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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

ANGELO MOZILO, DAVID SAMBOL, and ERIC SIERACKI,

Defendants.

CV 09-03994 JW

ERIC P. SIERACKI'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date:	October 19, 2009
Time:	1:30 PM
Judge:	Hon. John F. Walter
Courtroom:	Courtroom 16 Spring Street Courthouse

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I. INTRODUCTION

Plaintiff's Opposition brief (the "Opp") fails to refute Eric Sieracki's showing in his Motion To Dismiss that Plaintiff fails to state a claim. Rather, it makes even clearer that this case should be dismissed with prejudice.

First, the Opposition consistently resorts to Regulation S-K Item 303 as the supposed basis for a duty to disclose. But a failure to disclose information referenced by Item 303 does not constitute a violation of the antifraud provisions upon which Plaintiff sues (§10(b) of the Exchange Act and Rule 10b-5) because the disclosure and materiality standards required to show a violation of §10(b) / Rule 10b-5 are very different from and higher than the standards to show noncompliance with Item 303. Plaintiff cannot legitimately dispute that it must plead a material misstatement at penalty of dismissal, a burden the Complaint does not meet.

Second, the Opposition fails to refute Sieracki's point that in light of his undisputed consistent ***purchases*** of Countrywide stock during the multiyear period in which he supposedly participated in a scheme to fraudulently inflate the stock price—as well as Countrywide's detailed disclosures during that period—the fraud claims against him fail to meet the plausibility standard of *Bell Atlantic v. Twombley* and *Ashcroft v. Iqbal*. Indeed, Plaintiff's claim requires the Court to accept a scenario that is not just implausible but completely irrational. Plaintiff apparently is unaware that *Conley v. Gibson* has been overruled, and none of Plaintiff's cases included the factors that render the claim here implausible.

Third, the Opposition fails to refute Sieracki's point that Countrywide did ***not*** state that it had conservative or high loan origination standards as Plaintiff asserts, but ***did*** disclose the information that Plaintiff asserts was concealed—as proven by the fact that the Complaint itself alleges a "trend" towards liberalized standards ***based on the same disclosures that Plaintiff asserts were inadequate***. The Opposition fails to quote Countrywide's actual statements to support its arguments as to what the Company supposedly said, and it largely ignores Countrywide's risk

disclosures. Tellingly, Plaintiff seeks to prevent the Court from assessing who is correct in this dispute, by urging that it not consider the SEC filings at issue.

Finally, Sieracki showed that the Complaint fails to state a claim based on the alleged failure to disclose the subjective opinions of two individuals, Messrs. Mozilo and McMurray, concerning pay option ARMs, unspecified edits to SEC filings, or anything else. Case law and logic recognize that because there is a spectrum of opinion within every large organization, there is no duty to disclose each and every opinion. Plaintiff offers no response to this logic and case law, and no assertion in any event that the Complaint alleges that Sieracki agreed with Mozilo or McMurray. Nor does Plaintiff allege what McMurray would have changed in any SEC filing, which means it is impossible to conclude that any filing contained a material misstatement or omission for lack of his purported edits. Rather, Plaintiff again resorts to alleging non-compliance with Item 303, which is inadequate to allege fraud.

II. FUNDAMENTAL THRESHOLD ERRORS OF LAW UNDERMINE PLAINTIFF'S OPPOSITION

Prior to addressing Plaintiff's failure to surmount the arguments of his opening brief, Sieracki addresses two errors replete throughout the Opposition.

A. The Disclosure Standards Of Item 303 Substantially Differ From The Standards Of Section 10(b)

Importantly, whenever Plaintiff contends that a disclosure was inadequate, it resorts to Regulation S-K Item 303, 17 C.F.R. §229.303. *See* Opp at 16:3-14, 21:8-9, 21:22-28, 22:10-16, 25:6-16, 26:6-17.

