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 REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE FIRST AMENDED AND CONSOLIDATED COMPLAINT

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Plaintiffs' opposition does nothing to salvage the failed claims against Mr. Day. Accordingly, each of the claims alleged against Mr. Day should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

I. Plaintiffs' First Claim Fails Because The Complaint Alleges No Material Misstatements Or Omissions By Mr. Day.

In support of their first claim, for violation of Section 10(b), Plaintiffs do not challenge Mr. Day's showing that the Complaint fails to attribute to him directly ***any*** statement or omission, much less a materially misleading one. Instead, Plaintiffs argue that they are entitled to utilize group pleading such that the statements by other SocGen employees can be attributable to Mr. Day, who is a California-based non-executive director of SocGen. (Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss ("Pltf. Mem.") at 65-68.) To invoke the group pleading doctrine with respect to Mr. Day, however, Plaintiffs must show that he had "direct involvement in the everyday business" of SocGen. *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 641 (S.D.N.Y. 2007) (Lynch, J.) (internal quotations omitted); *see also In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005) ("In order to invoke the group pleading doctrine … the complaint must allege facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs, at the entity issuing the statement.") Plaintiffs have not made this showing.

Plaintiffs themselves acknowledge, (Pltf. Mem. at 68 n.35), that non-insiders, like Mr. Day, are generally not subject to group pleading because they are "not presumed to have participated in the preparation of corporate publications." *Dressner v. Utility.com Inc.*, 371 F. Supp. 2d 476, 494 (S.D.N.Y. 2005). Nonetheless, Plaintiffs attempt to meet the group pleading requirements by relying on Mr. Day's role as a non-executive director of SocGen.

More specifically, Plaintiffs' opposition reiterates the Complaint's self-serving contentions that, based on Mr. Day's position, he had control over, and responsibility for, SocGen's filings; unlimited access to the documents alleged to be false and misleading; and the opportunity to prevent or correct certain statements. (Pltf. Mem. at 66-67.) But the law is clear that mere reference to a defendant's title or role in a company, "without additional facts," is insufficient to invoke the group pleading doctrine. *In re Alstom*, 406 F. Supp. 2d at 467 (defendants' executive "titles do not, without additional facts, support a logical inference that [they] were responsible for the drafting, production, reviewing or dissemination of the [challenged] information"); *see also Dressner*, 371 F. Supp. 2d at 494 ("conclusory, vague allegations" are insufficient to support group pleading). In short, Plaintiffs do not, and cannot, point to any non-conclusory allegations (whether premised upon Mr. Day's role as a non-executive director or otherwise) that supply the necessary "additional facts" to argue that Mr. Day was a SocGen insider or had any involvement in SocGen's day-to-day affairs, much less the required "direct involvement in the everyday business" of SocGen. *In re Refco,* 503 F. Supp. 2d at 641.

Plaintiffs next argue that Mr. Day's alleged equity holdings in SocGen are sufficient to trigger application of the group pleading doctrine. But the cases relied upon by Plaintiffs (as well as any other case law) do not support this conclusion. For example, in *In re Adelphia Communications Corp. Securities & Derivative Litigation*, the court recognized that application of the group pleading doctrine does ***not*** turn on the defendant's equity stake, but on whether the particular defendant had "access to information concerning the company's day-to-day business." 398 F. Supp. 2d 244, 250 (S.D.N.Y. 2005). Similarly, *In re Oxford Health Plans, Inc.*, the dispositive question for application of the group pleading doctrine was ***not*** the two defendants'

equity ownership in the company. Rather, the court applied group pleading because the defendants were corporate executives -- a former vice president and a former CEO of the company's New York Region -- who had purported "knowledge of the fraud and assisted in its perpetration by ... drafting, reviewing and/or disseminating the statements." 187 F.R.D. 133, 142 (S.D.N.Y. 1999).[1] Both are a far cry from this case and the Complaint's allegations, or lack thereof, as to Mr. Day.

