

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SJUNDE AP-FONDEN, individually and on
behalf all others similarly situated,

Plaintiff,

v.

THE GOLDMAN SACHS GROUP, INC.,
LLOYD C. BLANKFEIN, HARVEY M.
SCHWARTZ, and GARY D. COHN,

Defendants.

Case No. 1:18-cv-12084

ORAL ARGUMENT REQUESTED

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO
DISMISS THE SECOND AMENDED CLASS ACTION COMPLAINT**

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PRELIMINARY STATEMENT

Plaintiff's opposition picks up where the complaint leaves off, taking its cue from *Billion Dollar Whale* and telling a tale of international intrigue—all in an apparent effort to distract the Court from the narrow legal issues before it. This case is not about bribery or fraud against 1MDB. That is being explored elsewhere. Rather, the question here is whether Plaintiff has met the high standard for pleading a claim of securities fraud *against Goldman Sachs' own shareholders*—a claim predicated on the allegation that Goldman Sachs affirmatively misled shareholders about its allegedly “critical role in one of the largest financial frauds in history.” Opp. 1. The answer is no.

First and foremost, the opposition fails to explain how Plaintiff has satisfied the pleading requirements for loss causation. Plaintiff was required to allege that Goldman Sachs affirmatively “concealed *something* from the market that, *when disclosed*, negatively affected the value of the security.” *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 261–62 (2d Cir. 2016) (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005)). As Plaintiff repeatedly puts it, the “concealed” risk was that Goldman Sachs would be the subject of extensive government investigations and would face exposure to significant penalties and sanctions. *See infra* at 5 n.1.

The problem for Plaintiff is that *this risk was not “concealed.”* Plaintiff has never explained how a handful of narrow factual statements about 1MDB—along with general statements about business principles between October 2014 and early November 2018—served to mislead anyone about the Firm's exposure to the risk of sanctions stemming from the 1MDB offerings in 2012 and 2013. And in any event, by November 9, 2018—when the alleged “corrective disclosures” began—the market *already knew* that Goldman Sachs faced extensive investigations and significant exposure: on November 2, 2018, a full week earlier, Goldman Sachs disclosed a guilty plea by the former banker who led the 1MDB offerings and an indictment against another banker who worked on the offerings, described the substance of that guilty plea and that

indictment, and told shareholders that proceedings “by the DOJ or other governmental or regulatory authorities *could result in the imposition of significant fines, penalties and other sanctions*” against the Firm. Ex. 2 at 89 (Q3 2018 10-Q) (emphasis added). Tellingly, the opposition completely ignores this disclosure—no doubt because it was not followed by a price decline. In fact, since at least August 2016, the Firm had been telling shareholders that it was subject to investigations and reviews by “various governmental and regulatory bodies . . . relating to the firm’s businesses and operations, including . . . those related to [1MDB].” Ex. 1 at 92 (Q2 2016 10-Q). These disclosures were not made in a vacuum. For years, extensive media reports on the 1MDB scandal—along with the best-selling *Billion Dollar Whale*—made the risk to Goldman Sachs abundantly clear.

Plaintiff cannot cast this problem aside as a “truth-on-the-market” defense unsuitable for a motion to dismiss. Opp. 9. A “truth-on-the-market” defense compares information in the marketplace *against the alleged false or misleading statements*, to see if those statements have been rendered immaterial. Defendants’ argument is focused not on materiality but on loss causation; it compares information in the marketplace *against the alleged corrective disclosures*. Courts can and do perform this kind of comparison at the pleading stage, and when the disclosure is not “corrective,” they do not hesitate to dismiss the complaint. *See* Mot. 19 (citing cases).

The flaws in Plaintiff’s claims are even more apparent in light of the alleged misstatements themselves, which consist mostly of general statements about risk management during a period well after the 1MDB bond offerings. The Second Circuit has held again and again that these kinds of general statements are not actionable. Although the opposition attempts to find a loophole in that case law, its effort fails. And as for the handful of narrow factual statements about 1MDB itself, Plaintiff has not shown they were false when made, much less that they concealed a risk that

came to light only in late 2018.

Finally, Plaintiff still has not explained how it could possibly satisfy the heightened pleading standard for scienter, which requires pleading particular facts sufficient to raise a strong inference that Defendants intended to defraud the Firm's shareholders. Defendants' own stock purchases during the class period defeat any such inference. Moreover, the complaint does not contain a single allegation about what the Individual Defendants knew about the 1MDB scheme or when they knew it—and it certainly does not show that Defendants knew any statements to shareholders were false when made. Plaintiff's entire argument for scienter boils down to the idea that certain "red flags" necessarily alerted Defendants to the risk of penalties against Goldman Sachs. This argument is insufficient as a matter of law, and it is also inconsistent with Plaintiff's position on loss causation. The complaint attributes the "red flags" directly to *Billion Dollar Whale* and the extensive media coverage that predated the corrective disclosures in this case. But if these "red flags" were enough to put Defendants on notice of the risk of significant penalties against the Firm, they were also enough to disclose that risk to the market. In attempting to plead scienter, Plaintiff pulls the rug out from under its loss causation argument.

ARGUMENT

I. THE OPPOSITION MISSTATES THE LAW ON LOSS CAUSATION AND CANNOT SAVE PLAINTIFF'S CLAIMS.

Recognizing the fatal flaws in its theory of loss causation, Plaintiff attempts to minimize the burden it faces. The opposition insists that Plaintiff need only plead that the market reacted to a "materialization of risk"—as if repeating that mantra relieves it of the obligation to plead loss causation (Opp. 16–18)—and it dismisses the prior disclosure of that risk as a "truth-on-the-market" defense unsuited to a motion to dismiss (*id.* at 9–16). The law says otherwise. Plaintiff was required to plead that the stock price fell when the market learned about a risk that Defendants

had concealed. Instead, the complaint here pleads that the stock price fell following six news reports reflecting (at most) the materialization of a risk that the market already knew about. SAC ¶¶ 397–415. This Court can and should dismiss the complaint on that basis.