However, a purported failure to disclose under Item 303 does not equate to a violation of Section 10(b) or Rule 10b-5. Plaintiff acknowledges why this is so (Opp 17:4-5): Item 303 uses a different materiality standard than *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which provides the standard for Section 10(b) and Rule 10b-5, and hence the disclosure standards for Item 303 "extend considerably

beyond those required by 10b-5." *Oran v. Stafford*, 226 F.3d 275, 287, 288 (3d Cir. 2000). Under Item 303, even assuming that management knows there is a "trend, demand, commitment, event or uncertainty," in deciding whether to make a disclosure, management must: (1) assess whether the known trend is likely to come to fruition, and if it is not reasonably likely no disclosure is required; or (2) evaluate the consequences of the trend on the assumption that it will come to fruition, with disclosure required unless management determines that a material effect is not reasonably likely to occur. This test "varies considerably from the general test for securities fraud materiality" of *Basic*, which premises disclosure "'upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" *Id.*, *quoting Basic*, 485 U.S. at 237. Because the disclosure and materiality standards "differ significantly," a failure to disclose under Item 303 "does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5." *Oran*, 226 F.3d at 288 (citation omitted). Numerous courts agree.[1]

Here, Plaintiff makes no attempt to allege a failure to disclose under the standard that actually applies to securities fraud, as opposed to Item 303. The Complaint contains no allegations showing that it was reckless of Sieracki not to anticipate and disclose that incrementally widened loan standards, affecting a quantity of loans Plaintiff fails to identify, had any indicated probability of causing the seizing up and virtual overnight elimination of liquidity in the secondary market in August 2007. Moreover, Sieracki showed that none of the supposed "warnings" about a lack of access to the secondary market were made to him (as distinguished from others). *See* Sieracki Memorandum In Support Of Motion To Dismiss ("SM") at 8 n.5. Plaintiff does not respond, and hence its case fails at this threshold. While

[1] *See, e.g., Securities & Exchn. Comm'n v. Todd*, No. 03 CV 2230 BEN, 2007 WL 1574756, *6 (S.D. Cal. May 30, 2007); *In re Marsh & McLennan Cos. Sec. Litig.*, MDL No. 1744, 2006 WL 2057194, *15 (S.D.N.Y. July 20, 2006); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1117-18 (N.D. Cal. 2003).

the Opposition asserts that Sieracki was "warned" that delinquencies would rise and of "increased balance sheet risk" (Opp at 11:25-26, 29:5-9), it does little more than string cite to paragraphs of the Complaint. It fails to point to any information in those paragraphs that would have alerted Sieracki to any contradiction between Countrywide's internal status and its public filings, and fails to address Sieracki's analysis of why the allegations do not suffice. For example, Sieracki explained that the "warnings" alleged in paragraphs 36 and 37 of the Complaint lacked any magnitude or context and hence lacked meaning (SM at 22:18-25 & n.16); and that Countrywide publicly disclosed the information referenced in the "flying blind" e-mail so touted by Plaintiff. *Id.* at 20:1-8. Plaintiff does not respond to either point.

Moreover, the Complaint does not allege facts showing non-compliance with Item 303 even had that regulation applied (which it does not). Item 303 refers to the assessment of "management." Neither Item 303 nor Plaintiff's gloss thereupon refers to the opinions of ***individual members*** of management. To the contrary, there may be reasonable differences of opinion as to whether a "trend" exists and will persist, such that a decision not to disclose some persons' opinion that a trend has materialized does not violate even Item 303. *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 218 (5th Cir. 2004) (brought under Securities Act §11, not under §10(b)) (decrease in price of natural gas not required to be disclosed under Item 303, as it was not unreasonable to consider the decline in prices as not yet constituting a trend). Yet all that the Complaint asserts was not disclosed are the alleged opinions of two persons, Mozilo and McMurray. It does not allege that "management," which bespeaks a consensus—let alone Sieracki as an individual—believed something yet caused Countrywide to omit it from its public filings.

In sum, Item 303 is irrelevant to this motion as are the allegations regarding Countrywide's internal disclosure guidelines and procedures, which Plaintiff equates to Item 303. Opp §III(A)(5)(b). Moreover, it is not a violation of §10(b) for a corporation to fail to follow its internal procedures. To hold otherwise would

give internal corporate procedures the force of federal law.

