UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF DEFENDANTS SOCIÉTÉ GÉNÉRALE, DANIEL BOUTON, PHILIPPE CITERNE AND DIDIER ALIX TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER AUTHORITIES

Defendants Société Générale ("SG" or the "Company"), Daniel Bouton, Philippe Citerne and Didier Alix (collectively the "Individual Defendants" and together with SG, the "Defendants") submit this memorandum of law in support of their motion to dismiss the Consolidated Amended Complaint (the "Amended Complaint" or "AC") filed by the Vermont Pension Investment Committee ("Lead Plaintiff", and certain other plaintiffs not appointed by the Court (together with the Lead Plaintiff the "Plaintiffs").).

PRELIMINARY STATEMENT

Like most other financial institutions, Société Générale, one of France's oldest banks, has been affected by the global credit crisis that began in the third quarter of 2007. Compounding the losses brought on by the crisis, Société Générale also discovered and disclosed that a rogue junior trader had engaged in massive unauthorized trades causing billions of Euros in losses. The Amended Complaint seeks to weave together these unrelated events to allege a deliberate two and half year fraud on the Company's shareholders. As discussed more fully below, these allegations are implausible on their face and should be dismissed.

As an initial matter, although Lead Plaintiff did not seek to represent foreign purchasers of SG stock on foreign exchanges when seeking appointment as Lead Plaintiff, it now purports to bring the Amended Complaint on behalf of a class that includes such foreign investors. But only days after the Amended Complaint was filed, the Second Circuit held that courts lacks subject matter jurisdiction over these foreign plaintiffs' claims, where the alleged fraudulent conduct occurred primarily abroad. See Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 175-76 (2d Cir. 2008). The Second Circuit made clear that activity of the type alleged to have occurred in the United States here is at best preparatory to the alleged fraudulent conduct – in this case, the issuance of purportedly false and misleading financial and other statements abroad – and not sufficient to warrant subject matter jurisdiction. Thus, Plaintiffs' attempt to create a worldwide class should be rejected.

As to the claims over which the Court does have subject matter jurisdiction – those brought by purchasers of American Depositary Receipts ("ADRs") traded in the United States – and American purchasers of SG common stock abroad – the allegations fall woefully short of the rigorous pleading requirements of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (the "PSLRA") (codified in part at 15 U.S.C. §§ 77z-1, 78u-4). Last year, the Supreme Court reinforced the already stringent standards that must be met by plaintiffs seeking to assert a claim under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2008). In order to establish the requisite "strong inference" of fraudulent intent required by the PSLRA, the court ruled that the "inference of scienter must be more than merely reasonable or permissible." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2510 (2007) (internal quotation marks omitted). Rather, "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Id.

The Amended Complaint in this action does not approach, let alone satisfy, this stringent standard. Indeed, as set forth below, the allegations on their face overwhelmingly establish the total absence of scienter, rather than a cogent and compelling inference of fraud.

Collateralized Debt Obligation Claims

According to the Amended Complaint, SG knew, but failed to disclose, that its investments in collateralized debt obligations ("CDOs") and residential mortgage-backed securities ("RMBS") backed by U.S. subprime residential mortgages were doomed to collapse and would necessitate billions of dollars in writedowns. Using the laser-like hindsight that only class action plaintiffs' counsel seem to have, Plaintiffs assert that SG knew, or was highly reckless in not knowing, that the greatest economic collapse since the Great Depression would occur – a collapse which stunned the entire financial world, and as Plaintiffs acknowledge, affected "other major financial institutions" (AC ¶ 88) – and therefore should have announced its CDO and RMBS writedowns before it actually did.

On its face, the Amended Complaint is a classic example of the type of "fraud by hindsight" pleading that the Second Circuit has routinely dismissed for failure to state a claim. See, e.g., Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978); see also Waxman v. Envipco Pick Up & Processing Servs., Inc., No. 02 Civ. 10132, 2003 WL 22439796, at *9 (S.D.N.Y. Oct. 28, 2003) (Lynch, J.). But beyond this patently obvious defect, the underlying premise of the Amended Complaint makes absolutely no sense.

Plaintiffs allege that SG acquired CDOs and RMBS over time simply to keep up the appearance of having an active underwriting business. (Id. ¶ 229.) But Plaintiffs also allege that SG abandoned its underwriting efforts in mid-2007 after only two months (AC ¶ 153). Moreover, Plaintiff further allege that SG increased its CDO and RMBS investments throughout the proposed class period ("Proposed Class Period") (e.g., id. ¶ 127.) But if SG knew – as Plaintiffs allege – there was at least a high likelihood, if not a certainty, that this investment strategy would fail, resulting in billions of Euros in writedowns, Plaintiffs fail to allege why SG would intentionally take these supposed actions. Plaintiffs' failure to account for this inherent inconsistency is fatal to their claims.

On its face, Plaintiffs' theory makes no sense. Indeed, far from raising a "compelling" inference of fraud, the only plausible inference from Plaintiffs' allegations is the antithesis of scienter – i.e., that SG did not and could not predict the unprecedented "credit crisis" and the severity of its impact. (AC ¶ 11.) As Federal Reserve Board Chairman Ben Bernanke has aptly said, "[he] and others were mistaken early on in saying that the subprime crisis would be contained. The causal relationship between the housing problem and the broad financial system was very complex and difficult to predict." John Cassidy, Anatomy of a Meltdown, The New Yorker, Dec. 1, 2008, at 49, 55 (Ex. 1).[1] SG simply made investment decisions that, with the benefit of hindsight following the worst economic collapse in nearly a century, proved imprudent. Even before Tellabs, the Second Circuit routinely dismissed such claims. In view of the even more rigorous standard established in Tellabs, the Amended Complaint manifestly fails as a matter of law.

Equally absurd are Plaintiffs' allegations that SG's 2007 third quarter write down of €230 million should have been greater (AC ¶¶ 154, 161) because in January 2008, SG announced an additional write down of approximately €2 billion on its CDO and RMBS investments. (Id. ¶ 168.) There are at least two fatal flaws with this theory. First, it is – once again – classic "fraud by hindsight" – i.e., SG announced a write down; it turned out a larger write down was later necessary; therefore, SG "must have known" its original write down disclosure was false. As noted above, such allegations cannot survive a motion to dismiss. The evolution of the credit crisis at the end of 2007 and its severity was not foreseeable to Defendants or indeed to the financial community at large.

Second, Plaintiffs' own allegations turn to bite them, because they admit that SG's CDO and RMBS losses grew over time as the value of these investments fell. Specifically,

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[1] Certain documents referenced in this memorandum are attached to the accompanying Declaration of Scott D. Musoff, dated December 18, 2008. References to "Ex. ___ " are to the exhibits to the Musoff Declaration.

Plaintiffs concede that SG's 2007 third quarter write down was based on a predicted total cumulative industry loss of $200 billion, an assumption Plaintiffs acknowledge that SG fully disclosed to the market. (AC ¶¶ 154, 364.) When the total cumulative industry loss declined further, SG promptly adjusted its write down. (Id. ¶¶ 161, 168.) As this Court has held, a dispute over the valuation of complex, illiquid securities cannot form the basis for securities fraud. See In re Allied Capital Corp. Sec. Litig., No. 02 Civ. 3812, 2003 WL 1964184, at *4 (S.D.N.Y. Apr. 25, 2003) (Lynch, J.). Plaintiffs also concede, undermining any inference of scienter, that: (1) SG pre–announced its third quarter and year-end 2007 write downs; (2) none of the Individual Defendants sold stock in unusual amounts or at unusual times; (3) there were no known red flags as to CDOs or RMBS at August 1, 2005 (the start of the Proposed Class Period); and (4) SG repurchased its stock at prices SG itself inflated. Finally, it makes no sense – and there is no plausible motive – for a company to minimize the amount of a loss when it supposedly knows that it will disclose the total loss shortly thereafter. See San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 813-14 (2d Cir. 1996) (delayed disclosure of adverse financial information to maintain appearance of profitability is insufficient to allege motive).

As set forth below, none of Plaintiffs' remaining allegations concerning SG's CDO or RMBS investments cure these fatal pleading defects.

Unauthorized Rogue Trading Activities

The Amended Complaint also purports to assert U.S. securities law claims resulting from the unauthorized trading activities of a "junior trader" in Paris. (AC ¶ 186.) Specifically, SG announced in January 2008 that it had incurred €4.9 billion in losses resulting from the unwinding of concealed, unauthorized derivatives trades related to European indices by

Jérôme Kerviel. Plaintiffs nowhere allege that Kerviel, who worked in SG's Paris headquarters, made any trades in the U.S., on any U.S. markets, that any U.S. customers were impacted, or that SG's U.S. divisions were involved in Kerviel's unauthorized trading activities. It is undisputed that SG immediately unwound these trades upon their discovery, announced an appropriate write down and launched an internal investigation. Notably, Plaintiffs do not and cannot allege that Messrs. Bouton, Citerne, Alix, or any other senior officers purported by Plaintiffs to have made misstatements, were aware of any of Kerviel's rogue trading activities or of any alerts concerning Kerviel's activities. On the contrary, the investigative and regulatory reports described in the Amended Complaint confirmed that there was no such knowledge, and that Kerviel took extreme measures to conceal his activities from his superiors and circumvent SG's control structure.

Straining to manufacture a securities law claim where none exists, Plaintiffs allege that SG knowingly made false and misleading statements by describing its internal risk management systems as "highly sophisticated" and stating that "risk is kept under control, under strong supervision and using our expertise." (AC ¶ 7.) According to Plaintiffs, SG's failure to detect Kerviel's skillfully concealed, unauthorized trading activities somehow evidences that SG knew, or was highly reckless in not knowing at the highest corporate levels, that its internal risk controls were inadequate, and therefore, knew, or was highly reckless in not knowing, that these generalized statements about SG's risk were false when issued.

The uniform case law squarely holds that such allegations cannot state a claim under the federal securities laws. As the Second Circuit observed in rejecting such allegations, "[t]he pleading strongly suggests that the defendants should have been more alert and skeptical, but nothing alleged indicates that management was promoting a fraud." Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129 (2d Cir. 1994). Indeed, this Court adopted this well-settled principle to dismiss precisely the same allegations asserted here – i.e., that the defendant falsely touted the strength of its business when they supposedly knew business practices were inadequate. See Waxman, 2003 WL 22439796, at *8-9 (alleged misrepresentations as to soundness of business operations amounted to, at most, mismanagement, not fraud).

As set forth below, the only reasonable inference that can be drawn from the Amended Complaint is that SG's internal risk management controls did not detect earlier the concealments and fictitious positions concocted by a single rogue trader operating on one relatively small trading desk within a bank of approximately 135,000 employees worldwide. (AC ¶ 35.) SG's internal report on the Kerviel affair, which Plaintiffs liberally quote and upon which they rely, showed that Kerviel went to extraordinary lengths to circumvent the bank's internal control systems and that when his activities did cause alerts, Kerviel provided responses that appeared convincing at the time when in fact it turned out that they were lies and forgeries. These findings have been confirmed by numerous French authorities, who have also concluded that SG's senior management did not know of Kerviel's activities. Whether, in hindsight, SG's internal controls could have been better is not a basis to infer scienter. Indeed, SG diligently took corrective steps upon discovering the Kerviel trades to improve its risk management controls in an effort to prevent similar incidents from occurring in the future. This is precisely the sort of responsible corporate conduct that squarely negates any inference of fraud.

For these and the additional reasons described below, the Amended Complaint should be dismissed with prejudice.

BACKGROUND

Although the allegations of the Amended Complaint, to the extent they purport to allege facts, must be accepted as true for purposes of this motion only, "'[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002) (alteration in original) (citation omitted); see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007) ("Allegations that are conclusory or unsupported by factual assertions are insufficient.").[2]

A. Parties

1. Plaintiffs

The Court appointed Vermont Pension Investment Committee ("VPIC") as Lead Plaintiff pursuant to the PSLRA. Although in its Lead Plaintiff motion, VPIC sought to represent only a putative class of purchasers of SG ADRs and U.S. purchasers of SG stock on the Paris Stock Exchange over a two and a half year period, the Amended Complaint expands the Plaintiff class exponentially, seeking to represent a worldwide class of all purchasers of SG

[2] For purposes of a motion to dismiss, courts may also consider documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. See Tellabs, 127 S. Ct. at 2509; see also ATSI Commc'ns, 493 F.3d at 98 (court may consider "documents possessed by or known to the plaintiff and upon which it relied in bringing the suit"). Newspaper articles and press releases are appropriate subjects for judicial notice, see, e.g., Condit v. Dunne, 317 F. Supp. 2d 344, 358 (S.D.N.Y. 2004) (reviewing articles "as evidence of the media frenzy"), as are speeches by government officials, see, e.g., In re Merrill Lynch & Co. Research Reports Sec. Litig., 273 F. Supp. 2d 351, 383-88 (S.D.N.Y. 2003) (speeches by SEC chairman and newspaper and journal articles showed widespread reporting of potential conflicts of interests of securities analysts), "documents filed in other courts," Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991), "'well-publicized stock prices,'" Allied Capital, 2003 WL 1964184, at *3 (citation omitted), as well as market phenomena, see, e.g., SEC v. Universal Express, Inc., 546 F. Supp. 2d 132, 137 n.7 (S.D.N.Y. 2008) (Lynch, J.) (taking judicial notice of "the widespread decline in property values over the past year"); In re Merrill Lynch & Co. Research Reports Sec. Litig., 289 F. Supp. 2d 416, 421 n.6 (S.D.N.Y. 2003) (taking judicial notice of "the internet bubble and its subsequent crash"); First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 770 (2d Cir. 1994) (real estate market downturn); Kramer, 937 F.2d at 773 (junk bond market collapse), and "information available to the market during the class period," In re Nuvelo, Inc. Sec. Litig., No. C 07-4056 VRW, 2008 WL 5114325, at *2 (N.D. Cal. Dec. 4, 2008).

securities regardless of who made the purchase or where. (AC ¶ 32.) Plaintiffs also seek to add additional plaintiffs who purportedly purchased SG shares or ADRs contemporaneously with certain Individual Defendants. (Id. ¶¶ 33-34.)

2. Defendants

Plaintiffs bring this action against SG and four of SG's officers and directors. SG is one of the oldest banks in France and one of the largest European financial institutions. It is incorporated under French law, has its headquarters in Paris. (See Declaration of Gerard Gardella ¶ 2 [hereinafter Gardella Decl.]) It is organized around three core businesses: retail banking, investment banking, and investment management and services. See SG, 2007 Registration Document 2 (Mar. 6, 2007) [hereinafter 2007 Reg. Doc.] (Ex. 2). SG operates "in approximately 82 countries and employed nearly 135,000 staff from 119 different nationalities." (AC ¶ 35.) For fiscal year 2006, SG had Net Banking Income of over €22 billion, and a group shareholder equity of €29.1 billion. See 2007 Reg. Doc., supra, at 14 (Ex. 2). SG's business model is based on "63 diversified profit centers" (AC ¶ 154) and follows "a policy of diversification." (Id. ¶ 202.)

Defendant Daniel Bouton was "Chairman and Chief Executive Officer ("CEO") of the Company" during the Proposed Class Period. (AC ¶ 39.) Defendant Philippe Citerne, also a French citizen residing in France (Gardella Decl. ¶ 5) was "a director and Co-Chief Executive Officer of [SG]" during the Proposed Class Period. (AC ¶ 45.) Defendant Didier Alix, also a French citizen residing in France (Gardella Decl. ¶ 5) was "Co-Chief Executive Officer of [SG]" during parts of the Proposed Class Period. (AC ¶ 47.)[3]

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[3] Plaintiffs have also named an outside director of SG, Robert Day, as a Defendant. Mr. Day is filing a separate motion to dismiss with the Court.