II. Plaintiffs' Second and Fourth Claims Fail To State A Claim Upon Which Relief May Be Granted.

Plaintiffs' opposition does nothing to cure the Complaint's fatal defects concerning the insider trading claims against Mr. Day under Section 10(b) (second claim for relief) and Section 20A (fourth claim for relief). In addition to the failure to allege scienter, which is addressed below in Section III, these insider trading claims must be dismissed (i) in part, because Plaintiffs have not satisfied the contemporaneous trading requirement for the majority of the trades, and (ii) in all, because Plaintiffs have not properly alleged that Mr. Day was in receipt of non-public information at the time of the alleged trades. *See, e.g.*, *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.) (insider trading claim must allege facts that support a strong inference that defendant was "in receipt" of inside information when he sold his shares).

First, Plaintiffs do not point to any allegations in the Complaint refuting Mr. Day's showing that there is no contemporaneity for at least eight of the twelve challenged trades. (Robert A. Day's Memorandum of Law in Support of His Motion to Dismiss the First Amended

[1] The other only case cited by Plaintiffs for their argument concerning Mr. Day's equity holdings, *In re Solucorp Industries Securities Litigation.*, is in accord. There, the court applied group pleading to a board member only after it was established that the board member, in fact, had access to information concerning the company's day-to-day business. No. 98 Civ. 3248, 2000 WL 1708186, at *7 (S.D.N.Y. Nov. 15, 2000).

and Consolidated Complaint ("Day Mem.") at 13-14.) They do not even try. Instead, Plaintiffs respond by stating that only a Section 20A claim, and not a Rule 10b-5 insider trading claim, has contemporaneous trading as a requirement. (Pltf. Mem. at 70.) Plaintiffs are wrong as a matter of law.

Not surprisingly, Plaintiffs cite no authority for their assertion, as there is none. To the contrary, Second Circuit case law has long been clear that to have standing to bring a Rule 10b-5 claim for insider trading, plaintiffs must trade "contemporaneously" with the alleged insider. *See, e.g., Wilson v. Comtech Telecomm. Corp.*, 648 F.2d 88, 94 (2d Cir. 1981). There is no case law in this Circuit (or anywhere else to our knowledge) holding that the enactment of Section 20A obviated, or otherwise altered, this contemporaneity requirement for insider trading claims under Rule 10b-5. To the contrary, the contemporaneity requirement has still been applied by courts to Rule 10b-5 insider trading claims subsequent to the enactment of Section 20A. *See, e.g., Peltz v. Polyphase Corp.*, 36 Fed. Appx. 316, 321 (9th Cir. 2002); *Perry v. Eastman Kodak Co.*, No. 91-2192, 1992 WL 103695, at *6 (7th Cir. May 15, 1992).[2]

Plaintiffs also argue that "contemporaneously" has an expansive definition which is ***not*** limited to trades made by Plaintiffs within a few days after the challenged sales by Mr. Day. (Pltf. Mem. at 70, 74-75.) Again, Plaintiffs are wrong on the law. In *In re Take-Two Interactive Securities Litigation*, 551 F. Supp. 2d 247 (S.D.N.Y. 2008), the court surveyed the case law and held that the "authority in this Circuit … maintains that trades are contemporaneous if they occur

[2] Plaintiffs' assertion that the lead plaintiff need not have standing to sue on all possible causes of action is misplaced. (Pltf. Mem. at 70.) The law is clear that when none of the named plaintiffs -- as is the case here -- has standing to pursue a claim, that claim must be dismissed. *See, e.g., In re Salomon Analyst Level 3 Litig.*, 350 F. Supp. 2d 477, 496 (S.D.N.Y. 2004) (dismissing claims for lack of standing and noting that "[w]hile plaintiffs are correct that lead plaintiffs, appointed pursuant to the PSLRA, need not satisfy all elements of standing with respect to the entire lawsuit, the selection of lead plaintiffs does not remove the basic requirement that at least one named plaintiff must have standing to pursue each claim alleged.")

within a reasonable period of time, usually limited to a few days, of one another." *Id.* at 311 n.50. Additionally, the court ruled that the defendants "may not be held liable for purchases Lead Plaintiffs carried out before the alleged insider trading in question." *Id.* Accordingly, because Plaintiffs have not alleged contemporaneity for eight of the twelve challenged trades, as they are required to do, Plaintiffs have no standing with respect to any of those trades.[3]

Second, Plaintiffs acknowledge, as they must, that all of their insider trading claims require that Mr. Day "***knowingly possessed*** non-public information when he traded." (Pltf. Mem. at 71) (emphasis in original).) Indeed, the law is clear that an insider trading claim must contain allegations that "support a strong inference that [the defendant] … was in receipt" of inside information when he sold his shares. *In re Global Crossing, Ltd. Sec. Litig.*, 2005 WL 2990646, at *10 (internal quotation omitted). Plaintiffs have not met this standard.

