UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re SOCIÉTÉ GÉNÉRAL SECURITIES LITIGATION	:	Case No. 08-CIV-02495 (GEL) ECF Case CLASS ACTION

ROBERT A. DAY'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE FIRST AMENDED AND CONSOLIDATED COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

INTRODUCTION

Robert A. Day was, and currently is, a California-based non-executive director sitting on the board of Sociéte Genéralé ("SocGen"), a French company. He is not authorized to speak, and has not spoken, on behalf of SocGen. Mr. Day has never had responsibility for, or authority over, any public pronouncements the company has made. He has no ability to sign or approve, and has not signed or approved, any of SocGen's regulatory or governmental filings. Mr. Day is not, and never was, involved in SocGen's everyday business, and he has never had the ability to direct the management and policies of SocGen or its employees.

Nothing in the First Amended and Consolidated Complaint (the "Complaint") is to the contrary. Instead, Mr. Day had the misfortune of making certain sales of his SocGen stock on a few dates that happen to fall within the more than two-year class period proposed by Plaintiffs. Were it not for this coincidence, Mr. Day – a non-executive director with no responsibilities for the day-to-day workings of SocGen or any of its public statements – would certainly not be a defendant in this lawsuit.

Despite Mr. Day's status as a non-executive director of SocGen and his plainly circumscribed responsibilities, Plaintiffs seek to hold him liable for purported misrepresentations and omissions in public statements issued by the company and its officers relating to the activities of Jerome Kerviel, a SocGen Paris-based employee, and investments by SocGen's Paris operations tied to the subprime mortgage market. Specifically, the Complaint alleges that Mr. Day violated Section 10(b) of the Securities Act of 1934 and Rule 10b-5 by virtue of the allegedly false statements made in SocGen's public disclosures (First Claim for Relief), and his purported insider sales of SocGen stock (Second Claim for Relief). The Third Claim for Relief alleges control person liability, pursuant to Section 20(a) of the 1934 Exchange Act, for the alleged violations in the First Claim. The Fourth Claim for Relief alleges liability, pursuant to

Section 20A of the 1934 Exchange Act, for the purported insider trading at issue in the Second Claim. Each claim is fatally flawed and should be dismissed.

With respect to the First Claim, the Complaint does not allege with the requisite specificity that Mr. Day participated in the making or execution of a single public statement or document issued by or on behalf of SocGen at any time, much less any of the statements the Complaint alleges contain material misrepresentations or omissions. Recognizing this clear defect, the Complaint instead improperly relies upon the group pleading doctrine in a failed attempt to attribute to Mr. Day statements made by SocGen and its officers. But the Complaint's conclusory allegations come nowhere close to meeting the appropriate legal standard for invoking the group pleading doctrine and, worse, ignore Mr. Day's limited role as a non-executive director. Additionally, the Complaint cannot meet the particularity requirements of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4 (2007), and Federal Rule of Civil Procedure 9(b) with respect to Mr. Day's supposed scienter in connection with the challenged public statements by SocGen.

The Second Claim, likewise, is plagued with terminal deficiencies and should be dismissed. As a threshold matter, the named Plaintiffs lack standing for the majority of trades at issue in the Second Claim because they cannot show that their purchases were contemporaneous with Mr. Day's alleged sales. In fact, Plaintiffs attempt to make this showing for only six of the twelve trades at issue, thereby conceding that they lack standing for the remaining six challenged trades. A review of the Complaint and Plaintiffs' accompanying certifications reveals that Plaintiffs cannot possibly satisfy the contemporaneity requirement for at least two of these remaining six trades because Plaintiffs' purchases were made ***before*** Mr. Day's corresponding alleged sales. Moreover, Plaintiffs' entire insider trading claim against Mr. Day should be

dismissed for the simple reason that the Complaint does not adequately plead the elements of such a claim.

The Third Claim, which alleges control person liability for the purported fraudulent statements by SocGen and its officers, should be dismissed for three independent reasons. First, no underlying Rule 10b-5 violation has been adequately pled. Absent an underlying violation, there can be no control person liability. Second, the Complaint fails to allege facts sufficient to show that Mr. Day, a non-executive director, possessed the ability to control any employee of SocGen, much less those employees accused of violating Rule 10b-5. Third, the Complaint does not adequately allege that Mr. Day was a culpable participant in SocGen's supposed misrepresentations and omissions.

The Fourth Claim fails because the Complaint does not adequately allege a predicate violation of the federal securities laws by Mr. Day. Without such a violation, there can be no cause of action pursuant to Section 20A of the 1934 Exchange Act.

