UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re SOCIÉTÉ GÉNÉRALE SECURITIES LITIGATION | : | No. 08-CIV-02495 (GEL) |
| | : | CLASS ACTION |

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE EXTRANEOUS MATERIALS RELIED ON BY DEFENDANTS IN THEIR MOTION TO DISMISS

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Plaintiffs hereby submit this memorandum in support of their motion to strike.

## I. INTRODUCTION

In support of their Rule 12(b)(6) motion to dismiss, defendants Société Générale ("SocGen"), Daniel Bouton, Philippe Citerne and Didier Alix (the "SocGen Defendants") (together with defendant Robert A. Day, "Defendants") improperly rely on a number of articles and other materials from outside Plaintiffs' First Amended and Consolidated Complaint for Violation of the Federal Securities Laws ("Complaint").[1] Defendants also improperly submit and rely on the Declaration of Gérard Gardella ("Gardella Declaration"), SocGen's Group General Counsel, for factual issues related to SocGen, SocGen's stock, SocGen's press releases, and the roles of Defendants Citerne and Alix at SocGen. Losing sight of the fact that in deciding a motion to dismiss the Court must "accept all factual allegations in the complaint as true," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2509 (2007), Defendants, nevertheless, rely on these materials to challenge the Complaint's factual allegations. While Defendants' motions to dismiss may certainly argue competing inferences, those inferences must be "rationally drawn from the facts alleged," *id.* at 2510, not from outside articles and other materials.

Plaintiffs' well-crafted Complaint alleges that Defendants made a number of false and misleading statements concerning SocGen's risk exposure, risk control management and subprime exposure. The Complaint contains a number of factual allegations which support Plaintiffs' claims, including factual allegations that support Defendants' knowledge or reckless disregard that their

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[1] Those documents are attached as exhibits to the Declaration of Scott D. Musoff in Support of the Société Générale Defendants' Motions to Dismiss the First Amended and Consolidated Complaint ("Musoff Declaration") and identified specifically below. To the extent Defendant Day's Rule 12(b)(6) motion to dismiss incorporates arguments from the SocGen Defendants' motion that rely on improper extraneous materials, the arguments herein apply to Defendant Day's motion as well.

statements were false. In the face of a long line of authority suggesting it is improper to do so, Defendants propose competing facts to support their alternative inferences. Alternatively, should the Court choose to consider any exhibits improperly relied on by Defendants, their motions to dismiss should be converted into motions for summary judgment, and Plaintiffs should be provided an opportunity to conduct discovery and present evidence of their own. Fed. R. Civ. P. 12(d).

## II. STANDARD UNDER RULE 12(b)(6)

As the Supreme Court stated in *Tellabs*, in deciding a Rule 12(b)(6) motion, courts may consider "the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs*, 127 S. Ct. at 2509. Aside from the sources named in *Tellabs*, in the Second Circuit the "other sources" ordinarily considered with a Rule 12(b)(6) motion to dismiss are limited to "legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied on bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

For documents to be considered integral to the complaint and permitted to be relied on by defendants in a Rule 12(b)(6) motion to dismiss, plaintiffs must have relied on "'the terms and effect of [the] document in drafting the complaint.'" *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006).[2] In *Global Network*, for example, where the complaint did not rely on or mention the testimony that the plaintiff's president gave in an unrelated criminal proceeding, even though the complaint mentioned the plaintiff's president's guilty plea in the

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[2] Citations are omitted and emphasis is added throughout, unless otherwise noted.

criminal matter, the court ruled that the nexus between the testimony in the criminal proceeding and the allegations in the complaint was too attenuated. *Id.* at 156-57.

The court may also rely on documents of which the court takes judicial notice; however, the outside documents relied on by Defendants here do not fall into that category. In fact, Defendants do not even request that the Court take judicial notice.[3]

Should the Court permit the SocGen Defendants to submit outside materials, other than those described above, the SocGen Defendants' motion should be reviewed as a motion for summary judgment, and Plaintiffs should be permitted to take discovery prior to opposing the motion. Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). As the Second Circuit determined in *Chambers v. Time Warner, Inc.*, 282 F.3d 147 (2d Cir. 2002), "[t]he court could have excluded the extrinsic documents. Because it elected not to do so, however, the court was obligated to convert the motion to one for summary judgment and give the parties an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56." *Id.* at 154; *see Global Network*, 458 F.3d at 155 ("[T]he requirement expressly addresses and solves the major problem that arises when a