Because they cannot point to any specific facts in the Complaint to meet this pleading requirement, Plaintiffs instead rely on plainly insufficient and conclusory allegations. (Pltf. Mem. at 70-71.) For example, Plaintiffs ask this Court to infer that Mr. Day must have had access to inside information when he traded based on conclusory allegations like the following: "[b]ecause of the Individual Defendants' positions with the Company, they each had access to adverse, undisclosed information … via access to internal corporate documents, conversations, and connections with other corporate officers and employees, attendance at management and board of director meetings and committees …." (Compl. ¶ 272.)

As a threshold matter, the law is clear that board memberships, or what Plaintiffs call Mr. Day's "positions," are not sufficient to impute knowledge of material nonpublic information

[3] The eight trades occurred on October 5, 2006; October 6, 2006; October 10, 2006; January 11, 2007 (two individual sales); January 9, 2008; and January 10, 2008 (two individual sales). (*See* Day Mem. at 13-14.)

to Mr. Day. *See, e.g., In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 605 (S.D.N.Y. 2007) ("[T]he Court must also reject plaintiffs' attempt to impute knowledge of material, nonpublic information to Barton merely because he held a position on IAC's board.") The law is equally settled that the conclusory allegations contained in the Complaint do not contain "adequate specifics regarding the circumstances surrounding [] possession of non-public information," such as "what non-public information [was given to Mr. Day], when the information was given, etc.," needed to survive a motion to dismiss. *Log On Am., Inc. v Promethean Asset Mgmt. L.L.C.*, 223 F. Supp. 2d 435, 447 (S.D.N.Y. 2001). Thus, Plaintiffs' second and fourth claims for insider trading must be dismissed.

III. Plaintiffs' First, Second and Fourth Claims Also Fail Because There Is No Scienter.

With respect to Plaintiffs' Section 10(b) and insider trading claims -- alleged as the first, second and fourth claims for relief against Mr. Day -- the PSLRA's heightened pleading requirements mandate that Plaintiffs "state[] with particularity facts giving rise to a strong inference that [Mr. Day] acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2007). As Plaintiffs' opposition brief notes, Plaintiffs can meet this requirement by properly alleging either (i) strong circumstantial evidence of conscious misbehavior or recklessness by Mr. Day or (ii) that Mr. Day had both the motive and intent to commit fraud. (Pltf. Mem. at 33 (citing *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000).) Plaintiffs have done neither. Thus, each of these claims against Mr. Day must be dismissed for the independent reason that they fail to plead scienter.

A. Plaintiffs Cannot Show Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness.

The Second Circuit has defined conscious misbehavior as "deliberate illegal behavior." *Id.* at 308. Recklessness, in turn, is "conduct which is highly unreasonable and which 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.* (internal citations omitted). Generally, recklessness is established when a complaint properly and "specifically allege[s] defendants' knowledge of facts or access to information contradicting their public statements." *Id.* Plaintiffs' Complaint does not adequately allege facts that constitute strong circumstantial evidence of either conscious misbehavior or recklessness.