In sum, Plaintiffs' Complaint, although lengthy, is fatally short on the specific allegations needed to support the claims against Mr. Day. Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Complaint should be dismissed in its entirety as to Mr. Day.

OVERVIEW OF ALLEGATIONS AGAINST MR. DAY

The Complaint consists of 435 paragraphs, only 33 of which specifically reference Mr. Day. Even then, many of the allegations concerning Mr. Day are vague, defective, and redundant.

The Complaint alleges that during the purported class period, Mr. Day was a SocGen board member, (Compl., ¶ 43), and Chairman of Trust Company of the West ("TCW"), (Compl., ¶ 253), a company that was founded by Mr. Day in 1971 and acquired by SocGen in 2001. (Compl., ¶ 43.) Both TCW and Mr. Day are based in California. The Complaint contains no

allegations concerning Mr. Day's specific responsibilities as a non-executive director of SocGen. Nor does the Complaint contain any allegations that TCW engaged in fraudulent or misleading conduct of any kind.

According to the Complaint, throughout the purported class period, SocGen filed public disclosure documents pursuant to French securities law and regulations that allegedly contained misrepresentations and omissions. (Compl., ¶ 115, 117, 128.) The Complaint similarly alleges that SocGen, through its officers, purportedly made numerous misleading public statements about the company, its practices, policies, and investments. (*See* Compl., ¶ 110, 111, 114, 119, 120.) While the Complaint identifies some of the SocGen officers who supposedly made these statements and specifically refers to some of the filings, the Complaint does ***not*** allege that Mr. Day made any of these statements or signed any of the identified filings.

The Complaint also alleges that, throughout the purported class period, Mr. Day periodically executed sales of SocGen common stock and related securities. More specifically, the Complaint alleges that Mr. Day sold 3,657 shares of SocGen common stock on April 5, 2006. (Compl., ¶ 427 at p. 179.) Additionally, the Complaint alleges that Mr. Day made sales of unspecified "[o]ther [s]ecurities" on October 5, 6, and 10, 2006. (Compl., ¶ 427 at p. 179.) These "[o]ther securities" were, in fact, rights to purchase SocGen common stock that were sold by the Kelly Day Foundation on October 5, by the Robert A. Day Foundation on October 6, and by Mr. Day's wife on October 10. The Complaint alleges that these four rights sales in October 2006 and the sale on April 5, 2006 (collectively, the "2006 Sales") were made on the New York Stock Exchange ("NYSE"). (Compl., ¶ 427 at p. 179.) Neither SocGen common stock nor the rights to purchase such stock, however, are traded on the NYSE.

The Complaint next alleges that Mr. Day sold SocGen common stock on January 4 and 11, 2007 (collectively, the "2007 Sales"). (Compl., ¶ 427 at p. 179.) According to the Complaint, Mr. Day sold 225,356 shares of stock on January 4, 2007. (Compl., ¶ 427 at p. 179.) The Complaint also alleges that Mr. Day made two sales of SocGen stock on January 11, 2007 – one sale of 1,282 shares and a second sale of 53,416 shares. (Compl., ¶ 427 at p. 179.) Again, the Complaint erroneously alleges that these sales were made on the NYSE, despite the fact that SocGen was never listed on that exchange.

Finally, the Complaint alleges that Mr. Day sold SocGen common stock on January 9, 10, and 18, 2008 on the Euronext Paris exchange (collectively, the "2008 Sales"). (Compl., ¶ 427 at p. 179.) According to the Complaint, Mr. Day sold 961,486 shares of stock on January 9, 2008. (Compl., ¶ 427 at p. 179.) Mr. Day also allegedly made two sales – one for 10,683 shares and another for 96,149 shares – on January 10, 2008. (Compl., ¶ 427 at p. 179.) The Complaint further alleges that Mr. Day made two sales of SocGen stock on January 18, 2008 – one for 480,743 shares and another for 53,416 shares. (Compl., ¶ 427 at p. 179.) The Complaint contains no other substantive allegations concerning Mr. Day.

ARGUMENT

On a motion to dismiss, "well-pleaded" factual allegations in the Complaint must be taken as true. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 237 (2d Cir. 2003). But the Court need not accept allegations that are merely "[c]onclusory" or "legal conclusions masquerading as factual conclusions." *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 630 (S.D.N.Y. 2007) (Lynch, J.) (quoting *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002)). Here, as explained below, the application of this standard compels the conclusion that the Complaint fails to state a claim for relief against Mr. Day and must, therefore, be dismissed. Moreover, to the extent applicable, the claims against Mr. Day must be

dismissed for the reasons stated in the Memorandum of Law in Support of the Motion of Defendants Sociéte Genéralé, Daniel Bouton, Philippe Citerne and Didier Aliz to Dismiss the Consolidated Amended Class Action Complaint (the "SocGen Moving Brief"), which Mr. Day relies upon rather than burdening the Court with duplicative briefing.