B. Plaintiffs' Allegations

The Amended Complaint attempts to cobble together allegations from unrelated events arising out of different business units: (1) SG's investment in AAA rated, super-senior tranches of CDOs backed in part by subprime U.S. RMBS, and senior tranches of RMBS; and (2) the activities of a rogue trader in Paris that SG itself uncovered, investigated and disclosed. The only commonality is that both series of events ultimately caused losses to SG that were disclosed on January 24, 2008. Ironically, however, Plaintiffs implicitly recognize that one had nothing to do with the other, as they allege that SG disclosed these losses simultaneously in an effort to somehow hide its CDO and RMBS writedowns. (AC ¶ 270.) Plaintiffs then allege that, given these losses, SG's financial statements and disclosures during the preceding two and a half years must have been deliberately false and misleading.

1. SG's Exposure to the U.S. CDOs, RMBS and Subprime Markets

Although it is difficult to discern from the meandering 435-paragraph, 184-page Amended Complaint, it appears that Plaintiffs' attempt to turn SG's CDO and RMBS losses into a deliberate fraud that spread across two continents is premised on two basic assertions. First, the alleged failure to disclose the "full extent of the Company's exposure to the sub-prime credit crisis" because SG was purportedly "sitting on €5 billion worth of toxic securities." (AC ¶ 11.) Second, Plaintiffs' assertion that SG's voluntary, pre-announced write down of hundreds of millions of Euros in September 2007 due to the onset of the credit crisis was not large enough because several months later, as the world's financial system continued to deteriorate, SG took an even larger writedown on these assets. (Id. ¶¶ 164, 364.)

(a) SG Invested in Super-Senior CDO and Senior RMBS Tranches

SG's CDO and RMBS business was part of the Fixed Income, Currencies and Commodities ("FICC") unit of its Corporate and Investment Banking division ("SGCIB").

Plaintiffs allege that starting on August 1, 2005, the first day of the Proposed Class Period, SG knew that its CDO and RMBS investments were "toxic securities" that were so risky that every financial statement issued since that date was deliberately false and misleading. (E.g., AC ¶¶ 11, 125, 213.) As Plaintiffs acknowledge, however, SG owned the highest-rated, prioritized tranches of CDOs and RMBS. (Id. ¶¶ 102, 154, 168.)

According to Plaintiffs, beginning sometime in late 2006 (and more than a year after the start of the Proposed Class Period), a handful of unnamed, lower-level SG employees in the U.S. started to believe that the market for these products was drying up, and that the models used to value these products somehow did not "reflect reality." (AC ¶ 164.) But instead of limiting this small line of business, or shorting the market to take advantage of this supposed knowledge, Plaintiffs allege that SG ignored these "facts" and continued in this line of business. (Id. ¶ 229.) Indeed, according to Plaintiffs, SG inexplicably continued to accumulate subprime assets "as late as summer 2007" even though those assets were "highly illiquid" and "materially overvalued." (Id. ¶ 202.) Plaintiffs invite the court to conclude from these economically irrational assumptions that SG's financial statements were deliberately false and misleading. (E.g., id. ¶¶ 125, 127, 149, 153.)

(b) CDOs and RMBS are Complex Securities

CDOs and RMBS are complex securities for which value is derived from cash flows produced by pools of collateral assets that may include a wide variety of debt obligations, such as mortgage-backed securities or other CDOs. See Jennifer E. Bethel et al., Law and Economic Issues in Subprime Litigation 6-12 (Harvard, John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 612, Nov. 2008) (Ex. 3). As Plaintiffs acknowledge, SG's CDO and RMBS investments were the "least risky" because they consisted of "senior" and "super-senior" tranches, which had payment priority over even the AAA-rated tranche, thus further protecting against risk of loss. (AC ¶¶ 102, 104, 105, 154, 168); see also SG, Third Quarter and 9 Month 2007 Results 57 (Nov. 7, 2007) [hereinafter Third Quarter & 9 Mo. 2007 Results] (Ex. 4); Press Release, SG, at 6, App. 3 (Jan. 24, 2008) [hereinafter SG Press Release] (Ex. 5).

(c) SG Disclosed that Its Business Involves Significant Risks

SG disclosed that its business involved substantial risks inherent to the financial services industry, including risks that allegedly materialized during the Proposed Class Period. SG extensively described these risks, including market risk, see 2007 Reg. Doc., supra, at 136 (Ex. 2), and risks related to the credit crisis, see SG, Second Update to the 2007 Registration Document 33 (Aug. 31, 2007) [hereinafter 2d Update to 2007 Reg. Doc.] ("The extension of the crisis affecting the US subprime market to other credit markets at the beginning of August has generated liquidity pressures in many markets.") (Ex. 6).

(d) A Global Credit Crisis Emerges in the 2007 Third Quarter

In the third quarter of 2007, the worst liquidity and credit crisis since the Great Depression began to emerge as credit markets unexpectedly began to seize up.[4] In each quarter since, markets have continued to deteriorate and dislocate. In just the three months since Lead Plaintiff's appointment in this case, Lehman Brothers has filed for bankruptcy, Goldman Sachs and Morgan Stanley have converted from investment banks to bank holding companies, Washington Mutual failed, insurance giant AIG has been bailed-out by the U.S. government multiple times, Fannie Mae and Freddie Mac were placed into government conservatorship, Merrill Lynch has agreed to be acquired by Bank of America and Congress has approved $700

[4] Tom Barkley et al., IMF Sees U.S. Maladies Infecting World Economy, Wall St. J., Apr. 10, 2008, at A9 (discussing International Monetary Fund report) (Ex. 7); CSI: Credit Crunch, The Economist, Oct. 18, 2007 (economist.com version) (Ex. 8); Sebastian Boyd, BNP Paribas Freezes Funds as Loan Losses Roil Markets (Update 5), Bloomberg.com, http://www.bloomberg.com/apps/news?pid=20601087&sid=ayOiMpIOavzw&refer=home (last updated Aug. 9, 2007) (Ex. 9).

billion to aid troubled financial institutions.[5] In Europe, the UK purchased controlling stakes in RBS, Lloyds, and HBOS; Germany and France have infused $1 trillion into faltering banks; and UBS has received CHF 54 billion from the Swiss Central Bank in exchange for an equity stake.[6] The total financial impact of the crisis to date has approached $1 trillion.[7]

Under fair value accounting, which Plaintiffs acknowledge SG used (AC ¶ 311), SG valued its assets based on observable factors "if available" (id.), such as market price. See Int'l Acct. Standards Bd., Int'l Accounting Standard 39: Financial Instruments: Recognition and Measurement, App. A ¶¶ AG 69-82 (Jan. 1, 2006) [hereinafter IAS 39] (applicable to IAS 39, IAS 32 and International Financial Reporting Standard ("IFRS") 7) (cited, e.g., at AC ¶ 311) (Ex. 20). When the credit markets deteriorated in the third quarter of 2007, SG could no longer use observable market prices to value CDOs. See Inst. of Int'l Fin., Final Report of the IIF Committee on Market Best Practices 13 (July 2008) ("[D]uring the recent stressed market conditions, illiquidity made valuation of many instruments much more challenging.") (Ex. 21).

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5 See, e.g., Andrew Ross Sorkin, Bids to Halt Financial Crisis Reshape Landscape of Wall St., N.Y. Times, Sept. 15, 2008 (nytimes.com version) (Ex. 10); Andrew Ross Sorkin, In Sweeping Move, Fed Backs Buyout and Wall St. Loans, N.Y. Times, Mar. 17, 2008, at A1 (Ex. 11); Damian Paletta, Banks That Went Bust, wsj.com, http://online.wsj.com/public/resources/documents/info-Failed_Banks-sort.html (last updated Dec. 5, 2008) (Ex. 12); James R. Hagerty et al., U.S. Seizes Mortgage Giants, Wall St. J., Sept. 8, 2008 (wsj.com version) (Ex. 13); 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 (wsj.com version) (Ex. 14); Daniel Dombey et al., Fall in Markets as Bail-out Is Approved, Fin. Times, Oct. 3, 2008, (ft.com version) (Ex. 15); Andrew Ross Sorkin & Vikas Bajaj, Shift for Goldman and Morgan Marks the End of an Era, N.Y. Times, Sept. 22, 2008 (nytimes.com version) (Ex. 16); Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201 et seq.

6 See, e.g., Henry Chu & Christian Retzlaff, Sweeping Bank Bailouts Unite Europe, L.A. Times, Oct. 14, 2008 (latimes.com version) (Ex. 17); Elena Logutenkova & Warren Giles, Switzerland Bails Out UBS; Credit Suisse Raises Funds (Update2), Bloomberg.com, http://www.bloomberg.com/apps/news?pid=20601087&sid=aPHq_T5t4R9U&refer=home (last updated Oct. 16, 2008) (Ex. 18).

7 See Gabi Thesing, German Consumer Confidence Unexpectedly Rises on Oil-Price Drop, Bloomberg.com, http://www.bloomberg.com/apps/news?pid=newsarchive&sid= a8rOYhpULq0w (estimated $1 trillion in writedowns as of November 25, 2008) (last updated Nov. 25, 2008) (Ex. 19).

In an illiquid market, applicable accounting regulations permitted entities to value assets based on alternative techniques, such as modeling. See IAS 39, App. A ¶¶ AG 69-82 (Ex. 20). One modeling technique SG used was stress testing. SG disclosed the limitations in its stress test models, such as that they were built around shocks caused by historical catastrophic events within the past few years. See SG, 2006 Registration Document 114-15 (Mar. 9, 2006) [hereinafter 2006 Reg. Doc.] (Ex. 22); 2007 Reg. Doc., supra, at 137-38 (Ex. 2); SG, 2008 Registration Document 143-45 (Mar. 3, 2008) [hereinafter 2008 Reg. Doc.] (Ex. 23).

(e) SG Pre-announces Estimated Third Quarter 2007 Losses

On September 10, 2007, SG voluntarily pre-announced its estimated CDO and RMBS losses for the third quarter of 2007. (AC ¶ 364.) SG disclosed that based on an estimated total cumulative industry loss of $200 billion on subprime mortgage loans, it estimated it would have approximately €200 million in CDO and RMBS writedowns for the third quarter, ending on September 30, 2007. (Id.) When SG released its third quarter results two months later, it disclosed a slightly higher €230 million writedown. (Id. ¶ 154.) SG later accurately warned investors that additional writedowns would be necessary if conditions continued to deteriorate. (AC ¶ 161.)

Through the fourth quarter of 2007, the credit markets continued to deteriorate at a rate faster than most anticipated, and market-wide estimates of total cumulative loss grew significantly. See SG Press Release, supra, at 5, App. 1 ($350 billion of global losses) (Ex. 5). As even Plaintiffs are forced to acknowledge, the situation grew more severe at the beginning of 2008, when it became apparent that many monoline insurance companies that hedged these types of products for SG and other financial institutions would not be able to live up to their financial commitments. (AC ¶ 167.) On January 24, 2008, SG again voluntarily pre-announced that it would be taking an additional approximately €2 billion in CDO and RMBS-related writedowns.

(See id. ¶ 168.)[8] This was nearly one month earlier than SG was scheduled to announce its 2007 results. See SG, Quarterly Financial Information 16 (Nov. 7. 2007) (disclosing release calendar) (Ex. 24). Other financial institutions revealed the impact of the crisis at or about the same time as well. (AC ¶ 88.)

2. A Rogue Trader, Jérôme Kerviel, Defrauds SG

SG's 2007 losses in the Fixed Income division were compounded by the discovery of billions of Euros of unauthorized and unhedged trades by Jérôme Kerviel, a junior trader in SG's Equity Derivatives business, that were deliberately concealed from SG by Kerviel. Kerviel was a trader in SG's Delta One division located in Paris. (AC ¶ 186.) Kerviel's activities included equity derivatives trading for clients and arbitrage for the bank's own accounts. SG, Gen. Inspection Dept., Mission Green: Summary Report 10 (May 20, 2008) [hereinafter Mission Green)] (Ex. 25). As Plaintiffs admit, Kerviel's arbitrage activities were intended to be "a riskless profit earned from offsetting transactions" through hedging. (AC ¶ 91.) Arbitrage activities can sometimes lead to trades for high volumes but, as Plaintiffs allege, "if properly hedged, these trades carry little risk." (Id.) Instead, Kerviel embarked on an ambitious and unprecedented rogue trading scheme whereby he took massive unhedged directional positions and entered into SG's books and records fictitious hedges in order to conceal his directional positions, and actively circumvent SG's risk management controls, among other things, creating the appearance of low-risk trades.

Upon learning of Kerviel's fraud, SG immediately unwound his unauthorized transactions and conducted an internal investigation. The French Banking Commission, Paris

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8 The "CDO-related writedowns" announced on January 24, 2008 consisted of approximately €1.1 billion in CDO writedowns, €500 million for writedowns related to the failure of certain CDO-related hedges, and €350 million related to writedowns of residential mortgage-backed securities ("RMBS").

Police and investigating magistrates all rejected the contention that his superiors knew of Kerviel's activities. (E.g., AC ¶ 239 (quoting Report of the Commission Bancaire 3-4 (June 20, 2008) [hereinafter Banking Report] ("lapses were not known by management") (Ex. 26))); see also Katrin Bennhold & Nicola Clark, Bank Was Unaware of Rogue Trades, Police Say, Int'l Herald Trib., Aug. 1, 2008 (iht.com version) (concluding it was "incoherent for [Kerviel] to continue to pretend that his superiors were aware of his activities since he felt it necessary to conceal them and even misrepresent them by producing false documents" (internal quotation marks omitted)) (Ex. 27); SocGen Rogue Trader Kerviel to Take Full Blame – Case Papers, Dow Jones Bus. News, Dec. 9, 2008 (easybourse.com version) (Ex. 28). Rather, as Plaintiffs admit, and the documents they themselves cite reveal, these investigations consistently found that Kerviel circumvented SG's controls. (AC ¶ 90.)[9]

ARGUMENT

THE AMENDED COMPLAINT SHOULD BE DISMISSED

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER FOREIGN PURCHASERS OF SG SHARES ON FOREIGN EXCHANGES

The extra-territorial application of the U.S. securities laws is limited. Under well-established Second Circuit law, a court will have subject matter jurisdiction over alleged violations of the federal securities laws by a foreign entity only if a plaintiff can allege either

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[9] See Mission Green, supra, at 24-25 (Ex. 25) (cited at AC ¶ 172); see also John O'Doherty, Kerviel 'Invented Contracts in Quest for Bonus', Fin. Times, Jan. 29, 2008 (ft.com version) (Kerviel used fictitious contracts) (Ex. 29) (cited at AC ¶ 172); David Gow & Emilie Boyer King, Eurex Exchange Told SocGen About Rogue Trader in November, The Guardian (London), Jan. 29, 2008, at 24 (fake documents) (Ex. 30) (cited at AC ¶ 172); Geraldine Baum & Martin Zimmerman, Trader at Bank Quelled Suspicion, Officials Say, L.A. Times, Jan. 29, 2008, at C.3 (false information) (Ex. 31) (cited at AC ¶ 172); Carol Matlack, SocGen Had Been Warned About Kerviel, BusinessWeek, Jan. 28, 2008 (businessweek.com version) (Kerviel used fake documents making it appear that the trades were not risky, and hacked into SG's computer system) (Ex. 32) (cited at AC ¶ 191).

sufficient fraudulent conduct (not conduct merely preparatory to the fraud) in the United States that caused plaintiff's losses (the so-called "conduct test"), or conduct abroad that had a direct effect in the United States (the so-called "effects test"). See SEC v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003). Plaintiffs have the burden of making a prima facie showing of subject matter jurisdiction. See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994).