Plaintiffs argue that the Complaint properly pleads conscious misbehavior or recklessness on the part of Mr. Day in light of alleged warnings received by SocGen concerning Mr. Kerviel and the purportedly critical importance of risk management to SocGen's operations. (Pltf. Mem. at 35-38). In support of their argument, Plaintiffs also point to allegations in the Complaint concerning statements made by so-called "confidential witnesses, (Pltf. Mem at 39-45), and SocGen's restatement of its 2007 financial statements (Pltf. Mem. at 46-47). But Plaintiffs supply no specific facts indicating that Mr. Day, a non-executive California-based director, (i) had any input into SocGen's financial statements, (ii) knew about the Kerviel warnings, or (iii) had any involvement with, or even knowledge of, the so-called "confidential witnesses" and their alleged job responsibilities. Instead, Plaintiffs group Mr. Day and the other individual defendants together. It is well-established, however, that a party cannot rely on group pleading to satisfy the PSLRA's requirements for alleging scienter. *See, e.g., In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 440 (S.D.N.Y. 2005) (group pleading "has no effect on the PSLRA's scienter requirement" and does not "permit plaintiffs to presume the state of mind … [of] those defendants").

Moreover, to the extent Plaintiffs even attempt to tie Mr. Day to the general allegations that supposedly support his conscious misbehavior or recklessness, they do so solely by pointing

to Mr. Day's positions as a non-executive director of SocGen and chairman of TCW. As explained below in Section III(B), however, Plaintiffs cannot, as a matter of law, rely on Mr. Day's titles to establish his scienter.[4]

Plaintiffs also point to allegations in the Complaint concerning supposed ongoing investigations by the SEC and U.S. Attorney's Office as supporting a strong inference of conscious misbehavior or recklessness by Mr. Day. (Pltf. Mem. at 49.) This, too, fails. The only case Plaintiffs cite in support of this argument — *In re Syncor International Corp. Securities Litigation*, 327 F. Supp. 2d 1149 (C.D. Cal. 2004) — serves to further undermine Plaintiffs' position. In *Syncor*, the SEC had issued a cease-and-desist order, finding that the company had violated the Foreign Corrupt Policies Act of 1977. *See id.* at 1155. Here, the Complaint does not allege that the SEC or the U.S. Attorney's Office has issued any order (or even a subpoena), or made any findings against Mr. Day. In fact, the most Plaintiffs can muster is the conclusory, and false, allegation that these investigations are ongoing. Notably, the Complaint does not provide a single fact from which it could even be inferred that Mr. Day is currently under investigation.

Moreover, in *Syncor*, a criminal plea had been entered into by the company's subsidiary in which the stipulated facts in support of the plea included acts by one of the individual defendants. *See id.* at 1161, n.5. None of these facts is present here. And, in *Syncor*, the district court had already independently found that the complaint, unlike Plaintiff's pleading here, adequately alleged specific corroborating facts sufficient to demonstrate that defendants had

[4] Additionally, as demonstrated in Mr. Day's moving brief, the Complaint lacks any allegation that TCW played a role in SocGen's allegedly fraudulent statements. (*See* Day Mem. at 10.) Plaintiffs' opposition brief does not even attempt to respond to this point.

actual knowledge of wrongdoing at the corporation. *See id.* at 1162. Thus, in *Syncor*, the SEC investigation, a cease-and desist order and a criminal plea bargain merely bolstered the other specific, well-pled allegations. *Id.* They were not a substitute for the failure of a civil litigant to allege scienter adequately and with particularity, which is what we have here.

The present case is, therefore, more analogous to *In re Ceridian Corp. Securities Litigation*, 542 F.3d 240 (8th Cir. 2008), than to *Syncor.* In *Ceridian*, the court held that mere allegations that the SEC is investigating a defendant cannot establish the requisite scienter. *See id.* at 248-249.

In addition to the failings above, Plaintiffs' allegations regarding Mr. Day's supposed recklessness lack the requisite specificity to plead scienter. The case of *Steinberg v. Ericsson LM Telephone Company*, No. 07 CV. 9615, 2008 WL 5170640 (S.D.N.Y. Dec. 10, 2008), is instructive. In *Steinberg*, the court, citing to the Second Circuit's *Novak* opinion, held that the complaint did not plead scienter through a recklessness theory because it "failed" to identify any "reports … or any conversations" to which the defendants were privy. *Id.*, at *12. Instead, the court found that the complaint "generically" made "boilerplate allegations" that were "not a sufficient basis for alleging scienter." *Id.* at 13.