I. The First Claim Fails To State A Valid Claim Against Mr. Day.

There are two fundamental, and fatal, defects with Plaintiffs' claim that Mr. Day violated Section 10 of the 1934 Exchange Act and Rule 10b-5: (1) Plaintiffs' failure to plead that Mr. Day made, participated in the making of, executed, or approved any statement or omission on behalf of SocGen, much less a materially misleading one; and (2) Plaintiffs' failure to plead that Mr. Day acted with the requisite scienter. Each of these deficiencies provides an independent basis on which to dismiss the First Claim against Mr. Day.

A. The Complaint Fails to Allege that Mr. Day Made any Material Misstatement or Omission of Fact.

It is well-settled that "a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b)." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998). Indeed, "[a]nything short of such conduct is … not enough to trigger liability under Section 10(b)." *In re Refco, Inc. Sec. Litig*., 503 F. Supp. 2d at 641 (quoting *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998)). Further, under Rule 9(b), to state a Section 10b-5 claim, a complaint must "identify the statements plaintiff asserts were fraudulent and why, in plaintiff's view they were fraudulent, ***specifying who made them***, and where and when they were made." *Dresner v. Utility.com, Inc.*, 371 F. Supp. 2d 476, 489 (S.D.N.Y. 2005) (emphasis added) (internal quotations omitted).

Here, the misstatements and omissions alleged in the Complaint are all contained in either newspaper and magazine articles or SocGen's public filings. Fatally, Plaintiffs never

connect these purported misstatements or omissions, or even the documents themselves, to Mr. Day. Indeed, the Complaint's 435 paragraphs fail to contain a single allegation that Mr. Day himself made, authorized, approved, or was otherwise involved in the dissemination of any statement concerning SocGen, much less any of the supposed misstatements or omissions.

Instead, the Complaint improperly relies upon overly-generalized, vague allegations. Typical of this flawed pleading – in which specific allegations concerning Mr. Day are completely absent – are the following statements made in the Complaint:

- "SocGen failed to disclose any information relating to its portfolio of subprime mortgage-backed financial instruments prior to Q3 2007." (Compl., ¶ 302.)
- "Defendants presented a misleading picture of SocGen's business risks and internal controls." (Compl., ¶ 405.)
- "Individual Defendants participated in drafting, producing, reviewing and/or disseminating the materially false and misleading information." (Compl., ¶ 79.)
- Defendants' direct participation included preparing and/or reviewing SocGen's false and/or misleading public filings and/or press releases, and knowingly or recklessly giving false information to securities analysts, money and portfolio managers and institutional investors in conference calls and other presentations." (Compl., ¶ 421.) [1]

Such allegations suffer from the same fundamental deficiency: they do not attribute any specific misstatements or omissions to Mr. Day. In fact, to the extent Mr. Day is specifically referenced at all in the Complaint, it is in connection with allegations concerning insider trading or some general attempt to establish scienter.[2] But nowhere does the Complaint specifically assert that Mr. Day made, authorized, approved, or was otherwise involved in the dissemination of the

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1 For other similarly defective allegations, *see* Compl., ¶¶ 7, 80, 81, 140, 430.

2 *See, e.g.*, Compl., ¶¶ 275, 377.

purportedly fraudulent statements. Thus, the First Claim against Mr. Day for violation of Section 10(b) and Rule 10b-5 should be dismissed.

B. Plaintiffs Cannot Invoke the Group Pleading Doctrine as to Mr. Day.

Recognizing that they cannot attribute a single alleged misstatement or omission directly to Mr. Day, Plaintiffs attempt to rely on the group pleading doctrine in order to ascribe to Mr. Day the alleged misstatements and omissions by SocGen and others that form the basis of the First Claim. This attempt to lump Mr. Day, a non-executive director residing in California, together with the other individual defendants, all of whom are officers of SocGen and reside in France, fails as a matter of law.