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[3] Federal Rule of Evidence 201 provides that judicial notice of adjudicative facts can only be taken if the facts are "not subject to reasonable dispute." Fed. R. Evid. 201. The facts must be: "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*; *see Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1354 (7th Cir. 1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite."). Moreover, adjudicative facts are "'facts about the parties and their activities, businesses, and properties,' as distinguished from 'general facts which help the tribunal decide questions of law and policy and discretion.'" *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971).

court considers matters extraneous to a complaint, namely, the lack of notice to the plaintiff that outside matters would be examined. It deters trial courts from engaging in factfinding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence [outside] the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it."). Otherwise, Defendants' motions should be limited to only those materials clearly within the pleadings.

## III. DEFENDANTS' OUTSIDE ARTICLES AND OTHER MATERIALS SHOULD BE STRICKEN

The SocGen Defendants' motion to dismiss relies on a number of articles and reports that are not mentioned in the Complaint, not relied on by Plaintiffs in drafting the Complaint, and are not otherwise proper for judicial notice. These documents include the following:

- Ex. 1 - John Cassidy, *Anatomy of a Meltdown*, New Yorker, Dec. 1, 2008.
- Ex. 7 - Tom Barkley, *IMF Sees U.S. Maladies Infecting World Economy*, Wall St. J., Apr. 10, 2008.
- Ex. 8 - *CSI: Credit Crunch*, Economist, Oct. 18, 2007.
- Ex. 9 - Sebastian Boyd, *BNP Paribas Freezes Funds as Loan Losses Roil Markets (Update 5)*, Bloomberg.com.
- Ex. 10 - Andrew Ross Sorkin, *Bids to Halt Financial Crisis Reshape Landscape of Wall Street*, N.Y. Times, Sept. 15, 2008.
- Ex. 11 - Andrew Ross Sorkin, *In Sweeping Move, Fed Backs Buyout and Wall Street Loans*, N.Y. Times, Mar. 17, 2008.
- Ex. 12 - Damian Paletta, *Banks That Went Bust*, wsj.com.
- Ex. 13 - James R. Hagerty et al., *U.S. Seizes Mortgage Giants*, Wall St. J., Sept. 8, 2008.
- Ex. 14 - Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, Wall St. J., Sept. 17, 2008.
- Ex. 15 - Daniel Dombey et al., *Fall in Markets as Bail-out Is Approved*, Fin. Times, Oct. 3, 2008.

- Ex. 16 - Andrew Ross Sorkin & Vikas Bajaj, *Shift for Goldman and Morgan Marks the End of an Era*, N.Y. Times, Sept. 22, 2008.
- Ex. 17 - Henry Chu & Christian Retzlaff, *Sweeping Bank Bailouts Unite Europe*, L.A. Times, Oct. 14, 2008.
- Ex. 18 - Elena Logutenkova & Warren Giles, *Switzerland Bails Out UBS; Credit Suisse Raises Funds (Update 2)*, Bloomberg.com.
- Ex. 19 - Gabi Thesing, *German Consumer Confidence Unexpectedly Rises on Oil-Price Drop*, Bloomberg.com.
- Ex. 21 – Institute of International Finance, *Final Report of the IIF Committee on Market Best Practices* (July 2008).
- Ex. 27 - Katrin Bennhold & Nicola Clark, *Bank Was Unaware of Rogue Trades, Police Say*, Int'l Herald Trib., Aug. 1, 2008.
- Ex. 28 - *SocGen Rogue Trader Kerviel to Take Full Blame – Case Papers*, Dow Jones Business News, Dec. 9, 2008.
- Ex. 36 - Jian Hu, *Structured Finance CDO Ratings Surveillance Brief: September 2007*, Moody's Investors Service, Oct. 23, 2007.
- Ex. 37 - Laurie S. Goodman et al., *Subprime Mortgage Credit Derivatives* (2008).
- Ex. 38 - Robert Stowe England, *The Mounting Toll*, Mortgage Banking, Vol. 68 Issue 4, Jan. 2008.
- Ex. 39 - Ben Logan, *The ABX Index: A Pricing Conundrum*, Credit, May 2008.
- Ex. 50 - *Subprime Impact on French Banks Limited-SocGen*, Reuters News, Dec. 19, 2007.