Here, the Complaint's allegations regarding Mr. Day's purported recklessness are strikingly similar to those found lacking in *Steinberg*. In *Steinberg*, the faulty allegations included assertions that the defendants' "knowledge of facts or access to information contradicting their public statements," *Novak*, 216 F.3d at 308, came from "internal corporate documents," "attendance at management and Board of Directors meetings," and "conversations and connections with other corporate officers and employees." *Steinberg*, 2008 WL 5170640,

at *12. The Plaintiffs in this case use nearly identical allegations in their Complaint. (*See* Compl., ¶¶ 77, 78, 272, 314, 340.)

B. Plaintiffs Cannot Show that Mr. Day Had Both the Motive and Opportunity to Commit Fraud.

Plaintiffs' contention that the Complaint adequately pleads scienter as to Mr. Day through allegations that he had both the motive and opportunity to commit fraud likewise fails. Plaintiffs first argue that the "Individual Defendants' status as officers and directors more than sufficiently establishes, at the pleading stage, their opportunity to commit the acts alleged." (Pltf. Mem. at 52.) This is an inaccurate statement of the law, which explains why Plaintiffs offer no support for their proposition. Indeed, under Plaintiffs' theory, every complaint, no matter how general and conclusory its allegations, would adequately plead scienter under the PSLRA and Fed. R. Civ. P 9(b) as long as the defendant is a corporate board member or officer. Of course, the law is decidedly to the contrary and holds, among other things, that "bare assertions [that defendants had access to undisclosed financial information], without any further facts or details, [does] 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); *see also In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603, 2004 WL 1415973, at *17 (S.D.N.Y. June 23, 2004) (allegations that "defendants had access to adverse undisclosed information because of their senior positions with the company" are insufficient to plead scienter).

Next, Plaintiffs argue that a strong inference of fraudulent intent is established through the Complaint's allegations concerning the timing and amount of Mr. Day's trades throughout the Class Period. (Pltf. Mem. at 52-55.) Plaintiffs miss the mark by a wide margin. Among other things, this argument ignores Mr. Day's showing that the theories behind many of his

supposed insider trades are economically irrational because many of these trades were actually ***sales*** that came ***before*** SocGen ***buybacks***, which typically boost stock prices. (*See* Day Mem. at 16, n. 8.) Plaintiffs' opposition papers do not even attempt to respond to this point.

Moreover, Plaintiffs' argument, if accepted, would violate the Supreme Court's mandate that courts must weigh the plausibility of competing inferences to determine whether a plaintiff has alleged a cogent and compelling inference of scienter. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 127 S. Ct. 2499, 2510 (2007). Under *Tellabs*, no court can look at any single fact in isolation, such as the time or amount of sales, and draw inferences of scienter. *Id.* at 2511. To the contrary, a court must consider any opposing inference. *Id.* at 2510. Where the inference of scienter is not "cogent and at least as compelling as any opposing inference," the complaint must be dismissed. *Id.* Here, given the absence of any factual allegations of Mr. Day's access to and receipt of material, non-public information to go along with the alleged timing of Mr. Day's trades, a far more plausible, and compelling, opposing inference is that Mr. Day did not engage in any wrongdoing when he made the stock sales at issue here.[5]

IV. Plaintiffs' Third Claim Fails To Meet The Elements For Control Person Liability.

Plaintiffs' opposition does nothing to avoid dismissal of the third claim against Mr. Day for control person liability under Section 20(a). Among other things, Plaintiffs have not

[5] For example, tax planning is a legitimate, competing inference with respect to Mr. Day's alleged sales in January 2008. It is not uncommon for individuals with sophisticated investment and tax planning advisors to delay transactions with negative tax consequences until shortly after the beginning of the taxable year in order to maximize the time to pay such taxes. Sales of SocGen stock in January 2008 provided Mr. Day with approximately fifteen months, or until April 2009, to pay capital gains taxes associated with the sales. Plaintiffs' Complaint falsely assumes that the decision to sell Mr. Day's SocGen stock was made by Mr. Day and his staff at time of the sales. Nor is it uncommon for individuals holding large or concentrated stock positions at a low basis to make periodic sales of stock either for diversification or estate planning purposes. And, if Mr. Day truly had inside information and improper intent, he would have sold all, not merely some, of his vast SocGen holdings, and would not have kept a sizeable portion of his wealth invested in SocGen. (*See, e.g.*, Compl.¶ 383 (alleging that Mr. Day sold 49.44% of his SocGen holdings in January 2008).)

adequately alleged the elements of control or culpable participation. *See, e.g., In re Refco*, 503 F. Supp. 2d at 660.