Although Lead Plaintiff did not seek to represent foreign purchasers of SG stock on foreign exchanges when it won the contest for Lead Plaintiff designation, it now purports to represent a class of all "purchasers of Société Générale securities" (AC ¶ 1) and to add a "foreign plaintiff" – Avon Pension Fund – not appointed by the Court under the PSLRA. (Id. ¶ 32.) But claims of foreign purchasers of SG stock on foreign exchanges must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

A. This Court Does Not Have Subject Matter Jurisdiction Over Foreign Plaintiffs Under the "Conduct Test"

Only two months ago, the Second Circuit squarely held that courts lack subject matter jurisdiction where, as here, the alleged violations of the federal securities laws are premised on the issuance of a foreign company's statements abroad, even if the reason such statements are alleged to be false is purported U.S. activity. See Morrison, 547 F.3d at 174-76.

In Morrison, the Second Circuit affirmed the dismissal of claims by a foreign plaintiff who purchased shares of a foreign company, National Australia Bank ("NAB"), on a foreign exchange. Id. at 175-77. While the Second Circuit recognized that the foreign plaintiffs had alleged U.S. activity – accounting manipulation by a U.S. subsidiary – the Court held that such activity was merely preparatory to the purported fraud, which was not the alleged accounting manipulation itself, but rather how the manipulation was incorporated into NAB's consolidated financial statements and the issuance of such statements from Australia. Even though the alleged manipulation in the U.S. was supposedly imported "wholesale" into NAB's financial statements, id. at 176, the Second Circuit held that the critical activity for alleged violations of Section 10(b) and Rule 10b-5 was the issuance of allegedly false and misleading financial statements by NAB from Australia, not the accounting manipulation in the U.S., id.

Plaintiffs' claims here suffer from precisely the same subject matter infirmities as those dismissed in Morrison. Here, the only alleged conduct in the U.S. relates to SG's acquisition of CDO and RMBS investments and part of the valuation of those assets. (AC ¶¶ 343, 354-64.)[10] As in Morrison, the conduct that actually forms the basis for the alleged violations of Section 10(b) are SG's disclosures and financial statements that were issued from Paris and therefore, Plaintiffs' unsubstantiated, conclusory allegations that the statements were "made" (Id. ¶ 354) in the U.S. fail as a matter of law. SG is organized under French law, and its disclosures and accounting decisions are made in France. (Gardella Decl. ¶¶ 2, 4.) Indeed, Plaintiffs do not allege (nor is it the case) that any SG communications to shareholders at issue here were drafted in or issued from the U.S. (Id. ¶ 4.) See City of Edinburgh Council ex rel. Lothian Pension Fund v. Vodafone Group Pub. Co., No. 07 Civ. 9921, 2008 WL 5062669, at *4 (S.D.N.Y. Nov. 24, 2008) (vague assertion that many of the false and misleading statements were made in the U.S. was insufficient). Plaintiffs cite only a single statement made in the U.S.: the September 10, 2007 pre-announcement by Mr. Oudea, SG's then-Chief Financial Officer based in Paris, who is not named as a Defendant, of SG's anticipated 2007 third quarter writedowns, near the end of the Proposed Class Period. (AC ¶ 364.) Plaintiffs do not refute the more logical inference that this statement was developed in France and simply delivered in the U.S. See Vodafone Group, 2008 WL 5062669, at *4 (isolated presentation in U.S. insufficient

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10 Plaintiffs do not and cannot allege that any of the conduct relating to Kerviel's rogue trading occurred in the United States.

for subject matter jurisdiction under conduct test). "Ensuring the accuracy of [financial] statements," as the Second Circuit held in Morrison, "is much more central to the responsibilities of [Defendants'] corporate headquarters, which issued the statements, than to those of [U.S. subsidiaries], which did not." Morrison, 547 F.3d at 176.

Indeed, the alleged conduct here has even weaker ties to the U.S. than the conduct in Morrison. Specifically, in Morrison, the alleged accounting manipulations occurred in Florida. In contrast, Plaintiffs here assert that the allegedly false valuations were made primarily in Paris (AC ¶¶ 206, 211, 216), that the plan for the CDO and RMBS business "was developed by SG's senior executives in Paris," and that "SG Paris implemented its TGV initiative." (Id. ¶ 354); see In re SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 565 (S.D.N.Y. 2008) (no subject matter jurisdiction where purported fraud was "masterminded" abroad (citing Berger, 322 F.3d at 194)). As the alleged conduct here has even less contact with the U.S. than the conduct that Morrison held was insufficient to establish jurisdiction, Morrison, a fortiori, compels dismissal.

B. This Court Does not Have Subject Matter Jurisdiction Over Foreign Plaintiffs Under the "Effects Test"

"[T]he effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges." Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 128 (2d Cir. 1998). It "has no bearing in an action involving the claims of foreign purchasers of a foreign company's securities on foreign exchanges." In re Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005); see also In re Rhodia S.A. Sec. Litig., 531 F. Supp. 2d 527, 538 (S.D.N.Y. 2007) (effects test inapplicable to claims by foreign investors in French company traded on Paris stock exchange). Thus, the Court does not have subject matter jurisdiction over claims brought on behalf of Avon Pension Fund or similarly situated plaintiffs under the effects test.[11]

II. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS CITERNE AND ALIX

All claims against Defendants Citerne and Alix must be dismissed under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. This court has neither general nor specific personal jurisdiction over these Defendants, because neither is alleged to have engaged in conduct intended to have an effect in the United States. Both are French citizens, who are not alleged to have made any of the alleged misleading statements to SG's shareholders, and neither is specifically alleged to have signed any of the financial disclosures in question. (Gardella Decl. ¶¶ 5, 6.) Thus, the exercise of jurisdiction over these two defendants is entirely unreasonable. See Rhodia, 531 F. Supp. 2d at 542 (no personal jurisdiction over officers of French company who made no false statements or finalized any disclosures at issue). Their purported status as "control persons" is insufficient. Id.

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

A. Standard of Review

In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) the Supreme Court held that to survive dismissal under Rule 12(b)(6), a plaintiff must allege facts that "raise a right to relief above the speculative level," id. at 1965. To meet this standard, "a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008) (quoting Twombly, 127 S. Ct. at 1974).

[11] Of course, foreign investors are not foreclosed from pursuing whatever rights they may have abroad, such as French shareholders pursuing claims in the French courts.

Claims under Section 10(b) are subject to the heightened pleading requirements of the PSLRA and Fed. R. Civ. P. 9(b). The PSLRA "'insists that securities fraud complaints "specify" each misleading statement; that they set forth the facts "on which [a] belief" that a statement is misleading was "formed"; and that they "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."'" Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81-82 (2006) (alteration in original) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005)); see also Lentell v. Merrill Lynch & Co., 396 F.3d 161, 168 (2d Cir. 2005) ("[R]ule [9(b)] is applied assiduously to securities fraud."); 15 U.S.C. § 78u-4(b)(1), (2).

B. The Amended Complaint Fails to Plead Scienter

Prolixity is no substitute for particularity. Plaintiffs' unwieldy, 435-paragraph and 184-page Amended Complaint fails to sufficiently allege with particularity facts giving rise to any inference of scienter, let alone a strong inference at least as cogent and compelling as a non-fraudulent one. Plaintiffs' theory of scienter, that SG purposefully invested in CDOs and RMBS knowing they were doomed to collapse, is entirely implausible and irrational. And Plaintiffs do not and cannot allege that SG or any of the Individual Defendants benefited in any concrete way from this purported fraud. Plaintiffs' attempt to use the later writedowns of CDO and RMBS assets to assert that larger writedowns should have been taken sooner is nothing more than impermissible allegations of fraud by hindsight. Similarly, Plaintiffs' disagreement with SG's third quarter 2007 valuation of illiquid and complex CDOs is a matter of opinion and not actionable as fraud. Plaintiffs' attempts to bolster these insufficient claims with allegations from so-called confidential witnesses – low-level employees who are not alleged to have communicated with senior SG management in Paris, let alone with any of the Individual Defendants – fail to raise any inference of scienter as well.

The allegations relating to the losses caused by Kerviel also fail to raise a strong inference of scienter. It is indisputable that Kerviel went to extraordinary lengths to circumvent internal controls, and none of SG's senior management knew of his activities. Thus, far from creating a cogent and compelling inference of scienter, allegations that SG's internal controls failed allege, at most, inactionable negligence.

For these and other reasons discussed below, Plaintiffs failed to allege scienter. The Court must therefore dismiss their claim under Fed. R. Civ. P. 12(b)(6).

1. The Tellabs Standard

To determine if a "strong inference" of scienter is adequately plead, "a court must consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." Tellabs, 127 S. Ct. at 2510. "A complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Id. See also Cozzarelli v. Inspire Pharms., Inc., No. 07-1851, 2008 WL 5194311, at *4-5 (4th Cir. Dec. 12, 2008).

Before Tellabs, courts in this Circuit recognized two methods for pleading scienter. First, scienter could be pleaded through allegations of "motive and opportunity" to commit fraud. See Novak v. Kasaks, 216 F.3d 300, 307 (2d Cir. 2000). In Tellabs, the Supreme Court instructed that "the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint." 127 S. Ct. at 2511. Second, scienter could be pleaded by alleging facts showing "strong circumstantial evidence of conscious misbehavior or recklessness." Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001). Recklessness means "highly unreasonable" conduct that "'represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Id. at 142 (citation omitted).

As discussed below, because Plaintiffs have failed to allege a cogent motive, any inference of scienter is weakened. Accordingly, "'the strength of the circumstantial allegations [of conscious misbehavior or recklessness] must be correspondingly greater,'" id. (citation omitted), "'and the plaintiff must allege facts approaching a knowledgeable participation in the fraud or a deliberate and conscious disregard of facts.'" In re Bayou Hedge Fund Litig., 534 F. Supp. 2d 405, 415 (S.D.N.Y. 2007) (emphasis omitted) (citation omitted).

Since Tellabs, the Second Circuit has reinforced that "'[w]here plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.'" Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 196 (2d Cir. 2008) (alteration in original) (quoting Novak, 216 F.3d at 309). Without allegations of contemporaneous documents contradicting public statements, the Second Circuit held that any inference of scienter was not "'at least as compelling' as the competing inference," id. at 197 (quoting Tellabs, 127 S. Ct. at 2505), "i.e., that the statements either were not misleading or 'were the result of merely careless mistakes at the management level based on false information fed it from below,'" id. (citation omitted).

2. Plaintiffs' Claims Regarding SG's Exposure to the "Credit Crisis" is Based on an Entirely Implausible Theory of Fraud

Courts must weigh the plausibility of competing inferences to determine whether a plaintiff has alleged a cogent and compelling inference of scienter. See Tellabs, 127 S. Ct. at 2510; see also Kalnit, 264 F.3d at 140-41 ("Where plaintiff's view of the facts defies economic reason . . . [it] does not yield a reasonable inference of fraudulent intent." (internal quotation marks omitted) (alterations in original) (citation omitted)). Ignoring the onset of the global "credit crisis" in the third quarter of 2007, Plaintiffs assert that – beginning in August 2005, more than two years before the credit crisis – SG commenced a deliberate scheme to defraud shareholders in connection with its CDO and RMBS investments, which eventually grew to billions of Euros, because it supposedly knew these assets were overvalued, rapidly deteriorating in value and "toxic." (AC ¶ 11.)

This theory of fraud is entirely implausible. Plaintiffs fail to provide a plausible inference, let alone a cogent and compelling one, as to why SG, if it actually knew (or even suspected) what Plaintiffs allege it knew about the value of its CDOs and RMBS, would continue to build and hold such positions and otherwise take actions inconsistent with a profitable investment. If what Plaintiffs allege is true, SG could have taken positions that would have allowed it to capitalize on the extreme downturn in the U.S. subprime market, rather than suffer the significant losses it ultimately did, along with other banks.

That SG allegedly continued to pursue a losing investment strategy to "stay in the game" (AC ¶ 202, 229) is entirely irrational, especially considering that Plaintiffs allege no concrete benefit to SG for continuing this line of business. As Plaintiffs allege, this business line contributed at most 1% of SG's revenue (Id. ¶ 144) and was only one of 63 diversified profit centers. (Id. ¶ 154.) It would have been economically senseless to continue investing in U.S. residential-backed CDO and RMBS investments unless SG expected them to be profitable. See Fadem v. Ford Motor Co., 352 F. Supp. 2d 501, 525 (S.D.N.Y.), aff'd, 157 F. App'x 398 (2d Cir. 2005). Continuing such an investment strategy undermines any inference SG knew the strategy was destined to fail. See In re JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595, 629 (S.D.N.Y. 2005) (continuing to loan money to Enron undercut inference JP Morgan knew Enron would collapse).

Plaintiffs assert in conclusory fashion that SG underwrote CDOs, but they fail to allege how many CDOs or any specific facts regarding the size of the underwriting fees earned from SG's CDO business. Indeed, Plaintiffs admit that by the time SG allegedly had made the decision to "stay in the game" (summer 2007), it was already supposedly clear that the CDO market was "shot" (AC ¶ 214), and that SG was "late to the game" (id. ¶ 213.) If in fact it was "insane" to "keep[ ] up the appearance of having an active underwriting operation" in "late 2007" (id. ¶ 229), Plaintiffs have failed to allege why SG continued to do so. Rather, the more cogent inference is that SG would have shorted the CDO market or reduced its CDO investments, knowing the CDO market was in danger of imminent collapse.

Plaintiffs also acknowledge that SG pre-announced both its third quarter 2007 writedown and its year-end 2007 results, further weakening any inference of scienter related to the purported concealment of SG's writedowns. See Rombach v. Chang, 355 F.3d 164, 176 (2d Cir. 2004) ("[T]he allegation that defendants behaved recklessly is weakened by their disclosure of certain financial problems prior to the deadline to file its [sic] financial statements."); see also In re Nokia Oyj (Nokia Corp.) Sec. Litig., 423 F. Supp. 2d 364, 407 (S.D.N.Y. 2006) (disclosure of poor sales ten days before filing deadline for financial statements undercut inference that defendants knew but concealed problems). Here, SG pre-announced it would have writedowns two months before it released its third quarter 2007 results. It then pre-announced its 2007 year-end writedowns one month before it was scheduled to release them to the public.

The 30-month Proposed Class Period, beginning on August 1, 2005, itself undermines an inference of scienter. "'Alleging such a lengthy class period weakens any inference of scienter' . . . and 'strengthens a competing inference that the plaintiffs filed their complaint simply to embark on a fishing expedition with the hope of catching a valid claim.'" Malin v. XL Capital Ltd., 499 F Supp. 2d 117, 151 (D. Conn. 2007) (quoting Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 185 (4th Cir. 2007)). Further undermining this inference is that

Plaintiffs fail to allege a single fact, from confidential witnesses or otherwise as discussed below, that SG knew of any problems with respect to its CDOs and RMBS investments as early as August 1, 2005, a full two years before the credit crisis hit. See In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1092 (9th Cir. 2002) (allegations of misstatements at beginning of a 63-week class period were "woefully inadequate").