For instance, the SocGen Defendants improperly rely on certain outside articles and reports (*e.g.*, Exs. 1, 4, 5, 10-19) to argue that the credit crisis caused SocGen's massive market loss, not SocGen's false and misleading statements about the valuations of its subprime-related assets. Defendants also rely on Exs. 7, 8 and 9 concerning the supposed size of the liquidity and credit crisis during Q3 2007. Defs.' Mem. at 12 n.4. Next, the SocGen Defendants rely on nine outside articles and reports to argue that a number of large financial institutions in the United States and Europe have suffered losses similar to SocGen. *Id*. at 13 nn.5-6 (citing Exs. 10-18).

Defendants also rely on certain outside articles to challenge the Complaint's allegations concerning SocGen trader Jerome Kerviel ("Kerviel"). For instance, Defendants cite at least two articles that, according to Defendants, support their contention that nobody at SocGen knew of Kerviel's trades. *Id*. at 16.

If Defendants are allowed to submit and rely on these articles, then Plaintiffs should have an equal opportunity to submit articles which controvert these points, of which there are many. For example, subsequent to filing the Complaint, a number of additional facts have come to light that support and corroborate Plaintiffs' claims. For instance, Kerviel insists that all of his trades were visible, as he "'took [his] positions in front of everyone, in front of managers.'" Dave Clark, *French 'rogue trader' blames bosses*, Agence France Presse, Feb. 6, 2009 (attached as Ex. A to the Declaration of Ryan A. Llorens ("Lorens Decl.") submitted herewith). Corroborating the Complaint's allegations that a trader could not take the massive positions Kerviel took without management noticing, Kerviel stated, "'Do you honestly believe a 15 billion euro operation could go unnoticed and that the bank would ask no questions?'" *Id.* Kerviel has also made it clear that "'all those stupid things [he] could only have done because the bank let [him] do them and encouraged [him] to do them.'" Heather Smith, *Kerviel 'Afraid' of Going to Prison Over SocGen Loss (Update 1)*, Bloomberg.com, Feb. 6, 2009 (Llorens Decl., Ex. B). In a similar article, Kerviel confirms the allegation that management was sent a letter, likely from an exchange, alerting them to a €2 billion trade that Kerviel made, naming him in the letter. Thomas Kirchner, *Kerviel Speaks Out: Far from the Typical Rogue Trader Story*, Seeking Alpha, Feb. 10, 2009 (Llorens Decl., Ex. C). Kerviel has also discussed his profit targets in recent articles, which escalated as follows: €3 million in 2005, €5 million in 2006, €12 million in 2007 and €55 million in 2008. *Id.* According to Kerviel, while he made as much as €1 million for the bank some days, most traders would consider €30,000 a good

day. *Id.* Each of these recent articles factually refute the points Defendants attempt to make with their improper factual submissions.

News articles that are neither relied on by plaintiffs nor incorporated by reference within the complaint must be excluded from a motion to dismiss. *See In re Astea Int'l Inc. Sec. Litig.*, No. 06-1467, 2007 U.S. Dist. LEXIS 58238, at *24-*25 (E.D. Pa. Aug. 8, 2007); *Atlas v. Accredited Home Lenders Holding Co.*, 556 F. Supp. 2d 1142, 1161 n.7 (S.D. Cal. 2008); *In re StockerYale Sec. Litig.*, 453 F. Supp. 2d 345, 348 (D.N.H. 2006). Nor is it permissible to submit and rely on outside articles to put into context the alleged fraud. *See Astea*, 2007 U.S. Dist. LEXIS 58238, at *24 (the court excluded, among other things, articles that were "relevant to put into context defendants' accounting errors and subsequent restatement").

"Market commentary," even when used simply as background, is not pertinent to the action and not properly used in a motion to dismiss if it is not contained in the complaint. *In re StockerYale*, 453 F. Supp. 2d at 348; *see Atlas*, 556 F. Supp. 2d at 1161 n.7 (newspaper articles regarding the defendant company "***and/or the subprime mortgage market***" could not be considered on a motion to dismiss).

Defendants' outside articles and reports are not materials of which the Court may properly take judicial notice either. While the SocGen Defendants do not request that the Court take judicial notice of any particular documents, in a footnote they nevertheless state that courts may consider matters of which a court may take judicial notice. Defs.' Mem. at 8 n.2. Defendants' failure to file a proper request for judicial notice, alone, is enough to prevent the Court from taking judicial notice of the extraneous materials here. *Atlas*, 556 F. Supp. 2d at 1161 n.7 ("these documents, which are neither referenced in Plaintiff's complaint nor the subject of a proper request for judicial notice, may not be considered on a motion to dismiss").