B. It Is Plaintiff's Burden To Plead A Material Misstatement

Plaintiff also asserts that granting Sieracki's motion requires the Court to make factual determinations inappropriate on a motion to dismiss. *See* Opp at 23:2-24:2. Plaintiff is wrong. The Court need not make any factual findings or assess the truth on the market as disclosed by sources other than Countrywide. All the Court need do is read Countrywide's public statements to see that they do not say what Plaintiff claims they say, but rather disclose what Plaintiff asserts was concealed. Courts routinely undertake such a review on motions to dismiss securities cases, as it is the plaintiff's burden to identify a misstatement and plead that it was material. *See, e.g., Greenhouse v. MGC Cap. Corp.*, 392 F.3d 650 (4th Cir. 2004) (even if CEO lied in SEC filing about completing final year of college, misrepresentation was not material; §10(b) claim dismissed). Moreover, where a claimed misrepresentation has a quantitative aspect (such as Plaintiff's challenge to the percentage of loans in the categories "prime" and "subprime" and the claimed omissions concerning widening loan standards), a complaint must plead a material difference between the numbers as disclosed and the actual numbers that allegedly should have been disclosed.[2]

III. SIERACKI'S STOCK PURCHASES AND FULSOME DISCLOSURES SHOW THAT THE CLAIMS AGAINST HIM FAIL TO MEET THE PLAUSIBILITY STANDARD OF *BELL ATLANTIC* AND *IQBAL*

Sieracki showed that the allegations of fraud against him fail to meet the plausibility standard set by *Bell Atlantic v. Twombley*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S.Ct. 1937 (2009). SM §III(D). To the contrary, Plaintiff's case as alleged is not just implausible, it is irrational. It is

[2] *See, e.g., In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1089 (9th Cir. 2002) (falsity not pleaded where complaint did not allege amount of revenue recognized during quarter on challenged contract, and hence did not plead material variance between reported revenue and "actual" revenue).

undisputed that the judicially noticeable public record shows that Sieracki ***purchased*** rather than sold Countrywide stock during a multi-year period in which Plaintiff argues that he knew that Countrywide's stock price was artificially inflated by the omission of undisclosed but inevitable risk and therefore intentionally overpaid for the repeated purchases (positing a laughable "averaging up" strategy). Common sense dictates that purchase of stock known to be inflated is "a fact wholly inconsistent with fraudulent intent." *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 561 (S.D.N.Y. 2004). The Court recognized as much in holding that no possible inference of scienter existed as to officers of a mortgage lender who held onto their stock and suffered millions of dollars in losses during the period in which they supposedly were concealing its risk exposure. *In re Downey Sec. Litig.*, No. CV 08-3261-JFW, 2009 WL 2767670, *14 (C.D. Cal. Aug. 21, 2009). Added to this are: (1) Countrywide's fulsome disclosures during Sieracki's tenure as CFO, beyond the requirements of the law, *see* SM at 30:5-22; (2) Sieracki's lack of operational responsibilities in the functional area of which Plaintiff complains; and (3) the absence of allegations of false financial statements, an area pertinent to a CFO such as Sieracki. *Id.* at 4:11-15. Accusing Sieracki of fraud in light of these facts flies in the face of common sense, much less plausibility.

Plaintiff is not even in a position to respond to these arguments. It asserts that *Conley v. Gibson*, 355 U.S. 41 (1957) provides the standard for dismissal for failure to meet Rule 8(a) (Opp at 30:14-17, 32:8-10), when *Conley* was overruled by *Bell Atlantic*. 550 U.S. at 577. Plaintiff's cases do not apply the plausibility standard of *Bell Atlantic* and *Iqbal*, which invites courts to exercise their common sense and judgment, to assertions of fraud.[3] Tellingly, ***none*** of Plaintiff's cases concern a defendant who purchased rather than sold stock over a multi-year alleged

[3] *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049 (9th Cir. 2008), mentioned *Bell Atlantic* in considering the narrow topic of loss causation.

fraud rather than selling before the presumably inevitable crash. None of Plaintiff's cases involve a CFO that made disclosures more frequently than required by law, and disclosed with such detail. Nor does this case differ from *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407 (1994), where the absence of a stock sales (much less stock purchases) was a determining factor in the rejection of securities fraud claims. Here, too, the documents alleged in the Complaint do not constitute genuine "warnings" to Sieracki that Countrywide had made or would make false public statements. *See* Section II(A), *supra*.