The group pleading doctrine is a narrow exception to the general requirement that "when fraud is alleged against multiple defendants, a plaintiff must set forth separately the acts complained of by each defendant." *In re Refco, Inc. Sec Litig.*, 503 F. Supp. 2d at 641 (internal quotations omitted). To invoke the group pleading doctrine, a complaint must adequately allege that the individuals whom the plaintiff seeks to subject to group pleading had "direct involvement in the everyday business of the company." *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d at 641 (internal quotations omitted). Moreover, "conclusory, vague allegations" that lack specificity simply cannot support the application of the group pleading doctrine. *Dresner v. Utility.com, Inc.*, 371 F. Supp. 2d 476, 494 (S.D.N.Y. 2005). Indeed, "a bare allegation that a defendant has inside information, in the absence of any allegation to support a reasonable inference that the defendant had control over the content of the allegedly fraudulent statement, is not sufficient" to invoke group pleading. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 180 (S.D.N.Y. 2006).

Instead, a complaint must "allege with specificity facts demonstrating a specific defendant's personal involvement in the preparation of the allegedly misleading statements or

direct 'operational involvement' with the company." *D.E. & J Ltd. P'ship., v. Conaway*, 284 F. Supp. 2d 719, 732 (E.D. Mich. 2003). Failure to plead with such specificity, including the failure to allege "specific facts concerning [a defendant's] actual authority to influence" a company's public statements, bars the application of group pleading. *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 267 (S.D.N.Y. 2008).

These cases make clear that, as it applies to Mr. Day, Plaintiffs' Complaint lacks the requisite specificity needed to invoke the group pleading doctrine. For instance, the Complaint alleges that the "Individual Defendants, by virtue of their high-level positions within SocGen, were directly involved in the day-to-day operations of SocGen at the highest levels, directly participated in the management of the Company and were privy to confidential … information …." (Compl. ¶ 78.) This self-serving allegation – devoid of even one specific supporting fact regarding Mr. Day's purported involvement in the everyday business of SocGen – comes nowhere close to meeting the group pleading requirement articulated by this Court in *Refco*. To the contrary, Plaintiffs have offered precisely the type of "conclusory, vague allegation[]" that is insufficient to apply group pleading to Mr. Day. *Dresner*, 371 F. Supp. at 494.[3]

Plaintiffs' allegation that the "Individual Defendants participated in the drafting, producing, reviewing and/or disseminating the materially false and misleading information," (Compl. ¶ 79), likewise is insufficient to trigger the group pleading doctrine. Indeed, such allegations lack any facts, much less the required "specific facts," regarding Mr. Day's "actual

[3] For other similarly defective allegations, *see* Compl., ¶¶ 77, 272, 427 at p. 178, and 430.

authority to influence" the content of SocGen's public disclosures. *In re Take-Two Sec. Litig.*, 551 F. Supp. 2d at 267.[4]

In fact, to the extent the Complaint alleges anything specific about Mr. Day with respect to his purported role at SocGen, it is merely that he is the chairman of TCW, a SocGen subsidiary, and a SocGen director. (*See, e.g.*, Compl., ¶¶ 19, 43, 243, 253, 275, 314, 348, 349, 353.) Neither allegation is sufficient to invoke group pleading as to Mr. Day. The Complaint does not allege that TCW played any role in SocGen's allegedly fraudulent statements. Nor does the Complaint allege that Mr. Day, as Chairman of ***TCW***, had anything to do with ***SocGen's*** day-to-day operations or had any control or input as to SocGen's public disclosures. Similarly, Mr. Day's unremarkable position as a non-executive director does not support the conclusion that Mr. Day was somehow responsible for SocGen's supposedly fraudulent statements. To the contrary, it is well-established that the recitation of defendants' "titles do not, without additional facts, support a logical inference that those defendants were responsible for the drafting, production, reviewing, or dissemination of the information communicated by" the company. *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 467 (S.D.N.Y. 2005); *see also In re Take-Two Sec. Litig.*, 551 F. Supp. 2d at 267.

In sum, Plaintiffs' attempt to use the group pleading doctrine to manufacture a claim against Mr. Day where none exists is a classic case of "clump[ing] defendants together in vague allegations" in a futile effort to evade the heightened pleading requirements of Rule 9(b) and the PSLRA. *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d at 641 (internal quotations omitted). Such conduct should not be condoned by this Court.

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[4] For other similarly defective allegations, *see* Compl., ¶¶ 80, 81, 279, 421, and 430.

C. The Complaint Fails to Allege Scienter Against Mr. Day.

The First Claim fails for the independent reason that the Complaint does not adequately allege scienter on Mr. Day's part. To state a claim under Section 10(b) and Rule 10(b)-5, the PSLRA expressly requires that a complaint "shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2007). The Complaint does not satisfy this pleading standard with respect to Mr. Day.