In any event, the outside articles and the commentary concerning the market are not the kind of information which is proper for judicial notice. *See StockerYale*, 453 F. Supp. 2d at 348 ("Nor are the editorial comments and analysis contained in the commentary about overall trends in the security sector the kind of information that is subject to judicial notice."). The fact that the articles are used to explain the alleged fraud defeats any attempt to have the content of the articles judicially noticed, as "the contents quite plainly are 'subject to reasonable dispute,' and are therefore inappropriate for judicial notice." *Astea*, 2007 U.S. Dist. LEXIS 58238, at *25.

In the few instances where courts have taken judicial notice of articles, judicial notice is taken strictly of the fact that the articles were published and not for the truth of the content of the article. *See Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 426 (2d Cir. 2008) (The appellate court approved of the fact that "the District Court simply took judicial notice of Appellees' exhibits for the purpose of establishing that the information in the various documents was publicly available. The court did not consider the contents of those exhibits for their truth."); *In re Salomon Analyst Winstar Litig.*, No. 02 Civ. 6171 (GEL), 2006 U.S. Dist. LEXIS 8388, at *14 n.6 (S.D.N.Y. Feb. 28, 2006) ("It should be emphasized, of course, that the Court does not accept the articles as evidence of the truth of the matters therein asserted."); *O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, No. 06 Civ. 6278 (SHS), 2006 U.S. Dist. LEXIS 91959, at *3 (S.D.N.Y. Dec. 18, 2006) ("the Court can take notice of the ***existence*** of a publicly-available newspaper or magazine article") (emphasis in original).

## IV. DEFENDANTS' EXHIBITS 21, 40 AND 41 SHOULD BE STRICKEN

The SocGen Defendants cite Exhibits 40 and 41, one published by the U.S. Securities and Exchange Commission ("SEC") (Ex. 40) and the other published by the Autorité des Marchés

Financiers ("AMF") (Ex. 41), concerning the valuation of subprime-related assets.[4] Defs.' Mem. at 32. These documents should be stricken for a number of reasons.

First, the articles were released on September 30, 2008 (Ex. 40) and October 15, 2008 (Ex. 41), well after the Class Period (August 1, 2005-January 25, 2008), and therefore are not relevant to Plaintiffs' claims. It is of no use to the Court that regulatory agencies in the United States and France discussed fair value of assets in a different context ***over nine months after the end of the Class Period***. This is a classic example of Defendants drawing on outside – and irrelevant – materials in an attempt to have the Court draw a competing inference. This clearly violates *Tellabs*, 127 S. Ct. at 2510 (defendants may only draw opposing inferences "***from the facts alleged***").

Second, these articles were neither incorporated by reference into the Complaint nor used by Plaintiffs in drafting the Complaint. Moreover, as discussed above, the Court cannot take judicial notice of the truth of the articles' contents.

For the same reasons, the SocGen Defendants' motion to dismiss cannot rely on excerpts from Exhibit 21, a financial report published well after the end of the Class Period, to proffer an explanation for the manner in which SocGen's subprime assets were valued.

## V. DECLARATION OF GÉRARD GARDELLA MUST BE STRICKEN

In another effort to challenge the Complaint's factual allegations, the SocGen Defendants submit the Gardella Declaration with their motion to dismiss. According to the Declaration, Mr. Gardella is Group General Counsel for Defendant Société Générale. The Gardella Declaration is replete with improper factual assertions concerning SocGen, SocGen's stock, SocGen's press

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[4] Exhibit 40 is a September 30, 2008 SEC article entitled "SEC Office of the Chief Accountant and FASB Staff Clarification on Fair Value Accounting" and Exhibit 41 is an October 15, 2008 AMF article entitled "Autorité des Marchés Financiers, Recommendation on Fair Value Measurement of Certain Financial Instruments."

releases, the roles of Defendants Citerne and Alix at SocGen, and their false and misleading statements. The Gardella Declaration is clearly outside the pleadings and should therefore be stricken.

At a minimum, if the Court were to allow that declaration to come into the record, Plaintiffs should have the opportunity to depose and cross-examine Mr. Gardella and complete all related discovery.

## VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court strike from the record those exhibits attached to the Musoff Declaration, identified above, and the Gardella Declaration.

DATED: February 16, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 16, 2009.

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