IV. THE COMPLAINT DOES NOT AND CANNOT STATE A CLAIM BASED ON LOAN ORIGINATION STANDARDS

A. Plaintiff Creates A Straw Man Regarding Countrywide's Purported Public Description Of Its Business

Sieracki also showed that the Complaint's characterization of Countrywide's public statements about loan standards is mere "spin," as Countrywide did not actually state that its standards were high, low, conservative, liberal, or anything else. SM §III(A)(1). In response, Plaintiff asserts that Countrywide made positive statements regarding its "loan quality" and underwriting standards, supposedly characterizing those standards as "prudent" and averring that it was a primarily a "prime" lender. Opp at 1:10-11, 7:12-13, 10:24-25, 11:9-26.

This, too, fails upon scrutiny. Tellingly, Plaintiff seeks to prevent the Court from assessing the truth of this dispute. Plaintiff acknowledges that courts routinely take judicial notice of SEC filings. Nevertheless, Plaintiff urges the Court ***not*** to examine the same SEC filings it challenges, in order to assess whether they actually state what Plaintiff alleges they state, or to assess whether they actually disclose what Plaintiff alleges was not disclosed.

Equally tellingly, Plaintiff's brief does not quote actual text from SEC filings to support its assertions of what Countrywide said. *Shapiro v. UJB Financial Corp.*, 964 F.2d 272 (3d Cir. 1992), is instructive by way of contrast. Plaintiff

quotes *Shapiro* for the proposition that investors may expect substantial information about loan standards from a lender that states that it has "conservative" standards. Opp at 15:1, *quoting* 964 F.2d at 282. But the Opposition, like the Complaint, does not quote Countrywide as having stated that its loan standards were "conservative" or any synonym of "conservative."[4]

The closest thing to an exception proves Sieracki's point. The Opposition twice asserts that Countrywide said that had "prudent" underwriting guidelines. Opp at 7:12, 11:21. But the actual quotations referenced elsewhere in the brief reveal that the word "prudently" was used only in connection with pay option ARMs. *Id*. at 3:24-25, 5:12-13, 11:13. Pay option ARMs were only a portion of Countrywide's loan originations, and they were a portion that steadily declined over time. *See* SM at 21:7-13 & Appendix. By taking the word "prudent" out of context, Plaintiff conceals from the Court that its argument refers to a small and declining portion of loans for which there were special risk disclosures to boot (*see* Section V(B), *infra*), not the whole of Countrywide's loan program.

Hence, it remains unrefuted that Countrywide did not make the boasts about loan standards attributed to it. This also disposes of Plaintiff's fall-back position that Countrywide gave a purported "impression" of high underwriting standards, supposedly actionable under *Brody v. Transitional Hospitals Corp.*, 280 F.2d 997 (9th Cir. 2002). Opp at 2, 27:11-13. There is no textual basis in Countrywide's actual statements from which to gather this "impression"; that is, no affirmative representation that the state of affairs was that Countrywide used conservative or high loan standards. This was the same deficiency that led the Court to reject plaintiffs' argument in *Brody* itself. *See* SM at 26:4-15; *see also In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 513 (9th Cir. 1991) (dismissing allegation that

[4] Likewise, the Complaint is unlike the complaint in *In re Clearly Canadian Sec. Litig*, 875 F. Supp. 1412 (N.D. Cal. 2005), which alleged that a company made a specific quarterly revenue forecast (*see* Opp at 31:26) when actual results for the quarter to date undermined that forecast.

company's reports of strong historical financial results implied that results would continue into future, where no affirmative statement to that effect was made).

B. Plaintiff's Five Categories Of Alleged Misrepresentations Do Not Support Its Assertions

Plaintiff's failure to back up its arguments also is evident in the five categories of supposed misrepresentations set forth in Section II(B) of its brief. One of these categories, statements about pay option ARMs, is discussed separately because it was the subject of special risk disclosures. *See* Section V(B), *infra*. Analysis of the remaining four categories undermines Plaintiff's arguments.