Plaintiffs' claims that Mr. Day possessed the requisite scienter are based exclusively on allegations that Mr. Day is a SocGen board member and the Chairman of TCW, a SocGen subsidiary. These allegations are insufficient as a matter of law, as it is well-settled that "scienter cannot be inferred solely from the fact that, due to the defendants' board membership or executive managerial position, they had access to the company's internal documentation as well as any adverse information." *Am. Fin. Int'l Group-Asia, L.L.C., v. Bennett*, No. 05-CV-8988, 2007 WL 1732427, at *8 (S.D.N.Y. June 14, 2007) (internal quotations omitted); *In re Health Mgmt. Sys., Inc. Sec. Litig.*, No. 97-CV-1865, 1998 WL 283286, at *6 (S.D.N.Y. June 1, 1998) ("[C]ourts have routinely rejected the attempt to plead scienter based on allegations that because of defendants' board membership and/or their executive managerial positions, they had access to information concerning the company's adverse financial outlook.") Moreover, "bare assertions [that defendants had access to undisclosed financial information], without any further facts or details, do not adequately demonstrate defendants' knowledge of facts or access to information contradicting their public statements." *Goplen v. 51Job, Inc.*, 453 F. Supp. 2d 759, 773 (S.D.N.Y. 2006).

Additionally, the Supreme Court has recently made clear that the PSLRA requires a plaintiff to plead "with particularity facts giving rise to a strong inference" of scienter. *Tellabs,*

Inc., v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007). The Court further instructed reviewing courts to "take into account plausible opposing inferences," including "plausible nonculpable explanations for the defendant's conduct." *Id.* at 2509-10. The Court concluded that a case should be allowed to proceed only if "the inference of scienter [is] cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 2510. Plaintiffs' Complaint falls far short of the Supreme Court's interpretation of the applicable PSLRA standard, as it does not contain any allegations that raise a legally cognizable inference – much less the type of cogent, compelling inference required by *Tellabs* – that Mr. Day possessed the requisite scienter to violate Section 10(b) and Rule 10b-5.

To the contrary, the Complaint fails to connect Mr. Day to any of the challenged statements by SocGen and its officers other than through his role as a SocGen board member and as the TCW Chairman, neither of which is sufficient as a matter of law.[5] Accordingly, Plaintiffs' failure to plead scienter against Mr. Day provides yet another ground upon which the First Claim should be dismissed. *See, e.g.*, *Goplen*, 453 F. Supp. 2d at 770.

II. The Second Claim Fails To State A Valid Claim Against Mr. Day.

Plaintiffs' insider trading claims against Mr. Day fail for two independent reasons. First, Plaintiffs lack standing to assert such claims on all but a handful of the trades allegedly made by Mr. Day. Second, the Complaint does not adequately allege the elements of a claim for insider trading.

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[5] Plaintiffs cannot use group pleading to excuse the Complaint's failure to allege scienter against Mr. Day with the required particularity because the group pleading doctrine "has no effect on the PSLRA's scienter requirement," and does not "permit plaintiffs to presume the state of mind ... of defendants at the time the alleged misstatements were made." *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 440 (S.D.N.Y. 2005).

A. Plaintiffs Lack Standing as to Most of the Twelve Challenged Sales.

Plaintiffs lack standing with respect to the majority of Mr. Day's twelve alleged insider trades that, according to the Complaint, took place between April 2006 and January 2008. (Compl., ¶ 427 at p. 179.) In order to have standing to bring a claim for insider trading in a putative class action case like this, both the class representatives and each member of the class must trade "contemporaneously" with the alleged insider. *Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 94 (2d Cir. 1981). Trades between a representative or a putative class member, on the one hand, and the supposed insider, on the other hand, are "contemporaneous" only "if they occur within a reasonable period of time, usually limited to a few days, of one another." *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d at 311 n.51 (citing cases). Moreover, in a case like this, where the supposed insider trades were ***sales***, a plaintiff must have purchased the securities ***after*** they were tendered for sale by the defendant. *See, e.g., O'Connor & Assocs. v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800, 803 (S.D.N.Y. 1983) ("[A] plaintiff whose trades were completed prior to those of the defendant can claim no injury from the defendant's nondisclosure, regardless of the defendant's later use of inside information in the course of his trading.").