Moreover, as Plaintiffs acknowledge, SG repurchased its own stock during the Proposed Class Period. The repurchase of stock at supposedly inflated prices presents a compelling inference against scienter. See McNamara v. Pre-Paid Legal Servs., Inc., 189 F. App'x 702, 717 (10th Cir. 2006); Mathews v. Centex Telemanagement, Inc., No. C-92-1837-CAL, 1994 WL 269734, at *8 (N.D. Cal. June 8, 1994) ("It would have made no sense to purchase that stock if defendants knew the prices to be inflated."). While Plaintiffs allege that SG repurchased stock in an effort to artificially inflate SG's share price so the Individual Defendants could sell their shares at a higher price (AC ¶ 372), as discussed below this theory is entirely specious.

Plaintiffs' theory makes even less sense because this so-called fraud could not have gone on indefinitely, such that the repurchased shares would never decline in value. The Second Circuit observed in Shields v. Citytrust Bancorp, Inc., in evaluating a claim that bank executives fraudulently understated the bank's loan reserves, that "the ordinary course of bank business would lead to the review of the loan portfolios, as it did," so that defendants would not have the opportunity to benefit from the alleged misstatements and nondisclosures. 25 F.3d at 1130; see also In re GeoPharma, Inc. Sec. Litig., 399 F. Supp. 2d 432, 449-50 (S.D.N.Y. 2005) (scienter allegations insufficient where "the alleged scheme could not possibly have succeeded" because truth inevitably would come out given media and regulatory scrutiny).

3. Plaintiffs' Assertion that SG's Third Quarter 2007 Writedown Was Not Large Enough is Classic "Fraud By Hindsight"

The more compelling and the only cogent inference to be drawn from Plaintiffs' allegations as to SG's CDO and RMBS losses is that SG, like so many other sophisticated financial institutions, simply did not foresee the severity of the rapid and unexpected credit market developments that began to unfold in the third quarter of 2007.

As this Court has recognized, "when a corporation tells an investor that its business is likely to be profitable, the investor cannot later point to evidence of losses or <u>adverse events in the life of the business</u> to allege fraud." <u>Waxman</u>, 2003 WL 22439796, at *9 (Lynch, J.) (emphasis added). Indeed, courts in this Circuit have long been highly skeptical of claims alleging that losses suffered in the wake of market-wide downturns were supposedly caused by fraud. <u>See</u> <u>Denny</u>, 576 F.2d at 469-70 (engaging in "risky and speculative" investments did not amount to a 10(b) violation in light of economic turmoil of 1970s); <u>Shields</u>, 25 F.3d at 1129 (rejecting claim that bank executives knew loan portfolio was "precarious" and understated reserves before commercial real estate market collapsed during late 1980s). This same logic applies to the current credit crisis, which is indisputably global and has left few if any market participants unscathed. <u>See</u> <u>In re 2007 Novastar Fin., Inc. Sec. Litig.</u>, No. 07-0139-CV-W-ODS, 2008 WL 2354367, at *3-4 (W.D. Mo. June 4, 2008) (losses from subprime loans due to credit crisis not actionable).

Plaintiffs implicitly recognize their complaint is founded on hindsight judgments about the credit crisis. For example, Plaintiffs cite to a "series of recent disclosures by financial institutions regarding exposure to derivatives and mortgage-backed securities," "revelations of the impact of the crisis at other major financial institutions," and a "tide of bad news about derivatives- and mortgage-related losses." (AC ¶ 88.) Plaintiffs fail to sufficiently allege that these "disclosures," "revelations" or "bad news" came prior to the third quarter of 2007, and did not worsen before SG released its 2007 results in January 2008. (Id. ¶ 165 (alleging writedown increased tenfold between the third quarter 2007 and year-end 2007).) In fact, Plaintiffs acknowledge that €500 million of writedowns was due to the failure of SG's monoline hedges, which occurred after the third quarter 2007. (Id. ¶ 167.) The allegation that SG somehow "stood alone" (id. ¶ 88), or was different from other banks (id. ¶ 89), is entirely conclusory. In fact, the same allegations made against SG regarding its CDO losses are made against other banks hit by the credit crisis.[12]

(a) Differences of Opinion Over Valuation are not Actionable as Fraud

Allegations that SG should have taken larger losses on its CDO and RMBS assets when it pre-announced the 2007 third quarter writedown (AC ¶¶ 163-65) ignore that these were complex valuations of what suddenly became illiquid securities. This Court's opinion in Allied Capital is instructive. In that case, plaintiffs sued over what they alleged was Allied's fraudulent overvaluation of certain investments. But in reasoning equally applicable here, this Court held:

> [T]he Complaint establishes nothing more than that the plaintiffs disagree with some of Allied's investment valuations – but given the difficulty of valuing illiquid securities, and the multitude of factors that may appropriately be taken into account, alleging disagreement with some of Allied's valuations does not equate to alleging fraud. There is simply no basis on which to infer that Allied's valuation of its investments was in fact incorrect or

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12 See, e.g., Consolidated Amended Class Action Complaint, In re Merrill Lynch & Co., Inc. Sec., Derivative & ERISA Litig., No. 07cv9633 (S.D.N.Y. May 21, 2008) ¶ 34 (alleging Merrill failed to disclose its subprime ABS CDO exposure); id. ¶ 92 (alleging Merrill misstated risk management, abandoned risk management policies) (Ex. 33); Consol. Securities Class Action Complaint, In re UBS AG Sec. Litig., No. 1:07-CV-11225-RJS (S.D.N.Y. July 11, 2008) ¶ 38 (alleging UBS's undisclosed exposure to the US subprime mortgage market); id. ¶ 210 (alleging UBS ignored or manipulated risk management controls) (Ex. 34); Amended Complaint for Violation of the Federal Securities Laws, Cornwell v. Credit Suisse Group, No. 08 Civ. 3758 (VM) (S.D.N.Y Oct. 20, 2008) ¶ 42 (alleging Credit Suisse falsely disclosed its subprime exposure as de minimis); id. ¶ 103 (alleging false statements as to risk management) (Ex. 35).

> inflated, and thus no basis to infer that Allied's accounting policies resulted in fraudulent overvaluation.

Allied Capital, 2003 WL 1964184, at *4.

Further, disagreeing with a valuation does not allege securities fraud because, as this Court has repeatedly recognized, valuation models are by definition opinions, not facts. See In re Salomon Analyst Level 3 Litig., 373 F. Supp. 2d 248, 251-52 (S.D.N.Y. 2005) (Lynch, J.) (because "financial valuation models depend so heavily on the discretionary choices of the modeler – including choice of method . . . choice of assumptions . . . and choice of 'comparables' . . . – the resulting models and their predictions can only fairly be characterized as subjective opinions"). Second-guessing opinions, "made all too easy with the benefit of hindsight," Podany v. Robertson Stephens, Inc., 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004) (Lynch, J.), does not allege securities fraud. It is not enough that an opinion becomes "incorrect or doubtful, . . . unreasonable, irrational, excessively optimistic, not borne out by subsequent events, or any other characterization that relies on hindsight or falls short of an identifiable gap between the opinion publicly expressed and the opinion truly held." In re Salomon Analyst Level 3 Litig., 350 F. Supp. 2d 477, 489 (S.D.N.Y. 2004) (Lynch, J.) (citations omitted).

Here, SG plainly disclosed it valued its assets through stress test models in the absence of market prices, 2007 Reg. Doc., supra, at 137-38 (Ex. 2), and wrote them down based on fully disclosed estimates of losses. (AC ¶¶ 364, 161 (writedowns based on expert loss estimations on 2006 and 2007 subprime vintages of 15%).) As these estimates were surpassed, the writedowns grew, as SG advised investors they might. (Id. ¶ 161.) See SG Press Release, supra, at 5, App. 1 (additional writedown based on $350 billion estimated loss) (Ex. 5). Plaintiffs do not allege the facts that would cause such an opinion to be false at the time made. The best they can do is conclusorily allege, for example, that "Defendants knew, or recklessly disregarded, that SG's subprime losses were estimated to far exceed €100 million, or even €200 million." (AC ¶ 364.) That valuation models purportedly did not "reflect reality" and were supposedly "not reliable" (id. ¶ 164) fails to allege that SG's valuations were knowingly false.

Moreover, Plaintiffs acknowledge SG was primarily invested in the highest rated – and least risky – tranches of CDOs and RMBS. (See AC ¶¶ 9, 102, 104, 105, 154, 168); see also Third Quarter & 9 Mo. 2007 Results, supra, at 57 (Ex. 4); SG Press Release, supra, at 6, App. 3 (Ex. 5). There are no specific allegations that these tranches were defaulting or being downgraded prior to the third quarter of 2007. See Jian Hu, Structured Finance CDO Ratings Surveillance Brief: September 2007, Moody's Investors Servs., Oct. 23, 2007, at 2 (as of September 30, 2007, only "0.6% of all Aaa [] CDO tranches outstanding, or 0.2% by outstanding balance" were downgraded in 2007) (Ex. 36). Indeed, Plaintiffs fail to sufficiently allege that any major financial institution touched by the "credit crisis" announced a writedown on its AAA super-senior CDOs or senior RMBS earlier than third quarter 2007.

(b) Plaintiffs' ABX Allegations Fail to Allege Scienter

Plaintiffs allege that the third quarter 2007 writedown was too small because the ABX, an index created to track certain RMBS securities,[13] declined more severely than the writedowns during the Proposed Class Period. (AC ¶ 316.) However, there are several reasons why using the ABX as a direct proxy to value CDOs or RMBS was not required, nor preferable.

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13 As one treatise describes them:

> The ABX.HE indices consist of five separate subindices, one for each of the rating categories: AAA, AA, A, BBB, and BBB-. . . . Each subindex consists of 20 tranches (of the same rating as the rating category for that particular subindex). . . . A new set of ABX.HE indices is launched every six months on January 19 and July 19."

See Laurie S. Goodman et al., Subprime Mortgage Credit Derivatives 145 (2008) (Ex. 37).

First, the decline in the ABX prior to the third quarter 2007, as Plaintiffs acknowledge (AC ¶ 316), measured the downturn in lower rated tranches of RMBS. (See Id. ¶ 316 (showing ABX BBB tranche from the second half of 2006).) As Plaintiffs must admit (Id. ¶¶ 9, 102, 104, 105, 154, 168), SG's CDO and RMBS investments were in the higher rated senior and super-senior tranches. See Third Quarter & 9 Mo. 2007 Results, supra, at 57 (Ex. 4); SG Press Release, supra, at 6, App. 3 (Ex. 5). Plaintiffs nowhere allege with particularity that the ABX decline should serve as a direct proxy for the higher rated tranches of CDOs or RMBS or that these tranches declined by more than SG's writedowns. See Robert Stowe England, The Mounting Toll, Mortgage Banking, vol. 68 issue 4, Jan. 2008, at 38-39, 44 (noting that the second quarter 2007 ABX for AAA traded at more than 95% of par on October 1, and only dropped below 80 by October 30) (Ex. 38).

Second, the ABX tracks only a tiny fraction of the trillion dollar asset backed securities market. Each series of the ABX includes a fixed, rigidly defined basket of 20 RMBSs all originated in a similar "vintage." See Goodman, supra, at 145-49, 156-60 (Ex. 37). In contrast, CDOs may include a wide range of debt securities, not just subprime RMBSs. A CDO is also far more diversified than the securities that comprise the ABX. For each CDO, a collateral manager is hired to judgmentally select a diverse set of underlying assets, so a typical CDO may have more than 100 underlying MBSs and other securities from varying vintages. See id. at 269-70. CDOs also have credit enhancements, as discussed above, to further protect them from losses, which may not be reflected in the bonds underlying the ABX. Indeed, Markit, the company that created the ABX (AC ¶ 315), has said that the ABX "was certainly not designed as a valuation tool for individual securities." Ben Logan, The ABX Index: A Pricing Conundrum, Credit, May 2008, at 48 (Ex. 39); see also Goodman, supra, at 160 ("[T]here is no way to use TABX [a composite of two ABX indices] pricing as the benchmark for CDO pricing.") (Ex. 37).

Third, Plaintiffs do not allege, nor could they, that entities must use the ABX in measuring the fair value of financial instruments under applicable accounting rules. (See AC ¶ 315 (ABX "may be a Level 2 input" (emphasis added)).) Rather, as the credit markets deteriorated in the third quarter of 2007 and market observables became more difficult to use, valuing these illiquid assets became even more than ever a matter of judgment. See Allied Capital, 2003 WL 1964184, at *1 ("There is no one authoritative method of determining fair value, since valuing securities for which no current market exists involves the exercise of judgment, and is inherently imprecise."). The SEC recently concurred, stating "the determination of fair value often requires significant judgment." Press Release, SEC, SEC Office of the Chief Accountant and FASB Staff Clarification on Fair Value Accounting (Sept. 30, 2008) (sec.gov. version) (Ex. 40). This view is shared by French regulators, who concluded companies could use internal estimates to price products that are illiquid in determining fair value. See Press Release, Autorité des Marchés Financiers ("AMF"), Recommendation on Fair Value Measurement of Certain Financial Instruments (Oct. 15, 2008) (Ex. 41).

Plaintiffs do not sufficiently allege that in exercising its judgment and discretion, SG deliberately ignored the ABX. Thus, it is of no consequence that SG purportedly used, then stopped using, the ABX as a valuation tool. (AC ¶ 209.) Far from establishing a cogent or compelling inference of fraud, all this demonstrates is that, at some points, SG believed it was appropriate to use the ABX, and at some points, it did not.

4. Plaintiffs' Confidential Witness Allegations are Insufficient to Create a Strong Inference of Scienter

Plaintiffs' confidential witness allegations do not raise either a cogent or compelling inference of scienter. "A complaint may rely on confidential sources as long as the facts alleged 'provide an adequate basis for believing that the defendants' statements were false.' In addition, the confidential sources must be 'described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.'" In re Am. Express Co. Sec. Litig., No. 02 CV 5533, 2008 WL 4501928, at *7 (S.D.N.Y. Sept. 26, 2008) [hereinafter AmEx] (citations omitted). Where confidential witnesses allege defendants had access to contrary facts, confidential witness allegations must also satisfy Dynex. See Dynex, 531 F.3d at 197 (pleaded facts must create a strong inference that "someone whose scienter is imputable to the corporate defendants and who was responsible for the statements made was at least reckless toward the alleged falsity of those statements"); see also AmEx, 2008 WL 4501928, at *8 (plaintiffs did not plead recklessness where none of the confidential sources "would have knowledge of what [defendants] knew or should have known").

In AmEx, plaintiffs alleged confidential witnesses had warned executives about risks associated with AmEx's high yield debt portfolio, including "significant defaults, increasing and persistently high default rates, and bankruptcy filings that negatively impacted the high-yield debt market." AmEx, 2008 WL 4501928, at *3-4. But Judge Pauley held, consistent with Dynex, and similar to Allied Capital, that none of these warnings created an inference that AmEx was improperly valuing its high yield debt portfolio, that risk control policies were inadequate or that AmEx was violating GAAP. See id. at *7 ("Allegations that [AmEx official] and senior management were warned of the risks or that senior management should not have been surprised by the charges relating to High Yield Debt show only that the Individual Defendants may have been made aware of the risks associated with the High Yield Debt, not that Amex was not properly valuing the debt or monitoring its risk.").