Managing standards and risk. Plaintiff asserts that statements that Countrywide "managed credit risk" through credit policy, quality control, and surveillance activities and had "proprietary underwriting systems…that improve the consistency of underwriting standards" were rendered false by the use of exceptions in the loan processing system. Opp at 4:25-5:5. However, Sieracki explained that statements that a company ***managed*** standards or had proprietary systems to assist in this effort do not set forth any ***particular*** standard or level of risk that is being managed. SM at 8:9-9:3. Plaintiff ignores this point, and hence this category of statements cannot constitute representations of high underwriting standards. Plaintiff's argument also is a non sequitur. The Complaint does not allege that the use of exceptions is inconsistent with a management system, as distinguished from being an element of the system itself (like the use of committees to consider loan products, *see id.* at 8:18-20). In fact, Countrywide disclosed that its system included the ability to consider exceptions, and the substantial use of exceptions in some instances. *See* Sambol Reply § II(B)(3).

"Quality mortgages." The Opposition asserts that Countrywide stated that it consistently provided "quality mortgages." Opp at 5:6-8. It acknowledges that this phrase was (fleetingly) used when Countrywide said that it sought access to the secondary market by originating loans tied to the quality standards of the secondary

market. *See id* & Complaint ¶¶ 6, 31. As Sieracki explained, Countrywide did not characterize the secondary market standards as high, low, or anything in between (SM at 7:24-8:2), and it disclosed exactly what was being sold into the market in great detail. Nor does the Complaint allege that Countrywide's standards varied from secondary market standards, or that any discrepancy between the two would have been evident to Sieracki (who was not warned about a lack of access to the secondary market). To the contrary, Plaintiff acknowledges that Countrywide prospered via access to the secondary market for many years, until August 2007. SM at 12:8-10. The Opposition does not address these points, and hence they remain unrefuted. In all events, representations of "quality" are too vague to form the predicate of a securities claim. *See* Sambol Reply §II(B)(3)..

"Prime" and "subprime." Plaintiff argues that Countrywide somehow misrepresented "prime" and "subprime" by using a "definition" of the terms that that did not inform investors that some prime loans were made to persons with low FICO scores or reduced documentation. Opp at 5:19-6:5. But Plaintiff does not quote ***any*** definition of these terms in Countrywide's SEC filings prior to the 2007 10-K. Rather, all Plaintiff complains is that the percentages of loans reported in these categories did not include additional details about the loans therein, a theory that does not state a claim and ignores Countrywide's detailed disclosure about loan originations. *See* SM §III(C), Opp at 10:26-27. Moreover, even assuming that "prime" was "commonly understood" to mean loans to persons with FICO scores over 620 (*id.* at 14:8-9)—a proposition the Court has questioned[5]—Plaintiff does not and cannot allege that this was an ***authoritative*** definition that Countrywide was required to use by law, which means that a claim cannot be stated by analogy to the

[5] *See Downey*, 2009 WL 2767670 at *7 (according to a June 2007 industry publication, "the term 'subprime' is not consistently defined in the marketplace or among individual institutions.").

GAAP cases cited by Sieracki. SM at 26:20-27:1 & n.20.[6] Finally, Sieracki showed without refutation that the Complaint does not plead any material misstatement. In the July 24, 2007 conference call on which Plaintiff relies, McMurray stated that some low-FICO score loans may be categorized as prime, but also that some high-FICO score loans may be characterized as subprime. The Complaint does not plead the magnitude of the loans that supposedly were classified and reported in the "wrong" categories, and hence does not plead a material difference between the percentages of loans Countrywide disclosed in these categories and the numbers it "should have" disclosed. SM at 27:5-28:3.