Here, Plaintiffs do not even attempt to allege contemporaneous purchases for six of Mr. Day's alleged twelve sales.[6] Thus, Plaintiffs cannot possibly satisfy the standing requirements as to those six sales as a matter of law. *See Wilson*, 648 F.2d at 94-95. Although Plaintiffs do allege contemporaneous purchases with respect to the remaining six sales purportedly made by Mr. Day – the sale on April 5, 2006, the sale on January 4, 2007, two sales

[6] These six sales were purportedly made by Mr. Day on October 5, 2006, October 6, 2006, October 10, 2006, January 9, 2008, and January 10, 2008 (two individual sales). (Compl., ¶¶ 427 at p. 179 and 434 at p. 182.)

on January 11, 2007, and two sales on January 18, 2007 (Compl., ¶ 434 at p. 182) – a simple review of the Complaint shows that Plaintiffs also lack standing with respect to the two sales on January 11, 2007. Indeed, the purchase that is supposedly contemporaneous with these January 11, 2007 sales was allegedly made by plaintiff Boilermaker-Blacksmith National Pension Fund ("Boilermaker") on January 9, 2007, which was two days ***before*** Mr. Day's supposed sales on January 11. (Compl., ¶ 427 at p. 179; Boilermaker Certification at Schedule A.) As explained above, because Boilermaker's January 9 ***purchases*** predate Mr. Day's January 11 ***sales***, they can hardly be considered contemporaneous.

In sum, at this motion to dismiss stage, Plaintiffs can claim standing for, at most, only four of Mr. Day's twelve challenged sales: the alleged sale on April 5, 2006; the alleged sale on January 4, 2007; and the two alleged sales on January 18, 2008.[7] Accordingly, Plaintiffs' insider trading claims with respect to Mr. Day's remaining eight alleged sales should be denied on standing grounds alone. In addition, as explained below, ***all*** of the insider trading claims against Mr. Day should be dismissed because the Complaint does not adequately allege the elements of such a claim.

B. Plaintiffs Have Not Satisfied the Elements of an Insider Trading Claim Against Mr. Day.

To state a claim for insider trading under Section 10(b) and Rule 10b-5, a complaint must, among other things, allege that the defendant traded on material, nonpublic information. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997) (insider trading occurs when a "corporate insider trades in the securities of his corporation on the basis of material, nonpublic

[7] The Complaint alleges that the Avon Pension Fund purchased shares of SocGen stock on April 5 and 6, 2006. (Compl., ¶ 427 at p. 179; Avon Pension Fund Certification at Schedule A.) The Complaint also alleges that the Vermont Pension Investment Committee purchased SocGen stock on January 21, 2008. (Compl., ¶ 427 at p. 179; Vermont Pension Investment Committee Certification at Schedule A.)

information."). In addition, a complaint must, consistent with Rule 9(b) and the PSLRA, adequately allege scienter by specific providing facts that give rise to a "strong inference" of fraudulent intent. *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000). Plaintiffs' insider trading claims against Mr. Day do not satisfy these pleading requirements.

Plaintiffs' Complaint contains no specific allegations that Mr. Day possessed and traded on material, nonpublic information with a fraudulent intent. Rather, the Complaint asks this Court to draw an inference of wrongdoing based solely on the timing and amount of Mr. Day's trades. Such allegations are insufficient as a matter of law because they in no way address, much less establish, whether Mr. Day actually possessed, failed to disclose and intended to profit from any material, nonpublic information at the time of the alleged trades. Indeed, the Supreme Court has made clear that "an insider will be liable under Rule 10b-5 for inside trading ***only*** where he ***fails to disclose material nonpublic information*** before trading on it and thus makes 'secret profits.'" *Dirks v. S.E.C.*, 463 U.S. 646, 654 (1983) (emphasis added). Thus, an insider trading claim must allege facts that "support a 'strong inference' that [the defendant] not only had access to inside information about [the company's] true financial status but was in receipt of such information when [the defendant] sold [his] shares." *In re Global Crossing, Ltd. Sec. Litig.*, No. 02-CV-910, 2005 WL 2990646, at *10 (S.D.N.Y. Nov. 7, 2005) (Lynch, J.).

Plaintiffs' Complaint does not contain any such allegations and falls far short of providing the required "adequate specifics regarding the circumstances surrounding Defendants' possession of non-public information: e.g., among other things, what non-public information [was given to] Defendants, when the information was given, etc." *Log On Am., Inc. v. Promethean Asset Mgmt. L.L.C.*, 223 F. Supp. 2d 435, 447 (S.D.N.Y. 2001). Instead, Plaintiffs offer wholly conclusory allegations, such as:

- Mr. Day sold SocGen shares "while in possession of material, adverse undisclosed information about the Company." (Compl. ¶ 380.)

- "Defendant Day utilized insider knowledge, thereby violating his duty to both SocGen shareholders and to investors trading on U.S. markets…." (Compl., ¶ 349.)

