dist. LEXIS 67660 at *11; *In re WorldCom*, *Inc. Sec. Litig.*, 294 F. Supp. 2d at 392, 428-29 (S.D.N.Y. 2003).

(*see* Def. Br. at 32-34), but there is no such requirement at the pleading stage. As the court in *Bristol-Myers* correctly emphasized, the applicable "pleading and plausibility standard" for pleading loss causation means that on a motion to dismiss, "[t]he Court need not make a final determination as to what losses occurred and what actually caused them." 2008 WL 3884384, at *16. At this early stage of the litigation, it would be virtually impossible to make a definitive determination as to which element of the fraud was responsible for the large drop in the price of Centerline stock on December 28, 2007. Accordingly, as long as the Court finds it "plausible" that the price drop on December 28, 2007 "was the result – at least in part – of the disclosure[s]," then loss causation is properly alleged. *Id.* ***"Any further requirement to ascribe the actual amount of the loss to one cause or another does not arise on a motion to dismiss."*** *Id. (Emphasis added.)*[40] A corrective disclosure need not reveal "the precise loss attributable to [the] fraud," or the precise manner in which the fraud occurred. *See Lentell*, 396 F.3d at 177.[41]

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[40] Defendants are forced to rely on unhelpful cases such as *Greenberg v. Crossroad Sys.,* 364 F.3d 657, 666 (5th Cir. 2004), an out-of-Circuit, pre-*Dura* case decided on *summary judgment.* (*See* Def. Br. at 32). However*, Greenberg* does not even address loss causation, much less hold that, on a *motion to dismiss*, a plaintiff must identify the precise amount by which a stock's price decline was due to the disclosure of fraud, or specify which elements of the fraud caused the decline.

[41] Plaintiffs in *Lentell* alleged that "buy" and "accumulate" recommendations made by Merrill Lynch with respect to certain Internet-related securities caused them to suffer losses. 396 F.3d at 164-67. The court found their allegations inadequate, explaining:

> ***However, plaintiffs do not allege that the subject of those false recommendations (that investors should buy or accumulate [the] stock), or any corrective disclosure regarding the falsity of those recommendations, is the cause for the decline in stock value that plaintiffs claim as their loss. Nor do plaintiffs allege that Merrill Lynch concealed or misstated any risks associated with an investment in [the stock], some of which presumably caused plaintiffs' loss.***

396 F.3d at 175 (emphasis added).

In stark contrast to the plaintiffs in *Lentell*, Lead Plaintiff here ***does*** allege that the subject of Defendants' misrepresentations and omissions, *i.e.*, the true facts about the bond portfolio, the dividend, and Centerline's liquidity, together with Defendants' belated corrective disclosures on December 28, 2007, were

The only other argument Defendants advance on loss causation – that Lead Plaintiff "fail[s] to identify any corrective disclosures ***prior*** to December 28, 2007" – is just another way of saying that Lead Plaintiff does not allege any partial disclosures. *See* Def. Br. at 29-31 (emphasis in original). This is evident from the face of the Complaint.[42] The chain of loss causation alleged by Lead Plaintiff is clear, and it plainly gives Defendants "some indication of the loss and the causal connection" that Lead Plaintiff "has in mind." *Dura,* 544 U.S. at 343.[43]

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the cause of the decline in Centerline's stock price that caused Lead Plaintiff's losses. *See* ¶¶141-145. Also unlike the *Lentell* plaintiffs, Lead Plaintiff here clearly alleges that Defendants "concealed" and "misstated" risks associated with their investment in Centerline, including the risk that the dividend and its tax-exempt component would be reduced. *See* ¶¶5-8, 23, 71-118.

[42] To the extent Defendants are suggesting that Lead Plaintiff attributes the entire decline in Centerline's stock price from the beginning to the end of the Class Period to the fraud, they are wrong. The precise extent to which Centerline's stock price decline was due to disclosure of the fraud will be the subject of expert testimony. *See Lentell*, 396 F.3d at 175. Furthermore, the fact that Centerline stock "trended downward" during the Class Period, as Defendants point out (*see* Def. Br. at 30), does not in any way negate the significance of the huge 25% single-day decline in the price of Centerline stock on December 28, 2007, the day of the disclosures.