C. Plaintiff Admits That Countrywide's Disclosures Revealed The Alleged Change In Business Strategy

Sieracki also showed that the Complaint cannot state a claim based on assertions of undisclosed loan standards because Countrywide disclosed detailed information in press releases, quarterly SEC filings, voluntary monthly operations reports filed with the SEC, and securitization prospectuses. *See* SM §III(A)(1). These latter disclosures are significant because what Countrywide ***actually*** said about its loan origination standards was that they were tied to the standards of the secondary market. The prospectus supplements for the secondary market securitizations disclosed loan-related information in extensive detail—including the FICO scores of which Plaintiff is so enamored. *See* SM §III(A)(2).

Plaintiff replies that this information was inadequate under Item 303 because it did not disclose in textual rather than numerical form that loan guidelines had expanded, or the "trend" to that effect and implications thereof. Opp at 21:18-28; *id*. at 22:19-20 (asserting failure to disclose "delinquency trend"). Plaintiff's argument fails at the outset, as it erroneously bases a supposed §10(b) duty to

[6] Plaintiff admits that "prime" is not a GAAP concept (Opp at 14:6-8), and hence there is even less of a warrant for Plaintiff to create a mandatory definition *ex post facto* in this case than there was in the GAAP cases cited by Sieracki.

disclose on Item 303. Plaintiff's argument also is contradicted by its Complaint. Countrywide disclosed a wealth of data (including delinquency rates) in real time, allowing anyone who wished to assess what, if any, "trend" existed. This is exactly what Plaintiff has done. As Defendants explained—***without refutation*** from Plaintiff—paragraph 18 of the Complaint alleges a supposed "trend" of expansion in loan guidelines based on the same public data (including the numbers in the categories "prime" and "subprime") that Plaintiff asserts was inadequate for that purpose. *See* SM at 10:12-11:1; Mozilo Reply §II(A)(1).

Apart from citing Item 303, Plaintiff ignores the contents of the prospectus supplements. Instead, Plaintiff pretends they do not exist. It asserts that they were not "readily available" to investors in Countrywide common stock, as the securitizations were issued by Countrywide subsidiaries. Opp at 22:1-2. But all the documents were filed with the SEC and posted on EDGAR. Plaintiff does not sue on behalf of investors in Countrywide common stock. It accuses the Defendants of misleading the market—investors as a whole. But investors have ready access to EDGAR. Hence, these prospectuses—which were signed by Sieracki—may be properly considered in this Motion for what they are: detailed disclosures that are utterly inconsistent with any claim that Sieracki concealed the truth from investors.

D. Plaintiff's Inability To Challenge Countrywide's Financial Statements Further Undermines Its Claim

Countrywide also disclosed the risks of its loan portfolio through its reporting of loan loss reserves. SM §III(A)(3). Plaintiff admits that it does not challenge the accuracy of the reserves or the financial statements in which they were included, but argues that additional disclosures were required under Item 303. Opp at 20:28-21:9. Item 303 is inapposite, and Plaintiff does not even address Sieracki's point that loan reserves account for and inform investors of risk.

V. THE COMPLAINT DOES NOT AND CANNOT STATE A CLAIM BASED ON DIFFERING INTERNAL OPINIONS

A. There Is Nothing Fraudulent About Non-Disclosure Of A Company's Internal Spectrum Of Opinion

Sieracki also demonstrated that all the Complaint asserts is a failure to agree with or disclose the alleged opinions of Mozilo and McMurray, neither of which constitutes securities fraud. *See* SM §III(B)(1). In response, Plaintiff argues that Mozilo and McMurray did not provide "opinions," but rather set forth "known trends" required to be disclosed under Item 303. Opp at 25:6-16.

At the outset, Plaintiff relies on misplaced semantics. Mozilo and McMurray allegedly provided their personal, subjective assessments. They were not objective "facts" or "known trends," although Plaintiff now asserts that they were so. Nor does the allegation that Sieracki was informed of certain opinions mean that he "knew" those opinions were fact. *Cf.* Opp at 19. In the real world, people are not required to agree with every opinion they may hear.

More fundamentally, it is simply not the law that an issuer must disclose ***every*** opinion held by ***every*** person at any time within a company. Sieracki carefully explained via case law and logic that such a proposition makes no sense. Among the many reasons why are: (1) differences of opinion are the norm within any large organization; and (2) one person's opinion cannot equate to "materiality" because materiality is assessed on an objective and not a subjective standard. SM at 15:15-17:25, 24:9-12. Plaintiff ignores these critical arguments.