As in AmEx, not a single confidential witness here makes a particularized allegation that Messrs. Bouton, Citerne, Alix, or any senior SG executives responsible for the issuance of SG's public statements knew that those statements were false, much less had contrary information about the value of SG's CDOs or RMBS or the need to take earlier or greater writedowns. See also Steinberg v. Ericsson LM Tel. Co., No. 07 CV. 9615, 2008 WL 5170640, at *13 (S.D.N.Y. Dec. 10, 2008) (plaintiffs failed to allege scienter, where complaint did not identify any reports seen by executive defendants, or conversations in which they were provided information, that was inconsistent with public statements). Indeed, no confidential witness is alleged to have had any direct communication with Messrs. Bouton, Citerne, Alix, or any of SG's officers in Paris, particularly those making the alleged misstatements at issue. Id. (confidential witnesses were mid-level managers in US who claimed no contact or communications with defendants' executives or European corporate headquarters). Plaintiffs merely posit the unremarkable proposition that "there was a lot of interaction" between the New York branch of SG and its Paris headquarters. (AC ¶ 216.)

Rather, the confidential witnesses are only alleged to have communicated with other SG employees in New York, who, likewise, are never alleged to have reported information to senior officials in Paris. (See, e.g., AC ¶¶ 62, 204, 210, 212, 218, 223.) This is insufficient to allege scienter. See Malin, 499 F. Supp. 2d at 141 ("The existence of one line of communication between CW1 and a non-defendant officer at XL's Stamford headquarters is not sufficient to support a theory of scienter based upon knowledge or reckless conduct on the part of the

Individual Defendants."). Moreover, all confidential witnesses are alleged to be low-level employees (see, e.g., AC ¶¶ 64, 65, 71, 72, 227), without any particularized knowledge of SG's CDO or RMBS valuations. (Id. ¶ 63 ("CW1 also had information and knowledge with respect to SG's valuation of its RMBS/CDO portfolio.").)

Plaintiffs' confidential witness allegations fail for several additional reasons. First, Plaintiffs' allegations as to certain confidential witnesses fail to provide the "adequate basis for believing that defendants' statements were false" that Novak requires, see 216 F.3d at 314, as several confidential witnesses purport to know facts regarding events that happened either before they joined or after they left SG. For example, CW5 allegedly left SG in January 2007. (AC ¶ 220.) Plaintiffs provide no basis whatsoever to conclude that CW5 would know whether statements as to SG's subprime exposure after this date (see generally id. ¶¶ 124-66), were in fact false, let alone whether there was a "viable market" for CDOs in mid-2007. (Id. ¶ 149.) Similarly, CW4 left SG in April 2006. (Id. ¶ 67.) It is implausible that CW4 would have knowledge of problems with SG's valuation of CDOs and RMBS after this date. (Id. ¶ 70.)

Likewise, CW3 only joined SG in July 2007, during SG's 2007 third quarter when it began announcing writedowns. (AC ¶ 219.) CW6 did not join SG until January 2007. (Id. ¶ 227.) Plaintiffs do not allege how these two confidential witnesses would know facts contradicting SG's public statements dating back to August 1, 2005, the beginning of the Proposed Class Period. Indeed, only one confidential witness – an Information Technology Director in New York – is alleged to have been employed by SG for the entire Proposed Class Period. (Id. ¶ 64.)

Second, none of the confidential witness allegations about "reports" indicate what these reports said that was contrary to SG's public statements, when they were sent to Paris in relation to SG's public statements or to which SG officials they were sent. (See, e.g., AC ¶¶ 76, 127, 216, 224, 225, 273.) Merely alleging that "reports" were sent to Paris (id. ¶¶ 355, 360) is insufficient. See Pittleman v. Impac Mortgage Holdings, Inc., No. SACV 07-0970AG, 2008 WL 4809962, at *2 (C.D. Cal. Oct. 6, 2008) (former employee's allegations about spreadsheets and "Loss Estimate reports" purportedly showing adverse facts about subprime loans were too generic to allege scienter). Vague allegations about "meetings" (AC ¶ 223) are similarly insufficient. See 380544 Can., Inc. v. Aspen Tech., Inc., 544 F. Supp. 2d 199, 230 (S.D.N.Y. 2008) (dismissing confidential witness allegations regarding "sales meetings," where allegations failed to provide details as to context of discussions at meetings regarding accounting policies).

Third, the confidential witness allegations primarily relate to adverse market events (e.g., AC ¶¶ 205, 212, 217, 219, 223, 229) and, at most, assert differing opinions as to valuation. See In re Elan Corp. Sec. Litig., 543 F. Supp. 2d 187, 213 (S.D.N.Y. 2008) (that purported warnings from confidential witnesses regarding drug risk were hypotheses, not facts, undermined fraudulent inferences); Druskin v. Answerthink, Inc., 299 F. Supp. 2d 1307, 1334 (S.D. Fla. 2004) (that confidential witnesses and defendants "had different business judgments" was insufficient to infer scienter).

Consequently, allegations, albeit conclusory, that confidential witnesses "believe" the CDOs were a "train wreck", that it was "common knowledge" that SG's CDOs and RMBS had declined in value and were "virtually illiquid" by the end of 2006, that these facts were a "clear sign" that the market was "shot" by March 2007, that things were "not going well" with SG's "securitized subprime loans," (AC ¶¶ 208, 213, 214, 217, 223, 228, 318), that the valuations "did not reflect reality" (id. ¶¶ 149, 164, 215), and that other facts were "widely known" (id. ¶ 212) are all insufficient. See Malin, 499 F. Supp. 2d at 140-41 (that confidential witness alleged problems were "well-known" was insufficient to allege scienter); In re Flag Telecom Holdings, Ltd. Sec. Litig., 308 F. Supp. 2d 249, 267 (S.D.N.Y. 2004) (allegation by unnamed officer of "terrible" business conditions held "far too vague" to show recklessness). Similarly, there are no allegations to support CW5's belief that SG's purported involvement with Magnetar was part of a "short sell scheme" rather than SG legitimately and prudently selling lower rated, higher risk CDO tranches. (AC ¶ 222.)

Fourth, confidential witness allegations regarding the purported change from mark-to-market to mark-to-model valuation, and subsequent changes to valuation models, are of no consequence. (AC ¶¶ 164, 207, 215.) As discussed above, applicable accounting rules allow the use of modeling in the absence of market prices, SG disclosed its use of modeling to investors, and this Court has held that valuation disputes, especially in an illiquid market, require the exercise of judgment and are inactionable. Plaintiffs allege no specific basis to infer that SG's supposed switch from mark-to-market to mark-to-model was false or fraudulent.

Fifth, as Plaintiffs acknowledge, SG held higher rated super-senior CDOs and senior RMBS with credit enhancements that allowed SG to limit risk that may have been associated with underlying RMBS. (AC ¶¶ 102, 104, 105.) None of the confidential witnesses indicates that supposed problems with SG's CDOs, such as purported "defaults" (Id. ¶ 225), reached a level where SG knew its higher-rated CDOs were overvalued.

5. Allegations relating to the Kerviel Losses do not Provide a Cogent and Compelling Inference of Fraud

(a) The Kerviel Allegations Fail to Satisfy the PSLRA

Plaintiffs' allegations as to Jérôme Kerviel are based largely on a selective use of press clippings and public reports. (See, e.g., AC ¶¶ 170-85.) As an initial matter, Plaintiffs cherry-pick quotes or paraphrase from these sources in ways helpful to their claims and ignore the contrary ones. Specifically, many of Plaintiffs' cited sources (see Id. ¶ 172) indicate that Kerviel used a variety of ruses to avoid being detected, see O'Doherty, supra (Ex. 29); Gow & King, supra (Ex. 30); Baum & Zimmerman, supra (Ex. 31), a fact which Plaintiffs tacitly concede elsewhere (see AC ¶ 90), and which infers that SG was unaware of his activities.

In any event, pleading securities fraud from press accounts was improper under Rule 9(b) before the PSLRA, and it surely cannot pass muster now. As Judge Mukasey observed in Hershfang v. Citicorp, 767 F. Supp. 1251 (S.D.N.Y. 1991) where the "[p]laintiffs have stitched together a patchwork of newspaper clippings and proclaimed the result a tale of securities fraud" their claims cannot survive dismissal under Rules 9(b) and 12(b)(6), id. at 1259. Accord In re Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549, 563 (S.D.N.Y. 2004) ("[C]onclusory allegations and opinions 'taken from a newspaper reporter's notebook' cannot satisfy the strictures of Rule 9(b) or the PSLRA and cannot be a predicate for [a fraud claim] under § 10(b) and Rule 10b-5." (citation omitted)); In re Optionable Sec. Litig., 577 F. Supp. 2d 681, 690 (S.D.N.Y. 2008) ("'Conclusory allegations of wrongdoing are no more sufficient if they come from a newspaper article than from plaintiff's counsel.'" (citation omitted)).

Moreover, Plaintiffs cannot stretch the "facts" well beyond what these news sources say. As Judge Kaplan observed recently in In re Optionable, allegations based on press reports may be credited only to the extent supported by the source. If the cited articles do not purport to describe a fraud, one cannot be inferred. See 577 F. Supp. 2d at 690. For example, Plaintiffs cite an article for the proposition that SG was warned by Eurex about Kerviel's concealed and unauthorized trades. (AC ¶ 192.) However, this article clearly indicates that Eurex's inquiries had nothing to do with "abnormal volumes," but were rather about "strategy." See Nelson D. Schwartz & Katrin Bennhold, Société Générale Scandal: 'A Suspicion That This

Was Inevitable', Int'l Herald Trib., Feb. 5, 2008 (iht.com version) (Ex. 42); see also SocGen to Call on Outside Audit Team for Probe, Fin. Times, Jan. 30, 2008 (ft.com version) (same) (Ex. 43) (cited at AC ¶ 172(h)). Likewise, the inspector quoted in a February 7, 2008 Daily Telegraph article (cited at AC ¶ 199) was employed by SG from 2001 to 2004, not during the Proposed Class Period or Kerviel's tenure in Delta One. Philip Aldrick, SocGen Days from Rights Issue, The Daily Telegraph (London), Feb. 7. 2008, at 2 (City Section) (Ex. 44). Finally, Plaintiffs quote from articles that do not contain the quoted passages. For example, the quoted passage in Paragraph 191 does not appear in the cited BusinessWeek article. See Matlack, supra (Ex. 32).

Therefore, since none of these sources state, or even suggest, that SG management knew about or recklessly disregarded red flags, Plaintiffs cannot draw this inference from those sources. (See, e.g., AC ¶¶ 170-75, 186, 191, 192, 199.) Indeed, one of the cited sources states the '"bank was right to think that [Kerviel] was practising his normal duties as a trader.'" Eric Reguly, Exchange Says It Questioned Kerviel's Actions, Globe & Mail Update, Jan. 28, 2008 (quoting Paris prosecutor) (Ex. 45) (cited at AC ¶ 171).

(b) The Kerviel Allegations Fail Under Dynex

Plaintiffs' allegations about Kerviel fail to satisfy Dynex because there is no particularized indication that any of the information about Kerviel's unhedged trades was received or should have been known by Messrs. Bouton, Citerne, Alix or any other senior officials responsible for SG's pubic statements. (E.g., AC ¶ 138 (alleging merely that SG generally was "aware").) Failing to allege specifically which, if any, of SG's more than 130,000 employees in (80 countries) supposedly knew of Kerviel's actions cannot satisfy Plaintiffs' pleading burden. The conclusions of the Paris police and investigating magistrates, discussed above, affirmatively refute Plaintiffs' conclusory allegations that Kerviel's superiors knew of his activities and certainly create a more cogent and compelling inference that there was no such knowledge, actual or imputable to SG or any of the Individual Defendants.

None of the other investigations raises any inference that Messrs. Bouton, Citerne, Alix or any other senior official responsible for SG's pubic statements knew about Kerviel's activities. (See AC ¶¶ 230-48.) The French Banking Commission concluded that the lapses in internal controls "were not known by management." (Id. ¶ 239 (citing Banking Report 3-4) (Ex. 26)).) The Mission Green report referred to in the Amended Complaint concluded that Kerviel's "hierarchy . . . never had any knowledge of either the size of the incriminated positions or the mechanisms used to conceal them." Mission Green, supra, at 6 (Ex. 25). Nor did the Mission Green report conclude that an investigation by SG subsidiary FIMAT "should" (AC ¶ 194) have led to a discovery of Kerviel's trades. Mission Green, supra, at 8 (Ex. 25). Likewise, the official report issued by Christine Lagarde, France's Finance Minister, according to an article cited by Plaintiffs (AC ¶ 232), "made no specific criticism of senior management, accepting its explanation that the losses were the work of a lone trader." John Ward Anderson, French Official Scolds Bank, Wash. Post, Feb. 5, 2008 (washingtonpost.com version) (Ex. 46).

Plaintiffs do not allege that Messrs. Bouton, Citerne, Alix or any other senior officials ever received any reports or information as to concealed, unhedged trades by Kerviel. In particular, neither the April 16, 2007 e-mail nor the November 20, 2007 letter from Eurex so heavily relied on in the Amended Complaint (AC ¶¶ 176, 187) are alleged to have been received by Messrs. Bouton, Citerne or Alix. While Plaintiffs allege that "SG was already aware" of Kerviel's unhedged trades by May 10, 2007 (id. ¶ 138) or that it supposedly knew of numerous unhedged transactions as of August 2, 2007 (id. ¶ 148) there are no facts alleged as to who at SG knew, particularly any of the Individual Defendants, and whether that knowledge contradicted any of SG's contemporaneous statements about risk management.[14]

That there were supposedly "clear and unequivocal red flags" as to Kerviel (AC ¶ 4), and that Kerviel himself – who has every incentive to point fingers at others – claims that he could not "believe" his superiors did not know (id. ¶ 6) is not as cogent and compelling as the competing inference that Kerviel through cunning, lies and planning defrauded SG. Indeed, Plaintiffs acknowledge that when Kerviel was confronted about his trades, he "invented a lie." (Id. ¶ 189.) Nor do Plaintiffs allege there were red flags as of August 1, 2005 (the beginning of the Proposed Class Period), when Plaintiffs chose to assert the deliberate fraud began.

Moreover, Plaintiffs acknowledge Kerviel used a range of techniques to conceal his activities (id. ¶ 90) which further undermines any inferences as to SG's awareness. See In re Ivan F. Boesky Sec. Litig., 36 F.3d 255, 265 (2d Cir. 1994) (considering surreptitious activity by employee in dismissing claims against employer for employee's fraud). The sources cited by Plaintiffs (see AC ¶ 172) detail the means Kerviel used to hide his activities from management. See O'Doherty, supra (Ex. 29); Gow & King, supra (Ex. 30); Baum & Zimmerman, supra (Ex. 31); see also Matlack, supra (Ex. 32) (cited at AC ¶ 191).

6. Allegations of Poor Controls and Risk Management Do Not Establish an Inference of Scienter

Courts will not "second guess the decisions made in the course of business operations, lest every strategy that goes awry becomes subject to a lawsuit, and corporations are inhibited from following all but the most conservative path." Fadem v. Ford Motor Co., No. 02

[14] Plaintiffs' citation to a newspaper article that reports on snippets of a letter purporting to warn that unspecified internal control procedures were "wanting" (AC ¶ 190) cannot support a strong inference of scienter. Not only is this allegation lacking in any detail to suggest that such a warning had anything to do with Kerviel's trading, but the Complaint does not allege that steps were not taken to address such concerns. Certainly, it does not suggest that senior management were aware of the Kerviel trading or that Kerviel's circumvention of such controls was even possible.