- "Defendant Day took advantage of material non-public information, including...writedowns related to its subprime exposure, as well as....directional trades by Kerviel.…" (Compl., ¶ 383.)[8]

The only other supposed support for Plaintiff's contention that Mr. Day was actually in possession of material, nonpublic information at the time of his alleged sales relies on allegations that Mr. Day is a SocGen director and the Chairman of TCW, a SocGen subsidiary. But such conclusory allegations, examples of which are set forth below, also are insufficient to show actual possession of, and an intent to misuse, nonpublic information:

- "During the Class Period, each Individual Defendant occupied a position that made him privy to non-public information concerning SocGen. Because of this access, each of the Individual Defendants knew that the adverse facts specified herein were being concealed and that false and misleading statements were being made. Notwithstanding their duty to refrain from selling SocGen stock while in the possession of material, non-public information concerning SocGen, the Individual Defendants sold over 2.3 million shares of the Company's stock, profiting from their fraudulent scheme." (Compl., ¶ 427 at p. 178.)

- "By virtue of his dual roles as a SocGen director and Chairman of TCW, Defendant Day was certainly in a position to know both the extent of SocGen's CDO exposure, as well as the adverse affect such exposure would have on SocGen's financials." (Compl., ¶ 253.)

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[8] Additionally, Plaintiffs' theory that Mr. Day's alleged 2006-2007 Sales were made with material, nonpublic information regarding a SocGen buyback program, (Compl., ¶¶ 372-378), is nonsensical and, as such, does not permit even an inference of scienter. *See, e.g., Kalnit v. Eichler*, 264 F.3d 131, 140-141 (2d Cir. 2001) ("Where plaintiff's view of the facts defies economic reason, ... [it] does not yield a reasonable inference of fraudulent intent.") (internal quotations omitted; alteration in original). If Mr. Day had possessed inside information regarding the buyback program, logic dictates that he would have sold his shares only ***after*** – not before – the announcement of the buyback program. An insider could not expect to benefit by selling before a buyback announcement. Moreover, after the buyback announcement the information is no longer nonpublic.

- "Defendant Day, who concurrently served as the Chairman of TCW – a United States subsidiary of SocGen with over $52 billion of CDOs under management – and a director at SocGen, was privy to information regarding the extent of SocGen's CDO exposure, as well as the adverse affects such exposure would have on SocGen's financials. Defendant Day utilized this inside information when trading SocGen stock during the Class Period." (Compl., ¶ 275.)

Likewise, these allegations do not establish fraudulent intent because "scienter cannot be inferred solely from the fact that, due to the defendants' board membership or executive managerial position, they had access to the company's internal documentation as well as any adverse information." *Am. Fin. Int'l Group-Asia v. Bennett*, No. 05-CV-8988, 2007 WL 1732427, at *8 (S.D.N.Y. June 14, 2007) (internal quotations omitted); *see also Duncan v. Pencer*, No. 94-CV-0321, 1996 WL 19043, at *14 (S.D.N.Y. Jan. 18, 1996) (mere allegations that defendants were senior executives and thus had access to inside information are insufficient). Consequently, the Complaint does not satisfy the elements of an insider trading claim as to Mr. Day.

III. The Third Claim Fails To State A Valid Claim Against Mr. Day.

The Third Claim against Mr. Day, which alleges control person liability under Section 20(a) of the 1934 Exchange Act, cannot survive this motion to dismiss. In order to establish a *prima facie* case for Section 20(a) control person liability, a plaintiff must show: "(1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *ATSI Commc'n, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007). The Complaint does not adequately plead any of these elements, much less all of them.

First, for the reasons set forth above, the Complaint does not properly allege a primary violation of Section 10(b) or Rule 10b-5.[9] Absent such a primary violation, there can be no control person liability as a matter of law. *See Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1132 (2d Cir. 1994) (affirming dismissal of a § 20(a) claim where the primary Rule 10b-5 allegation was not adequately pled and therefore properly dismissed); *Waxman v. Envipco Pick Up & Processing Servs., Inc.*, No. 02-CV-10132, 2003 WL 22439796, at *11 (S.D.N.Y. Oct. 28, 2003) (Lynch, J.) ("A plaintiff … cannot state a claim under § 20 … in the absence of a predicate securities-law violation by the 'primary' culprit.").

Second, the Complaint does not properly allege that Mr. Day actually had control over the primary violator (whoever that may be). To meet that requirement, a complaint "must allege facts from which it can be inferred that the defendant had ***actual*** power or influence over the controlled person …." *Harrison v. Rubenstein*, No. 02-CV-9356, 2007 WL 582955, at *19 (S.D.N.Y. Feb. 26, 2007) (emphasis added) (internal citations omitted); *see also In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 221 (S.D.N.Y. 1999) ("Actual control is essential to control person liability."). The Complaint fails to do this.