In the end, Plaintiff asserts that Item 303 required Sieracki to sign SEC filings that contained whatever statements McMurray would have added (which are not pleaded), regardless of whether McMurray's opinions reflected the view of management as a whole (which is not alleged) and indeed regardless of whether Sieracki agreed with McMurray's opinions (which is also not alleged). Opp at 25:17-18, 26:6-17. But Plaintiff relies on Item 303, which is inapposite.

B. Countrywide's Public Statements Regarding Pay Option ARMs Undermine Plaintiff's Claim

The remaining category of purported misrepresentations cited in the brief are statements that Countrywide had "prudently underwritten" pay option ARMs. Opp at 5:12-13 & §III(A)(2). These statements cannot be universalized to statements regarding Countrywide's loan standards as a whole (s*ee* Section IV(A), *supra*), and the Complaint does not state a claim even as to the narrow subset of pay option ARMs. Plaintiff acknowledges that Countrywide expressed a belief, not fact, about this product; and almost completely ignores the contents of the extensive risk disclosures that qualified this expression of belief. *See* SM III(B)(1). Plaintiff's avoidance of the disclosures means that it is in no position to defend its assertions of material misstatement by omission.[7] Finally, Plaintiff treats as "fact" opinions about the product expressed on some occasions by one person (Mozilo). The opinions of one officer are not facts and need not be disclosed, and the opinions are not alleged to have been shared by Sieracki (or for that matter Countrywide).

C. There Is No Alleged Contradiction Between The Internal Opinions And Mr. Sieracki's Statements Or Beliefs

Sieracki also showed that the Complaint does not allege any contradiction between the supposed "warnings" by individual managers and his actual beliefs or Countrywide's public statements. Rather, the Complaint traffics in vagueness.

The failure to allege a contradiction between any internal information and Sieracki's statements or beliefs regarding loan standards is shown in Section II(A), *supra*. With respect to the allegations concerning McMurray's comments on two SEC filings in 2007,[8] Sieracki explained that the Complaint does not plead what

[7] For example, Plaintiff asserts that Countrywide did not disclose increased negative amortization (Opp at 13:17-18), but ignores the fact that Countrywide disclosed that metric and warned of the phenomenon. SM at 19:3-19 & nn.13-15.

[8] The Opposition acknowledges that McMurray had reviewed but did not object to SEC filings well before 2007, contrary to Plaintiff's theory of a multi-year fraud against which McMurray warned. SM at 23:26-24:1; Opp at 29:11-13.

McMurray supposedly would have added to (or subtracted from) the filings. Hence, it is impossible for this Court to conclude that Plaintiff has met its burden to plead a material difference between the documents as filed and how they would have read had McMurray's comments been incorporated—even assuming, contrary to law, that the subjective opinions of an individual can equate to materiality. SM at 24:2-15 & n.17. In addition, the Complaint fails to allege that Sieracki agreed with McMurray or believed that his comments needed to be included, and therefore provides no basis for scienter. *Id.* at 24:16-21. Plaintiff ignores these arguments.

VI. CONCLUSION: THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE

Sieracki respectfully requests dismissal with prejudice. The Opposition further reveals that Plaintiff relies on legal theories and allegations that are inapposite (such as equating Item 303 to §10(b) and claiming that SEC filings are not readily available to investors). These problems exist in a Complaint filed after an extensive investigation, replete with millions of pages of documents and numerous depositions. None of these factors were present in the cases allowing amendment cited by Plaintiff. Any remaining doubt as to this issue is dispelled by Plaintiff's claim that it could cite a September 2007 presentation in which Sieracki supposedly shared the alleged opinions of Mozilo and McMurray. Opp at 27 n.5. The presentation is dated ***after*** the alleged opinions and ***after*** Countrywide's situation and prospects had dramatically changed in August 2007, and says nothing about what Sieracki believed prior to September 2007. If (as one must presume) this is the best Plaintiff can come up with, it is a further sign that amendment would be futile.

Respectfully submitted,

October 2, 2009

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