[43] Defendants' extensive reliance on factually dissimilar cases brought against third parties such as securities analysts and outside auditors simply underscores the weakness of their loss causation arguments. In addition to *Lentell*, Defendants cite several cases involving analysts' allegedly fraudulent coverage of an issuer's stock. *See, e.g., In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 2008 WL 2324111 (S.D.N.Y. June 4, 2008)*; In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 568 F. Supp. 2d 349 (S.D.N.Y. 2008); *60223 Trust v. Goldman Sachs*, 540 F. Supp. 2d 449 (S.D.N.Y. 2007); *Joffee v. Lehman Bros., Inc.*, 2005 WL 1492101 (S.D.N.Y. June 23, 2005). However, the Complaint here alleges that Defendants made false and misleading statements about provable *facts*, not opinions. Hence, the cases Defendants cite are distinguishable because they involved claims arising from analysts' *opinions.* Moreover, in the analyst cases – unlike this case – the plaintiffs failed to plead either corrective disclosure or materialization of a concealed risk. *See, e.g., Merrill Lynch,* 2008 WL 2324111, at *6. To the extent the plaintiffs did attempt to allege concealed risks in the analyst cases, the courts found that those risks were in fact disclosed during the relevant class periods – exactly the opposite of the situation here. *See, e.g., Merrill Lynch*, 568 F. Supp. 2d at 362-66; *Goldman*, 540 F. Supp. 2d at 459-61. Further, it is obvious that this is not a case where "the stock had already lost almost all its value" by the end of the Class Period. *See Merrill Lynch,* 568 F. Supp. 2d at 364; *Goldman,* 540 F. Supp. 2d at 461.

Cases alleging that an accountant's audit opinions caused the plaintiff's losses are similarly inapposite. *See Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007)*; In re AOL Time Warner, Inc. Sec. Litig.*, 503 F. Supp. 2d 666 (S.D.N.Y. 2007); *In re The Warnaco Group Sec. Litig.*, 388 F. Supp. 2d 307 (S.D.N.Y. 2005). The question of whether an auditor caused a plaintiff's loss separately from the losses caused by an issuer's allegedly false statements is simply not relevant here, and unlike the cases

V. THE COMPLAINT ALLEGES CONTROL PERSON LIABILITY AGAINST THE INDIVIDUAL DEFENDANTS

In a footnote, Defendants challenge Lead Plaintiff's control person claims under Section 20(a). *See* Def. Br. at 34 n.30. Here, however, the Complaint adequately alleges Section 20(a) claims against Defendants Schnitzer, Levy, Ross, and Blau. The Complaint adequately alleges primary violations of Section 10(b) against Centerline and that Defendants Schnitzer, Levy, Ross, and Blau controlled Centerline ¶¶30-38, 177-79. *See, e.g., In re Parmalat*, 375 F. Supp. 2d at 278 (Section 20(a) claim adequately alleged where plaintiff pleads (1) a primary violation by a controlled person, and (2) control of the primary violator by the defendant).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety.[44]

Defendants cite, Lead Plaintiff does not predicate its losses on "revelations regarding numerous factors beyond the scope of [Defendants'] liability." *See AOL Time Warner,* 503 F. Supp. 2d 677. Moreover, this case, unlike many of the cases cited by Defendants, does not involve partial disclosures and the question of whether the partial disclosures were corrective. *See id.* at 679-80; *Garber v. Legg Mason*, 537 F. Supp. 2d 597, 617 (S.D.N.Y. 2008). Nor is this a case like *Joffee*, 2005 WL 1492101 at *9, where the complaint relied solely on boilerplate allegations of price inflation and "contained no allegations of a causal connection between the alleged misrepresentations and a subsequent economic loss suffered by the Plaintiffs." *See also, e.g., In re Sara Lee Corp. Sec. Litig.*, 2006 WL 1980199, *7 (N.D. Ill. July 10, 2006). Defendants' reliance on *In re China Life Sec. Litig.*, 2008 WL 4066919 (S.D.N.Y. Sept. 3, 2008) is also unavailing because in that case, unlike this case, there was no disclosure of adverse facts which caused the stock price to drop.

[44] In the event the Court grants, in whole or in part, the motion to dismiss, Lead Plaintiff respectfully requests leave to amend. *See* Fed. R. Civ. P. 15 (a) (stating "leave [to amend] shall be freely given when justice so requires.").

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Respectfully submitted,

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