Rather than plead specific facts tending to show "actual power or influence over the controlled person," the Complaint improperly relies on conclusory allegations based solely on Mr. Day's status as a non-executive director of SocGen. To cite just a few examples:

- "The Individual Defendants, by virtue of their positions of control and authority as officers and/or directors of the Company, were able to, and did, control the content of the various public filings, press releases and other public statements pertaining to SocGen during the Class Period." (Compl., ¶ 81.)

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[9] As noted earlier, the First Claim, which alleges the underlying violation, fails for the reasons stated herein and as in the SocGen Moving Brief.

- "In particular, each of the Individual Defendants had direct involvement or intimate knowledge of the day-to-day operations of the Company during the Class Period." (Compl., ¶ 431.)

- "Defendants were provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by Plaintiffs to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected." (Compl., ¶ 430.)

The Second Circuit has held that these kinds of "vague allegations" are "conclusory at best" and therefore insufficient to state a claim for control person liability. *Suez Equity Investors L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 102 (2d Cir. 2001). Moreover, "the law is settled that a person's status as a director does not alone amount to the requisite power to control." *In re Par Pharm., Inc. Sec. Litig.*, 733 F. Supp. 668, 679 (S.D.N.Y. 1990) (citing cases); *see also In re Livent, Inc. Sec. Litig*, 78 F. Supp. 2d at 221 ("Officer or director status alone does not constitute control.") (citing cases).

Third, in addition to the fact that Plaintiffs have not adequately alleged an underlying violation, the control person claims against Mr. Day fail because the Complaint does not plead culpable participation by Mr. Day in any such violation. To plead the requisite culpable participation, a complaint must allege that the defendant had "actual involvement in the making of the fraudulent statements by the putatively controlled entity." *In re Refco Sec. Litig.*, 503 F. Supp. 2d at 663. In other words, "a claim under § 20(a) requires that the defendant have actual control over the transaction in question." *Id.* (internal quotations omitted). Additionally, because the PSLRA's heightened pleading requirements apply to the culpable participation test, "determination of § 20(a) liability requires an individualized determination of a defendant's control of the primary violator as well as a defendant's particular culpability." *Burstyn v. Worldwide Xceed Group, Inc.*, No. 01-CV-1125, 2002 WL 31191741, at *8 (S.D.N.Y. Sept. 30, 2002) (Lynch, J.) (quoting *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1996)). A

complaint, therefore, "must plead with particularity facts giving rise to a strong inference that the controlling person knew or should have known that the primary violator, over whom the person had control, was engaging in fraudulent conduct.'" *In re Refco Sec. Litig.*, 503 F. Supp. 2d at 661 (internal quotations omitted).

Here, the Complaint contains no allegations that Mr. Day had "actual involvement in the making" of any allegedly fraudulent statements or "control over the transaction[s] in question." *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d at 663. Nor does the Complaint contain any allegations of specific facts giving rise to even a mild inference (much less the required "strong inference") that Mr. Day knew or should have known that any individual at SocGen was engaging in fraudulent conduct. Accordingly, the control person liability claims (Third Claim) should be dismissed as to Mr. Day.

IV. The Fourth Claim Fails To State A Valid Claim Against Mr. Day.

The Fourth Claim, which is Plaintiffs' Section 20A claim against Mr. Day, fails for the simple reason that the Complaint does not "properly plead an independent cause of action for insider trading under § 10(b) of the 1934 Act." *DeMarco v. Robertson Stephens Inc.*, 318 F. Supp. 2d 110, 126 (S.D.N.Y. 2004) (Lynch, J.) (citing *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703 (2d Cir. 1994)). To state a Section 20A claim, a plaintiff must properly "plead a predicate insider trading violation …." *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d at 311. As shown above, Plaintiffs have not pled a predicate insider trading violation against Mr. Day. Consequently, the Fourth Claim against Mr. Day must be dismissed. *See, e.g., In re Astranezeca Sec. Litig.*, 559 F. Supp. 2d 453, 472 (S.D.N.Y. 2008) ("Without the § 10(b) and Rule 10b-5 claims, plaintiffs' … § 20A insider trading claims against the individual defendants also fail.").

CONCLUSION

For the foregoing reasons, Defendant Robert A. Day's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted and Plaintiffs' Complaint against him should be dismissed, with prejudice, in its entirety.

Date: December 18, 2008
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Respectfully submitted,

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