Civ. 0680, 2003 WL 22227961, at *4 (S.D.N.Y. Sept. 25, 2003); see also Lerner v. FNB Rochester Corp., 841 F. Supp. 97, 101 (W.D.N.Y. 1993) ("Far from alleging fraudulent misstatements or omissions . . . plaintiff is more accurately expressing his displeasure with the judgment calls made by management, which turned out to have been poorly made, and with management's failure to anticipate that its portfolio would be particularly vulnerable in an economic slump."). These decisions and judgments are not actionable as fraud.

Plaintiffs' hindsight allegations, that risk management procedures and controls failed or were overridden do not state a fraud claim. See Ciresi v. Citicorp, 782 F. Supp. 819, 821 (S.D.N.Y. 1991) (dismissing claim that Citicorp violated its risk management policies by entering into high-risk loans and holding that "the claim that the defendants did not plan their loan reserves properly is essentially a claim that defendants mismanaged the company"), aff'd mem., 956 F.2d 1161 (2d Cir. 1992). As this Court has held, it is not sufficient for a plaintiff to allege "what procedures he believes to be necessary or proper for the sound operation of a business" to state a fraud claim. Waxman, 2003 WL 22439796, at *9.

As to Kerviel, the mere fact that losses occurred may reveal in hindsight that certain controls and risk management systems may have been ineffective, but it cannot create a strong inference of deliberate securities fraud. "[B]y definition, all frauds [perpetrated on institutions] demonstrate the 'inadequacy' of existing controls, just as all bank robberies demonstrate the failure of bank security and all burglaries demonstrate the failure of locks and alarm systems." Higginbotham v. Baxter Int'l Inc., 495 F.3d 753, 760 (7th Cir. 2007); see also In re BearingPoint, Inc. Sec. Litig., 525 F. Supp. 2d 759, 776 (E.D. Va. 2007) ("Plaintiff cannot piggyback an inference of scienter for the false financials on a subsequent determination by the Audit Committee that the internal controls were inadequate."). Negligence as to internal controls (e.g., AC ¶¶ 245-48) is insufficient to state a Section 10(b) claim. See In re DRDGOLD Ltd. Sec. Litig., 472 F. Supp. 2d 562, 574 (S.D.N.Y. 2007); In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367, 376 (S.D.N.Y. 2004) (allegations that risk management was a "core element" of Citigroup's business amounted to nothing more than inactionable mismanagement), aff'd sub nom. Albert Fadem Trust v. Citigroup, Inc., 165 F. App'x 928 (2d Cir. 2006).

As to CDOs and RMBS, a claim of investment mismanagement cannot create a strong inference of scienter. See, e.g., Shields, 25 F.3d at 1129 ("The pleading strongly suggests that the defendants should have been more alert and more skeptical, but nothing alleged indicates that management was promoting a fraud."); Mfrs. Life Ins. Co. (U.S.A.) v. Donaldson, Lufkin & Jenrette Sec. Corp., No. 99 Civ. 1944, 2000 WL 709006, at *4-5 (S.D.N.Y. June 1, 2000) (allegation that defendants ignored red flags, including that loans underlying mortgage backed securities were subprime, did not sufficiently allege recklessness, and was inactionable); Citigroup, 330 F. Supp. 2d at 376, 380-81 (that company entered into "risky" transactions in violation of risk management policies did not support inference of scienter). At most, this is all Plaintiffs have alleged.

7. Plaintiffs' Stock Sale Allegations Fail to Raise a Strong Inference of Scienter

Plaintiffs have entirely failed to meet their burden to allege that the Individual Defendants' stock sales were unusual in timing or amount to infer motive. See Acito v. IMCERA Group, Inc., 47 F.3d 47, 54 (2d Cir. 1995). Instead, Plaintiffs refer to certain stock sales in a vacuum hoping to distort their context and create an appearance of purportedly large profits. These allegations, however, are devoid of any "meaningful context" and should be rejected. See Cornelia I. Crowell GST Trust v. Possis Med., Inc., 519 F.3d 778, 783 (8th Cir.

2008); see also In re BISYS Sec. Litig., 397 F. Supp. 2d 430, 445 (S.D.N.Y. 2005) ($60 million in proceeds did not establish motive).

First, the changes to the Individual Defendants' SG stock holdings during the Proposed Class Period is inconsistent with fraudulent intent. For example, Messrs. Bouton and Citerne increased their holdings, which undercuts any inference of scienter. See Bristol-Myers, 312 F. Supp. 2d at 561, see 2006 Reg. Doc., supra, at 54 (Mr. Bouton: 98,500 shares; Mr. Citerne: 25,897 shares) (Ex. 22); 2007 Reg. Doc., supra, at 58 (Mr. Bouton: 120,000 shares; Mr. Citerne: 43,124 shares) (Ex. 2); 2008 Reg. Doc., supra, at 64 (Mr. Bouton: 127,500 shares; Mr. Citerne: 43,321 shares) (Ex. 23). Mr. Alix, who only became a senior officer in September 2006, had almost identical share holdings in 2007 and 2008. Compare 2007 Reg. Doc., supra, at 68 (5,030 shares) (Ex. 2) with 2008 Reg. Doc., supra, at 73 (5,037 shares) (Ex. 23).

Second, Plaintiffs do not allege the percentage of stock the Individual Defendants sold during the Proposed Class Period compared to prior years. See Malin, 499 F. Supp. 2d at 151-52; In re Glenayre Techs., Inc. Sec. Litig., No. 96 Civ. 8252, 1998 WL 9158907, at *3-4 (S.D.N.Y. Dec. 30, 1998) (no inference of scienter where defendant engaged in comparable cumulative sales both inside and outside of alleged class period), aff'd sub nom. Kwalbrun v. Glenayre Techs., Inc., 201 F.3d 431 (2d Cir. 1999). Thus, there is no basis to infer that the amount of their purported stock sales during the Proposed Class Period was unusual.

Third, Plaintiffs do not allege the timing of the sales coincided with any of the allegedly false comments, "such that the [c]ourt could infer that the Individual Defendants sought to reap the immediate benefit a falsely positive statement would have on the market." In re Bausch & Lomb, Inc. Sec. Litig., No. 06-CV-6294, 2008 WL 4911796, at *15 (W.D.N.Y. Nov. 13, 2008). Where the bulk of the alleged misrepresentations occur after the defendants sold stock, "the theory of insider selling as a motive for misrepresentations is effectively negated." In re AstraZeneca Sec. Litig., 559 F. Supp. 2d 453, 469 (S.D.N.Y. 2008); see also City of Brockton Ret. Sys. v. Shaw Group, Inc., 540 F. Supp. 2d 464, 475 (S.D.N.Y. 2008) (ten week gap between stock sales and corrective disclosure undercut inference of scienter); Bausch & Lomb, 2008 WL 4911796, at *16 (where defendants stopped selling shares more than two months before corrective disclosure, "[s]uch timing does not suggest that the Individual Defendants meant to realize profits immediately prior to an expected and dramatic fall in the stock's price"). Here, no Individual Defendant is alleged to have sold a single share after SG supposedly misrepresented its subprime exposure was "limited" (see, e.g., AC ¶ 141), and throughout the remainder of the Proposed Class Period. Thus, there is nothing "opportunistic" (Id. ¶ 250) about the timing of the alleged sales.

Moreover, Plaintiffs do not allege that purported "sales" did not: (1) include the exercise of vested stock options, see In re eSpeed, Inc. Sec. Litig., 457 F. Supp. 2d 266, 290-91 (S.D.N.Y. 2006) (considering stock options in determining percentage of stock sold); (2) occur after SG issued public disclosures of financial results, see Shaw Group, 540 F. Supp. 2d at 475 (no suspicious timing where sales made in trading window); or (3) represent sales on the basis of a predetermined plan, see In re IAC/InterActiveCorp Sec. Litig., 478 F. Supp. 2d 574, 604 (S.D.N.Y. 2007) (where sales are part of a periodic divestment plan, the timing and amount of sales do not raise a strong inference of scienter).

Finally, Plaintiffs' allegations that Messrs. Bouton, Alix and Citerne initiated a stock repurchase program to artificially inflate the price of SG's stock is entirely irrational and specious. First, Plaintiffs ignore the more compelling inference that the share repurchase program was initiated for its stated purpose, "to neutralize the dilutive impact of the annual capital increase reserved for employees and the attribution of stock options and restricted shares." See 2006 Reg. Doc., supra, at 39 (Ex. 22); 2007 Reg. Doc., supra, at 46 (Ex. 2); 2008 Reg. Doc., supra, at 45 (Ex. 23).[15] Second, unless the Defendants used the repurchase to sell all of their "overvalued" shares (which Plaintiffs do not and cannot allege), they would be left with less valuable stock once the alleged fraud ceased. Third, it is not alleged that all the Individual Defendants used all of the repurchases to sell stock. Some Individual Defendants are alleged to have sold stock pursuant to some repurchases, while others made no sales. If the Individual Defendants were supposedly using their knowledge of a fraud to sell stock at inflated prices, the lack of any such sales is telling. Mr. Bouton, in particular, allegedly sold stock before the January 2007 stock repurchase, not after it. (AC ¶ 377.) Moreover, Messrs. Bouton, Citerne and Alix are alleged to have stopped selling stock by June 15, 2007 at the latest (Id. ¶ 427), before two of the alleged repurchases were completed. (Id. ¶¶ 378, 379.)

8. The Alleged Accounting Violations do not Raise a Strong Inference of Scienter

As discussed below, the Amended Complaint fails to sufficiently allege any actual violation of International Financial Reporting Standards ("IFRS")[16] or any duty to disclose thereunder, such that Plaintiffs' allegations do not provide *strong* evidence of conscious misbehavior or recklessness. See Kalnit, 264 F.3d at 143. But even if Plaintiffs had alleged accounting violations, such violations are insufficient to infer scienter; rather, "[o]nly where such

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[15] Moreover, the share repurchase programs were relatively small in size, leading to the repurchase of 3.52 % of the total outstanding shares of the company in 2005, 2.23 % in 2006 and 3.12 % in 2007. See 2006 Reg. Doc., supra, at 13, 245 (Ex. 22); 2007 Reg. Doc., supra, at 19, 306 (Ex. 2); 2008 Reg. Doc., supra, at 19, 334 (Ex. 23).

[16] As Plaintiffs allege, International Financial Reporting Standards ("IFRS") "are those principles adopted by the International Accounting Standards Board ("IASB") and recognized by the accounting profession as the conventions, rules and procedures necessary to define accepted international accounting practices at a particular time. IFRS are promulgated by the IASB (formerly the Board of the International Accounting Standards Committee ("IASC"))." (AC ¶ 283.) They are not legally binding. See 3F Harold S. Bloomenthal & Samuel Wolff, Securities and Federal Corporate Law § 27:82 (2008) (Ex. 47).

allegations are coupled with evidence of 'corresponding fraudulent intent,' might they be sufficient." Novak, 216 F.3d at 309 (citation omitted); see also Davidoff v. Farina, No. 04 Civ. 7617, 2005 WL 2030501, at *17 (S.D.N.Y. Aug. 22, 2005) (failure to allege any cogent motive precludes inference of scienter based on accounting violations). Moreover, there are no allegations, as required by Dynex, that any of the purported accounting violations were ever reported to Messrs. Bouton, Citerne, Alix or other senior SG officers. See AmEx, 2008 WL 4501928, at *7 (no warnings to individual defendants that AmEx was violating GAAP).

While a restatement may indicate an accounting violation, a restatement does not necessarily raise a cogent and compelling inference of scienter. See Ley v. Visteon Corp., 543 F.3d 801, 812 (6th Cir. 2008); Shaw Group, 540 F. Supp. 2d at 473; Bausch & Lomb, 2008 WL 4911796, at *12 ("The mere fact that [Bausch & Lomb's] financial reporting was inaccurate does not establish scienter."). On the other hand, the absence of a restatement is a competing non-fraudulent inference. See In re JP Morgan Chase Sec. Litig., No. 02 Civ. 1282, 2007 WL 950132, at *13 (S.D.N.Y. Mar. 29, 2007). Here, Plaintiffs merely allege a restatement due to unwinding the Kerviel trades, but not related to any of the CDO or RMBS valuations. This further undermines Plaintiffs' fraudulent inferences as to the CDO and RMBS allegations. Moreover, there can be no inference of scienter simply because SG properly restated certain quarterly results after the disclosure of the Kerviel losses in order to correct any issues caused by the fictitious operations used by Kerviel to conceal his unauthorized trading positions.

9. Corporate Personnel Changes do not Create an Inference of Scienter

Firings, resignations and corporate restructurings do not create strong, cogent or compelling inferences of scienter. See In re Ceridian Corp. Sec. Litig., 542 F. 3d 240, 247 (8th Cir. 2008) (firing those responsible for accounting errors more compelling as to non-fraudulent explanations); BISYS, 397 F. Supp. 2d at 446-47, 448 (although resignations were announced "shortly before and/or coterminous with" disclosures of improper accounting and financial restatements, "absent any alleged facts linking the two resignations and the alleged fraud, the resignations of [two former CFOs] do not support an inference of conscious misbehavior or recklessness"); DRDGOLD, 472 F. Supp. 2d at 572 (no inference of scienter from corporate restructuring); see also Mizzarro v. Home Depot, Inc., 544 F.3d 1230, 1254 (11th Cir. 2008) (improvements to business did not raise inference of scienter).

Plaintiffs' allegations of "wholesale organizational and personnel changes" (AC ¶¶ 25, 57), such as moving VaR calculation to Paris (id. ¶¶ 206, 211), budget reductions (id. ¶ 212), disbanding the CDO group (id. ¶ 153) and firing certain employees consequently do not raise an inference of scienter. None of the cited articles (id. ¶¶ 264-69) says that any employees – other than Kerviel – were fired for having committed fraud. To the contrary, although Plaintiffs allege that Philippe Citerne "was forced to give up his seat," the article they cite for this proposition actually states only that Citerne would leave "when his mandate ended in May 2008." (AC ¶ 266 (citing Nicola Clark, Société Générale Chief to Step Down, Int'l Herald Trib., Apr. 17, 2008 (iht.com version) (Ex. 48)).)

10. Plaintiffs Fail to Allege Scienter From Announcing the Kerviel and CDO/RMBS Losses at the Same Time

Plaintiffs allege SG deliberately announced the Kerviel and "Subprime Fraud" at the same time to create "noise," in an effort to somehow obscure the CDO losses that were being disclosed. (AC ¶¶ 85, 270.) As the press release itself demonstrates, the CDO and RMBS writedowns were clearly and prominently disclosed; and all that can really be said is the Kerviel losses – the larger of the two announced losses – appear first in the press release.

Regardless, Plaintiffs cannot dispute that SG could not have disclosed the Kerviel losses sooner. SG, Gen. Inspection Dept., Progress Report of the Special Committee of the

Board of Directors of Societe Generale 2 (Feb. 20, 2008) [hereinafter Progress Report] (Ex. 49). The more compelling inference is that upon learning of and promptly disclosing the impact of the Kerviel fraud on SG's financials, SG chose to also announce the impact of the further credit deterioration of its CDO and RMBS exposure one month before its financials were due to be released. It is quite ironic that Plaintiffs are now criticizing SG for voluntarily pre-announcing its CDO and RMBS writedowns. To be sure, Plaintiffs would have accused SG of hiding losses had it chosen to announce them separately and later. There is also no rational motive for SG to have allegedly understated a loss knowing that it would shortly thereafter have to announce a greater loss. See San Leandro, 75 F.3d at 813-14.