To allege control, the Complaint must contain "facts from which it can be inferred that [Mr. Day] had actual power of influence over the controlled person." *Harrison v. Rubenstein*, No. 02-CV-9356, 2007 WL 582955, at *19 (S.D.N.Y. Feb. 26, 2007). In their attempt to meet this requirement, Plaintiffs point to different Complaint allegations regarding Mr. Day's status as a director. Specifically, Plaintiffs rely on conclusory allegations that Mr. Day had a "high–level position[] and responsibilities" at SocGen; that by virtue of his position Mr. Day "participated in the drafting, producing, reviewing and/or disseminating of SocGen's various public filings;" and that Mr. Day had "access to internal reports" as a director. (Pltf. Mem. at 72-73.) But it is "well-settled that a person's status as director does not alone amount to the requisite power to control." *In re Par Phar., Inc. Sec. Litig.*, 733 F. Supp. 668, 679 (S.D.N.Y. 1990).

Plaintiffs also rely on allegations concerning Mr. Day's equity holdings in SocGen in an effort to establish Mr. Day's control. (Pltf. Mem. at 72.) But the very cases relied upon by Plaintiffs make clear that such allegations are legally insufficient to sustain a Section 20(a) claim. For instance, in *Adelphia Communications*, the court held that a Section 20(a) claim was properly pled as to the Chairman of the Board and founder of the company only after finding that the Chairman signed the company's annual reports and directed the company's affairs. *See* 398 F. Supp. 2d at 262. There are no such allegations in the Complaint pertaining to Mr. Day. Similarly, as even Plaintiffs acknowledge, the court in *Oxford Health* found the directors to be control persons because, among other things, they had "intimate knowledge of the day-to-day operations of the company." (Pltf. Mem. at 72.) Mr. Day has no such knowledge, and there are no Complaint allegations to the contrary. (*See* Day Mem. at 18-19.)

Plaintiffs' Section 20(a) claim fails for the additional reason that the Complaint does not adequately allege culpable participation by Mr. Day in the supposed wrongdoing. To do so, the Complaint must contain facts supporting a strong inference that Mr. Day had "actual control over the transaction[s] in question," and such allegations must meet the PSLRA's heightened pleading standards. *See In re Refco Sec. Litig.*, 503 F. Supp. 2d at 663 (internal citation omitted). Plaintiffs do not, and cannot, point to any facts in the Complaint that come close to meeting this standard.

Instead, Plaintiffs merely recycle the same conclusory and self-serving allegations that Mr. Day, a California-based non-executive director, (i) participated in the day-to-day management and strategic decisions of the SocGen; (ii) had the power to dictate and approve the purported false and misleading statements challenged in the Complaint; and (iii) was part of an alleged scheme involving the SocGen stock repurchase program. (Pltf. Mem. at 73.). Aside from being conclusory, none of these allegations specifically tie Mr. Day to any alleged wrongful activity on the part of any SocGen employee, let alone create a "strong inference" that he had "actual control" over the creation and issuance of SocGen's supposedly false and misleading public statements and/or the alleged insider trading of other SocGen officers. [6]

[6] An underlying violation of the securities laws is also an element of a Section 20(a) claim. *See ATSI Commc'n, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007). As explained in SocGen's papers, which Mr. Day incorporates by reference, there is no predicate securities law violation here. Accordingly, this is another independent reason why Plaintiff's Section 20(a) claim against Mr. Day fails.

V. Conclusion

Based on the foregoing together with the reasons stated in Mr. Day's moving brief, Robert A. Day respectfully requests that this Court (i) grant his motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), (ii) dismiss Plaintiffs' Complaint against him with prejudice in its entirety, and (iii) award him his costs and such further relief as is appropriate.

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Respectfully submitted,

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