Furthermore, Plaintiffs fail to allege how creating "noise" in the market by announcing both the CDO/RMBS and Kerviel losses at the same time creates a cogent and compelling inference of scienter. Rather, each of the alleged frauds independently fails, and Plaintiffs allege no reason to infer that announcing them at the same time makes any difference. See In re Bio-Tech. Gen. Corp. Sec. Litig., 380 F. Supp. 2d 574, 585 (D.N.J. 2005) (each of two supposed frauds revealed on the same day independently dismissed for failing to allege scienter); In re SCB Computer Tech., Inc. Sec. Litig., 149 F. Supp. 2d 334, 354-55 (W.D. Tenn. 2001) (where one press release disclosed revenue recognition error and doubts as to viability of prior contract, court dismissed as fraud by hindsight (citing Novak, 216 F.3d at 309)).

C. The Amended Complaint Fails To Allege any Actionable Misleading Statement or Omission

Apart from all the pleading deficiencies detailed above, Plaintiffs' laundry list method of pleading (e.g., AC ¶ 112) is also defective under Fed. R. Civ. P. 8(a) and 9(b), as well as the PSLRA, which place the burden squarely on Plaintiffs to identify the specific statements claimed to be misleading and to explain why those statements are fraudulent. See, e.g., In re

Sina Corp. Sec. Litig., No. 05 Civ. 2154, 2006 WL 2742048, at *6 (S.D.N.Y. Sept. 26, 2006) ("large block quotes taken from public statements made by the Individual Defendants and from SEC filings, followed by generalized explanations of why the statements collectively misled the plaintiffs" fail to satisfy the pleading requirements of Rule 9(b) and of the PSLRA (citation omitted) (footnote omitted)).

To the extent it can be discerned, Plaintiffs' allegations that statements were "false" appear to fall into two broad categories: (1) SG's exposure to "risky" CDOs and RMBS; and (2) SG's risk management procedures and internal controls. In each case, Plaintiffs have either mischaracterized the disclosure or failed to explain with sufficient particularity why the disclosure was misleading. The overriding defect with these allegations, however, is that they all depend on hindsight – Plaintiffs have not alleged facts showing that SG actually knew or had reason to believe before the 2007 third quarter that (i) their highly-rated CDOs and RMBS were "risky" or were valued inappropriately, (ii) its risk management strategies would not prevent losses in an historic market downturn, or (iii) a junior employee would go to extraordinary lengths to circumvent internal controls and conduct a massive trading fraud against the Bank.

1. No Misleading Statements or Omission as to CDO or RMBS Exposure

Plaintiffs repeatedly allege that SG failed to disclose its exposure to subprime mortgages through its CDOs or RMBS. This omission supposedly rendered statements dating back to August 2005, regarding SG's net earnings, financial performance and risk management, false and misleading. (E.g., AC ¶ 40.) But consistent with this Circuit's dismissal of fraud by hindsight claims, Plaintiffs must allege that statements were false at the time they were made, not merely that they became false based on unforeseen, changed circumstances. See JP Morgan, 363 F. Supp. 2d at 624 ("[P]laintiffs must 'supply some factual basis for the allegation that the defendants knew or should have known that the statements were false at some point during the time period alleged.'" (citation omitted)); Fadem, 352 F. Supp. 2d at 509-10 (no duty to disclose "large risk of loss" where defendant did not know of alleged risk at time of disclosure). There are several reasons why SG's statements about CDO or RMBS exposure are not adequately alleged to have been false at the time they were made.

First, a larger writedown in January 2008 does not make SG's November 2007 writedown announcement false. (AC ¶ 165.) Merely because something was disclosed later in time does not mean an earlier disclosure was false at the time made. See In re CIT Group, Inc. Sec. Litig., 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004) (allegation that defendants knew loan loss reserves were inadequate at time of IPO, because they were increased three weeks later, did not allege falsity). It is more cogent and compelling, for the reasons discussed above, that the crisis worsened between the November 2007 and January 2008 writedowns.

Second, as discussed above, Plaintiffs allege no basis to infer that SG was in possession of contradictory facts as to its CDO or RMBS investments at the time the statements in question were made. Plaintiffs cannot allege SG failed to disclose facts regarding the risk of losses from, or exposure to, its CDOs (AC ¶ 101), when Plaintiffs acknowledge SG disclosed it held high rated CDOs and RMBS (id. ¶¶ 102, 104, 105) which had no history of defaults or downgrades before the 2007 third quarter. Plaintiffs do not sufficiently allege that merely because the market was supposedly "illiquid" (AC ¶ 153) that the crisis was not under control or would not have a "limited impact." (Id. ¶ 162.)

Third, Plaintiffs challenge SG's statements that CDOs represented 1% of its CIB division's revenue. (AC ¶ 141, 144-47.) Yet, Plaintiffs provide no factual allegations contrary to that figure and do not allege that CDOs represented a larger portion of SG's revenue than what was disclosed. See In re Geopharma, Inc. Sec. Litig., 411 F. Supp. 2d 434, 449 (S.D.N.Y. 2006) (no false statement given the context in which the statement was to be understood). Accurate statements of historical financial results such as this cannot be actionable even if future results turn out not to be as favorable. See Sina, 2006 WL 2742048, at *8; In re Duane Reade Inc. Sec. Litig., No. 02 Civ. 6478, 2003 WL 22801416, at *6 (S.D.N.Y. Nov. 25, 2003), aff'd sub nom. Nadoff v. Duane Reade, Inc., 107 F. App'x 250 (2d Cir. 2004). The allegations here are even less specific than those rejected in Sina, where the plaintiffs claimed a statement that the company had had a "'record-setting quarter' due to 'a better than expected revenue contribution from mobile value-added service'" was false because the "real reason" for its revenues were unsustainable due to a change in Chinese law. Sina, 2006 WL 2742048, at *6 (citation omitted). The court held the plaintiffs there failed to allege that "SINA did not have a record-setting quarter or that mobile value-added services did not fuel SINA's revenue growth." Id. As in Sina, Plaintiffs here cannot argue that the CIB division's revenue attributable to CDOs was not 1%.

Fourth, Plaintiffs fail to allege that SG's statements that its subprime exposure was "low," "negligible" and had a "limited impact" or was "under control" were false. (AC ¶¶ 11, 152.) These characterizations are clearly opinions based on the limited percentage of revenue CDOs represented compared to SG's net income at the time, which, as this Court has previously held, cannot serve as the basis for actionable misstatements. See Salomon, 373 F. Supp. 2d at 251-52; N.Y. State Teachers' Ret. Sys. v. Fremont Gen. Corp., No. 2:07-CV-05756-FMC-FFMX, 2008 WL 4812021, at *6 (C.D. Cal. Oct. 28, 2008) (opinions as to underwriting practices not actionably false, in context of express acknowledgments that Fremont was a subprime lender). Rather, to allege that a statement of opinion is false, Plaintiffs "must allege 'with particularity' 'provable facts' to demonstrate that the statement of opinion is both objectively and subjectively false." Bond Opportunity Fund v. Unilab Corp., No. 99 Civ. 11074, 2003 WL 21058251, at *5

(S.D.N.Y. May 9, 2003) (quoting Va. Bankshares v. Sandberg, 501 U.S. 1083, 1093-98 (1991)), aff'd, 87 Fed. App'x 772 (2d Cir. 2004). As discussed above, Plaintiffs have alleged no facts known at the time contradicting these statements.

Moreover, Plaintiffs take Mr. Bouton's purportedly false statement that the credit crisis had a "limited impact" severely out of context. (AC ¶ 152.) The cited article shows that Mr. Bouton was not even discussing SG, but rather the exposure of "French banks" in general. In reality, Mr. Bouton is reported as saying that "there is no French bank that gets a major part of its revenues from the U.S. securitisation market." Subprime Impact on French Banks Limited-SocGen," Reuters News, Dec. 19, 2007 (reuters.com version) (Ex. 50).

2. No Duty to Disclose Additional Information About CDOs or RMBS

Contrary to Plaintiffs' contention (AC ¶¶ 298-309), SG's disclosures were not rendered misleading by its supposed failure to separately break out a portion of its fixed income holdings, with underlying collateral consisting of subprime mortgages, and assign them pejorative labels such as "risky" (Id. ¶ 299), especially when Plaintiffs admit that securitization allowed SG to reduce the risk of loss on its high-rated CDOs or RMBS. (Id. ¶ 105.) See In re N.Y. Cmty. Bancorp, Inc. Sec. Litig., 448 F. Supp. 2d 466, 480 (E.D.N.Y. 2006) (no duty to describe mortgage backed securities "in pejorative terms" (internal quotation marks omitted))

Moreover, the securities laws do not require corporations to "disaggregate" particular assets, line items of revenue or costs, or other financial details or investment strategies simply because those items become problematic based on subsequent events. See In re AXIS Capital Holdings Ltd. Sec. Litig., 456 F. Supp. 2d 576, 590 (S.D.N.Y. 2006) ("As to any claim that AXIS was nonetheless required to identify contingent commissions as a line item, plaintiffs point to no accounting or reporting requirements which would require the disaggregation of acquisition costs."); N.Y. Cmty. Bancorp, 448 F. Supp. 2d at 479 (additional disclosure not required where "it is apparent from the quarterly reports disclosed to the public that the company was heavily involved in investing in mortgage-backed securities"); Nolte v. Capital One Fin. Corp., 390 F.3d 311, 316-17 (4th Cir. 2004) (as long as the bank met its regulatory obligations, disclosing its capital and loan loss reserves, no more specificity regarding the size of its "subprime" portfolio was required); see also In re Canandaigua Sec. Litig., 944 F. Supp. 1202, 1211 (S.D.N.Y. 1996) (no duty to disclose "competitive information" about investment strategy); cf. AmEx, 2008 WL 4501928, at *4 (allegations that "Amex did not separately account for [its high-yield debt investments], but rather lumped together all corporate debt securities in its financial statements" was insufficient absent duty to disclose).

3. SG Made No Misleading Statements as to Risk Management or Internal Controls

(a) General Statements About Risk Management are not Actionable

Plaintiffs allege that SG's disclosures regarding its risk management were misleading because of (1) its accumulation of purportedly "risky" CDO or RMBS investments in its U.S. fixed income business; and (2) Kerviel's unhedged trades in the 25 person Delta One division. (AC ¶¶ 333-37.) But rather than identifying specific statements as to risk management on either of these particular specific business lines that were false, Plaintiffs attempt to challenge statements regarding the SG Group's overall integrity, fiscal discipline and risk management. (See, e.g., id. ¶¶ 7, 89, 108, 109.) Courts, including this one, recognize such statements are inactionable as investors do not rely on these generalities. See JP Morgan, 363 F. Supp. 2d at 612, 633 (statements that "'traders and others responsible for managing risk positions were accountable for identifying potential "worst-case" losses and estimating the probability of loss'" and that bank was able to "'identify material risks and potential earnings vulnerabilities that might not be captured by statistical methodologies'" were "puffery" (citing Lasker v. N.Y. State

Elec. & Gas Corp., 85 F.3d 55, 59 (2d Cir. 1996))); JP Morgan, 2007 WL 950132, at *7, *12 (statement that "'[p]rocesses in place are intended to ensure credit risk instruments are accurately assessed, properly approved and continuously monitored'" was not actionable (alteration in original) (citation omitted)); N.Y. Cmty. Bancorp, 448 F. Supp. 2d at 478-79 (statements such as that "risk-averse . . . strategy permeates every decision the company makes" were inactionable, particularly given disclosures of investment in mortgage-backed securities); Waxman, 2003 WL 22439796, at *8 (statements as to soundness of business operations and that Plaintiff would not lose money were inactionable).

Moreover, Plaintiffs' allegations that procedures were supposedly not followed in the CDO/RMBS or Delta One divisions, which were small parts of SG's wide-ranging businesses, would not render statements regarding SG's overall risk management false. See Citigroup, 330 F. Supp. 2d at 379 (allegations that "Citigroup extended increasingly more credit to an 'unstable borrower' [Enron]" did not show falsity of statements regarding Citigroup's risk management procedures as a whole (alteration in original) (citation omitted)). Plaintiffs have failed to allege that SG's statements about its risk management were not broad statements about risk management for the bank as a whole. (See, e.g., AC ¶¶ 7, 108-11, 129, 136.)

(b) Plaintiffs Fail to Allege Risk Management Statements Were False When Made

Plaintiffs fail to allege facts "showing that the descriptions of the [risk management] processes were false or misleading at the time they were included in the public statements, [or] facts showing that the processes were not followed." Citigroup, 330 F. Supp. 2d at 379; see also In re FBR Inc. Sec. Litig., 544 F. Supp. 2d 346, 359-60 (S.D.N.Y. 2008) (that company's risk management program failed to root out alleged insider trading did not mean that statements regarding risk management were false when made). Rather, Plaintiffs admit the purported falsity depends entirely on hindsight. (AC ¶ 89 ("[a]s is now apparent").) This is insufficient to allege falsity. See Fadem, 352 F. Supp. 2d at 507-08 (allegations that disclosed risk management strategy ended up being a "costly mistake" were not actionable where facts undermining strategy were not alleged to have been known at time statements were made).

Plaintiffs have failed to allege any statements as to risk management that were false when made. First, Plaintiffs do not dispute that SG was primarily investing in the "least risky," higher rated CDO and RMBS tranches with historically low levels of default. (AC ¶¶ 102, 104, 105, 154, 168.) Second, SG disclosed that it used credit default swaps "to actively manage its risk exposure." See 2006 Reg. Doc., supra, at 109 (Ex. 22). Plaintiffs do not allege these hedges failed until January 2008. (AC ¶ 167.) Third, sources cited by Plaintiffs confirm that no senior officials, including Messrs. Bouton, Citerne or Alix, knew about Kerviel's concealed positions until January 18, 2008. (Id. ¶ 182 (citing Progress Report, supra, at 2 (Ex. 49)).)

In addition, SG used specific cautionary language as to the limitations of its risk management, including as to risks that allegedly materialized here. See Halperin v. eBanker USA.com, Inc., 295 F.3d 352, 359 (2d Cir. 2002) (statutory safe harbor under PSLRA applied to specific cautionary language on risk management). SG warned investors of the risks the bank may face "resulting from the unsuitability or failure of internal procedures, persons or systems . . . [and] [i]t includes risks linked to the security of information systems," 2007 Reg. Doc., supra, at 142 (Ex. 2), and from the credit crisis, see 2d Update to 2007 Reg. Doc., supra, at 33 (Ex. 6).

Plaintiffs do not and cannot allege that any of the internal controls and risk management functions disclosed in SG's Registration Statements and elsewhere (e.g., AC ¶¶ 108-11, 128-30) were not in place and followed. Simply because Kerviel was able to fraudulently circumvent controls through extraordinary means does not make such statements false when made. See FBR, 544 F. Supp. 2d at 360 (plaintiffs failed to allege falsity, where Defendants did not provide "qualitative assurance" that company's risk management would catch all instances of insider trading). As SG made clear, it sought to manage risk, see, e.g., 2006 Reg. Doc., supra, at 108, 111 (Ex. 22), not eliminate it.

4. The Amended Complaint Does Not Allege Accounting Violations

Plaintiffs allege that SG's financial statements were false under applicable accounting rules, because "SG's senior management, as pled herein, knew or recklessly disregarded that the Company faced substantial risks" from Kerviel's unhedged trades and CDO or RMBS investments. (AC ¶ 287.) As with their other claims of falsity, Plaintiffs' accounting claims are premised on SG's purported knowledge of facts at the time disclosures were made. (See, e.g., id. ¶ 291 (IAS 8 violation premised on "reliable information that … was available when financial statements for those periods were authorized for issue").) For the reasons discussed above, Plaintiffs have failed to allege Messrs. Bouton, Citerne, Alix or any other senior SG official knew any such facts about false accounting at the time disclosures were made.

Nor do Plaintiffs' accounting allegations satisfy Rule 9(b) or the PSLRA. Where improper accounting is alleged, a plaintiff "must provide at the very least some level of detail about the improper accounting alleged to underlie misleading statements, and their materiality, in order to survive the motion to dismiss phase." Gavish v. Revlon, Inc., No. 00 Civ. 7291, 2004 WL 2210269, at *13 (S.D.N.Y. Sept. 30, 2004).

The requisite level of detail is absent from the Amended Complaint. Plaintiffs list eight accounting violations, with each alleged violation merely positing that the block-quoted accounting standard in question purportedly required a disclosure SG did not make or rendered a disclosure false. Yet Plaintiffs fail to specify how SG violated each of these provisions, or why these purported violations render SG's public statements false. See In re Alcatel Sec. Litig., 382

F. Supp. 2d 513, 533 (S.D.N.Y. 2005) (failing to connect purported GAAP violations with allegedly false statements does not plead fraud with particularity).

For example, Plaintiffs allege that SG violated certain accounting regulations that have either been superseded or amended by other accounting regulations that Plaintiffs allege SG violated as well, and accounting regulations that went into effect after the beginning of the Proposed Class Period. (See, e.g., AC ¶¶ 304, 305, 307, 308.) Plaintiffs fail to identify which disclosures violated specific accounting standards and when. Similarly, Plaintiffs allege SG violated IAS 1, which allegedly requires that all items of income and expense shall be included in profit and loss. (Id. ¶ 296.) Yet they allege SG violated IAS 1 by not disclosing the "financial statement impact" of the Kerviel writedown. Plaintiffs do not allege any basis to claim that "financial statement impact" is an item of income or expense under IAS 1.

As to valuation, Plaintiffs fail to allege why SG's use of valuation models rendered its financial statements false under IAS 39. As discussed above, "fair value measurement considerations" applicable to IAS 39, IAS 32 and IFRS 7 recognize that an entity can establish fair value through modeling in the absence of an active market. IAS 39 does not mandate SG use specific inputs in its models. Rather, IAS 39 allows an entity to exercise its judgment in determining fair value in the absence of an active market. Plaintiffs have failed to allege why the judgments SG used made its valuations false under IAS 39.

D. The Amended Complaint Fails to Plead Loss Causation

In light of Rule 9(b) and because the PSLRA explicitly requires proof of loss causation, see 15 U.S.C. § 78u-4(b)(4), a plaintiff must, at the very least, plead loss causation with "sufficient specificity to enable the court to evaluate whether the necessary causal link exists." Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 186 (4th Cir. 2007) (citing Lentell, 396 F.3d at 172). The Amended Complaint fails to allege loss causation for two reasons. First, Plaintiffs do not account for the effects of the worst credit crisis since the Great Depression on SG's stock. Second, Plaintiffs fail to allege the disclosures that led to decreases in the stock price were actually so-called "corrective" disclosures for supposedly prior misstatements at issue.

1. Plaintiffs Fail to Control for Other Factors that Caused Their Losses

Plaintiffs' failure to account for the ongoing credit crisis underscores the lack of any causal link necessary to establish loss causation. Where, as here, the alleged "'loss coincides with a marketwide phenomenon causing comparable losses to other investors . . . a plaintiff's claim fails when 'it has not adequately [pled] facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events.'" Lentell, 396 F.3d at 174 (quoting First Nationwide, 27 F.3d at 772). "[P]laintiffs must distinguish the alleged fraud from the 'tangle of [other] factors' that affect a stock's price." In re Merrill Lynch & Co. Research Reports Sec. Litig., Nos. 02 MDL 1484, 02 Civ. 9690, 2008 WL 2324111, at *7 (S.D.N.Y. June 4, 2008) (second alteration in original) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343 (2005).). As the Supreme Court recognized in Dura:

> [a] lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken together separately or together account for some or all of that lower price. . . . Other things being equal, the longer the time between purchase and sale . . . the more likely that other factors caused the loss.

Dura, 544 U.S. at 343 (emphasis added).

Plaintiffs make no effort to explain the losses attributable to the alleged fraud as opposed to "changed economic circumstances," such as the "marketwide phenomenon" of the ongoing credit crisis described above. Instead, Plaintiffs conclusorily assert that the entire decline in SG's stock price was a direct result of a fraudulent scheme and the "truth" being revealed to the market, rather than "changed market conditions." (AC ¶ 410.)

2. Plaintiffs Fail to Allege a Corrective Disclosure that, When Revealed, Caused Their Losses

Plaintiffs allege that SG issued purportedly corrective disclosures on January 24, 2008, when it announced the Kerviel rogue trading and additional CDO and RMBS writedowns. Where a supposed "corrective disclosure" reveals no facts alleged to have been concealed, however, Plaintiffs have failed to plead loss causation. See Lentell, 396 F.3d at 175 n.4 (disclosure was not corrective because it did not reveal falsity of prior statements); Rhodia, 531 F. Supp. 2d at 546 (purported corrective disclosure did not reveal criminal investigation, but rather disappointing earnings); Marsden v. Select Med. Corp., No. 04-4020, 2007 WL 518556, at *4-5 (E.D. Pa. Feb. 12, 2007) (disclosure of proposed regulatory changes that would have an adverse effect on revenue did not reveal falsity of past revenue practices or inadequacy of internal controls); In re Avista Corp. Sec. Litig., 415 F. Supp. 2d 1214, 1220-21 (E.D. Wash. 2005) (no loss causation where "corrective disclosure" did not mention issuer's risk management policies).

The purported corrective disclosure here reveals nothing false about SG's risk management statements or valuation models, and is therefore insufficient to allege loss causation. Rather, it merely disclosed losses related to unwinding Kerviel's trades, and writedowns related to the decreased current value of certain of its CDOs and RMBS. This is an insufficient basis to allege loss causation. See Rhodia, 531 F. Supp. 2d at 545 ("[D]isclosure of financial losses generally – even if those financial losses are a result of the specific concealed fact – is not sufficient."). In other words, the decrease in stock price reflected the actual losses Kerviel incurred (and not due to some correction of prior statements of risk) because it was not until after the end of the Proposed Class Period that SG began indicating that Kerviel had managed to circumvent internal controls by exploiting certain weaknesses in the system (AC ¶ 182), and it was not until May 13, 2008 that SG announced it would have to restate its financials in order to adjust quarterly results due to trading positions which Kerviel had successfully hidden until January 18, 2008 by his fictitious transactions. (Id. ¶ 249.) This is insufficient to allege loss causation. See Weiss v. Amkor Tech., Inc., 527 F. Supp. 2d 938, 947 (D. Ariz. 2007) (no loss causation where weak internal controls and restatement were disclosed after class period ended).

Indeed, there are no corrective disclosures alleged as to the valuation of SG's CDOs and RMBS, which as noted above are opinions. As Judge Sweet observed, "to plead that such statements of opinion actually caused Plaintiffs' damages, it is critical for Plaintiffs to allege that the 'relevant truth,' i.e., the alleged dishonesty of the opinions, is revealed to the market." Joffee v. Lehman Bros., 410 F. Supp. 2d 187, 193 (S.D.N.Y.), aff'd, 209 F. App'x 80 (2d Cir. 2006); see also Lentell, 396 F.3d at 174-75 & n.4. Plaintiffs have not alleged any disclosures in which SG revealed it did not honestly believe the previous valuations of its CDO and RMBS portfolio. Rather, those valuations merely changed over time due to a worsening of the credit crisis, as SG advised investors they might. (AC ¶ 161.)

Finally, Plaintiffs fail to allege facts indicating that the supposed losses experienced from January 18-21, 2008 had anything to do with a corrective disclosure either. Rather, Plaintiffs merely allege that during that span "news began leaking into the market" about SG. (AC ¶ 407.) But this alleged news was one report by a BNP Paribas analyst, not a corrective disclosure from the company, that SG had "significant monoline exposure," and a second report that estimated an additional CDO writedown. (Id. ¶ 167.) The first "disclosure" has nothing to do with SG's unhedged CDOs or RMBS, and therefore did not reveal any supposedly concealed fraud. The second does not disclose a loss or correct a prior misstatement, but only the potential for a loss, which is insufficient to allege loss causation. See Metzler Inv.

GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1064 (9th Cir. 2008) ("'risk' or 'potential' for widespread fraudulent conduct" is not a corrective disclosure).

E. Plaintiffs Fail to Allege a Violation of Rule 10b-5(a) and (c)

Where, as here, Plaintiffs' allegations are premised on misleading statements or omissions, there is no "scheme" liability under Rules 10b-5(a) and (c). Lentell, 396 F.3d at 177. Conduct giving rise to, or facilitating, the making of misstatements is not independently actionable apart from any alleged misstatements because investors do not rely on such conduct. See Morrison, 547 F.3d at 177 (citing Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008)). The "Magnetar" allegations (e.g., AC ¶ 222) do not make out a scheme, because the alleged behavior, short selling, is not manipulative. See ATSI Commc'ns, 493 F.3d at 101. The alleged "scheme" by SG's officers (AC ¶¶ 271-80) was merely "to misrepresent the results of SG's operations and to conceal adverse material information." (Id. ¶ 279.) This is not actionable under Rules 10b-5(a) and (c).

F. The 10(b) Claims Against Defendants Citerne and Alix Must be Dismissed

Well-established Second Circuit law holds that for an individual defendant to be liable for false and misleading statements under Rule 10b-5(b), Plaintiffs must adequately allege that each individual defendant made a false or misleading statement. See Wright v. Ernst & Young LLP, 152 F.3d 169, 176 (2d Cir. 1998). The complaint must also state facts giving rise to each defendant's scienter. See BISYS, 397 F. Supp. 2d at 440.

Neither Defendant Citerne nor Alix is alleged to have made any of the false statements at issue. None of the allegedly false statements are attributed to them. Neither is alleged to have signed any of the allegedly false disclosures or filings. Allegations based on their position or general duties are insufficient. See Shaw Group, 540 F. Supp. 2d at 473 ("It is not enough for a post-Tellabs plaintiff to allege that, because executives like the Individual

Defendants were 'closely involved' in [defendant's] business, one can strongly infer that they 'were furnished with financial data which contained the "errors" that later required restatement.'" (citation omitted)).[17] As discussed above, the allegations of motive against Citerne or Alix, the only other basis alleged for either Defendant's scienter, are entirely insufficient.

IV. PLAINTIFFS FAIL TO ALLEGE A VIOLATION OF SECTION 20(a) OR 20A

Section 20(a) requires a three-part showing by plaintiffs: "(1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) 'that the controlling person was in some meaningful sense a culpable participant' in the primary violation." Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998) (quoting SEC v. First Jersey Sec. Inc., 101 F.3d 1450, 1472 (2d Cir. 1996)).

As discussed above, Plaintiffs have failed to allege a primary violation of Section 10(b). Plaintiffs have also failed to allege control or culpable conduct with particularity on the part of Citerne or Alix. Neither is alleged to posses actual power to control the actions of SG, and merely pleading their status as officers of SG is insufficient. See Rich v. Maidstone Fin., Inc., No. 98 Civ. 2569, 2002 WL 31867724, at *11 (S.D.N.Y. Dec. 20, 2002). Thus, conclusory allegations as to Citerne or Alix's control over SG do not suffice. (E.g., AC ¶¶ 81, 431, 430.)

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17 Likewise, Plaintiffs cannot invoke the group pleading doctrine as to Defendants Citerne or Alix. Plaintiffs do not allege, with particularity, that either had "direct involvement in the everyday business of the company." In re Refco, Inc. Sec. Litig., 503 F. Supp. 2d 611, 641 (S.D.N.Y. 2007) (Lynch, J.) (internal quotation marks omitted); Dresner v. Utility.com, Inc., 371 F. Supp. 2d 476, 494 (S.D.N.Y. 2005) ("conclusory, vague allegations" cannot support the application of the group pleading doctrine). Rather, by mere "virtue of their positions" (AC ¶ 77), Plaintiffs conclusorily allege that "Individual Defendants participated in drafting, producing, reviewing and/or disseminating the materially false and misleading information." (Id. ¶ 79.) This is insufficient to plead either Defendant Citerne or Alix's culpability. See Am. Fin. Int'l Group-Asia v. Bennett, No. 05 Civ. 8988, 2007 WL 1732427, at *8 (S.D.N.Y. June 14, 2007) (Lynch, J.) (holding scienter cannot be inferred from executive managerial position, as to access to internal documentation or adverse information)

Moreover, Plaintiffs' allegations as to the Individual Defendants' state of mind are entirely vague, so Plaintiffs have failed to allege their culpable participation. See In re Emex Corp. Sec. Litig., No. 01 Civ. 4886, 2002 WL 31093612, at *11 (S.D.N.Y. Sept. 18, 2002) (stating defendants "exercised their power and influence to cause" primary violation was insufficient); Mishkin v. Ageloff, No. 97 Civ. 2690, 1998 WL 651065, at *26 (S.D.N.Y. Sept. 23, 1998) (culpable participation must be alleged with particularity under PSLRA). Neither is specifically alleged to have any knowledge as to the purported misstatements at issue.

To state a claim under Section 20A, Plaintiffs must allege a predicate insider trading violation and a contemporaneous purchase and sale by Plaintiffs. See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 703 (2d Cir. 1994); Wilson v. Comtech Telecomms. Corp., 648 F.2d 88, 95 (2d Cir. 1981); Refco, 503 F. Supp. 2d at 665 (Lynch, J.). Plaintiffs have failed to allege a predicate insider trading violation by Bouton, Citerne or Alix.[18] Moreover, the contemporaneous purchases by plaintiffs must be made soon after a defendant sold. See In re Take-Two Interactive Sec. Litig., 551 F. Supp. 2d 247, 311 n.51 (S.D.N.Y. 2008) ("These defendants, however, may not be held liable for purchases Lead Plaintiffs carried out before the alleged insider trading in question."); O'Connor & Assocs. v. Dean Witter Reynolds, Inc., 559 F. Supp. 800, 803 (S.D.N.Y. 1983) ("[L]iability does not extend to those who traded prior to the defendant's breach of his duty to 'disclose or abstain' that is, prior to the date of the

[18] Plaintiffs' insider trading allegations are based on a purported "scheme." (AC ¶¶ 368-71.) As discussed above, Plaintiffs have failed to allege scheme liability. Moreover, Plaintiffs fail to allege any insider trading violations with particularity, as required by Rule 9(b), see In re Global Crossing, Ltd. Sec. Litig., No. 02 Civ. 910, 2005 WL 2990646, at *10 (S.D.N.Y. Nov. 7, 2005) (Lynch, J.), merely alleging, without specificity, that the Individual Defendants purportedly sold stock on the basis of material nonpublic information. (AC ¶¶ 388, 394, 400.) As discussed above, Plaintiffs have failed to allege facts to support a strong inference that Bouton, Citerne or Alix "had access to inside information about [SG's] true financial status" or "was in receipt of such information when [Defendants] sold [their shares]." See Global Crossing, 2005 WL 2990646, at *10. Thus, for the same reasons Plaintiffs have failed to allege scienter against Defendants Bouton, Citerne or Alix for their first claim for relief, they have failed to allege scienter against these Defendants for their second claim for relief, insider trading.

defendant's trades."). Here, Plaintiffs fail to allege any purchases contemporaneous with sales by Messrs. Bouton, Citerne or Alix, nor can they, because Plaintiffs purportedly purchased stock before the alleged insider sales by these defendants.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed with prejudice.

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