A. The Alleged Corrective Disclosures Reflected the Materialization of a Risk Already Known to the Market—which is Not Enough for Loss Causation.

As the Second Circuit has explained, its decisions “do not suggest that ‘corrective disclosure’ and ‘materialization of risk’ create fundamentally different pathways” for loss causation. *Vivendi*, 838 F.3d at 261–62, *cited in* Opp. 17. The idea of “materialization of risk” simply acknowledges that a corrective disclosure does not need to correct a misstatement explicitly, if it discloses “events constructively disclosing the fraud.” *Id.* at 262. Either way, the plaintiff still must plead that the stock price was “negatively affected” when the market learned something that had previously been “concealed.” *Id.* at 261–62. Plaintiff cannot rely on disclosures that had a “*negative* effect on stock prices,” if they did not also have “a *corrective* effect.” *In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005).

For this reason, courts routinely dismiss complaints alleging that the company’s “stock price dropped when a *disclosed* risk . . . materialized.” *In re Tempur Sealy Int’l Inc. Sec. Litig.*, 2019 WL 1368787, at *15 (S.D.N.Y. Mar. 26, 2019) (emphasis added). For example, in the case of *DoubleLine Capital*, the complaint included claims about a concealed risk that the firm would be implicated in a bribery scheme. The court held that those particular claims could not be based on corrective disclosures made *after* the news broke about the involvement of the firm’s officers; the prior reports “let the cat out of the bag,” such that “[s]ubsequent reports merely confirmed what the market already knew. Therefore, these later reports were not corrective disclosures.” *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 459 (S.D.N.Y. 2018); *see also* *Nguyen v. New Link Genetics Corp.*, 297 F. Supp. 3d 472, 500 (S.D.N.Y. 2018) (granting

motion to dismiss where “risk that materialized was disclosed by Defendants and known by investors”); *Monroe Cty. Emps.’ Ret. Sys. v. YPF Sociedad Anonima*, 15 F. Supp. 3d 336, 358 (S.D.N.Y. 2014) (granting motion to dismiss where allegations involved “materialization of a known risk, rather than the disclosure of a concealed one”).

Here, the risk that Plaintiff says began to “materialize” on November 9, 2018 was Goldman Sachs’ “exposure to the 1MDB fraud.” Opp. 17.¹ In other words, Plaintiff’s claims depend on the idea that until November 9, 2018, shareholders were deceived into believing that “the bank’s exposure to the scandal, if any, was limited.” *Id.* at 8.

Yet *before* that date, Goldman Sachs explicitly disclosed that its exposure could be “significant.” As early as August 2016, Goldman Sachs disclosed that it was subject to investigations by “various governmental and regulatory bodies” about matters “including . . . those related to [1MDB].” Ex. 1 at 92 (Q2 2016 10-Q). And on November 2, 2018, Goldman Sachs disclosed that proceedings “by the DOJ or other governmental or regulatory authorities could result in the imposition of significant fines, penalties and other sanctions against the firm.” Ex. 2 at 89 (Q3 2018 10-Q). This was accompanied by the news that former banker Tim Leissner had pled guilty to criminal charges; that another former banker, Roger Ng, had been criminally charged; and that the charging documents alleged that Leissner and Ng (along with a third unnamed banker) “participated in a conspiracy to misappropriate proceeds of the 1MDB offerings for themselves and to pay bribes to various government officials to obtain and retain 1MDB business for the firm,” that “the firm’s system of internal accounting controls could be easily circumvented,” and that the

¹ Opp. 9 (arguing that disclosures “progressively revealed the extent of Goldman’s role in 1MDB fraud and the bank’s massive exposure to criminal and regulatory actions around the world.”); *id.* at 8 (arguing that “[w]ith each new revelation, investors learned that Goldman’s statements minimizing the bank’s exposures had been misleading.”); *id.* at 10 (arguing that disclosures “provided new information about Goldman’s role and exposure in the 1MDB fraud”).

firm’s business culture, particularly in Southeast Asia, “at times prioritized consummation of deals ahead of the proper operation of its compliance functions.” *Id.*

These disclosures revealed the precise “risk” that Plaintiff claims had been “concealed.” Unable to avoid their dispositive import, Plaintiff summarily dubs the earlier 10-Q disclosures as “boilerplate” and “tepid” (Opp. 16–17) and ignores the November 2 10-Q disclosure altogether—undoubtedly because the stock price actually *rose* that day. That is no response at all. On their face, Goldman Sachs’ disclosures—not to mention *Billion Dollar Whale* and the extensive media coverage about government investigations relating to 1MDB—were more than enough to “let the cat out of the bag” with respect to the Firm’s significant exposure, such that “[s]ubsequent reports merely confirmed what the market already knew.” *DoubleLine Capital*, 323 F. Supp. 3d at 459. As a matter of law, then, the alleged corrective disclosures cannot support a claim.

Indeed, *both* categories of alleged corrective disclosures—about government action, and about Mr. Blankfein’s attendance at an event in 2013—merely reported on the materialization of risks that had already been disclosed in the market. We examine each category below.

Disclosures of Follow-on Government Action. Five of the purportedly corrective disclosures involve reports about the latest developments in government investigations against the Firm relating to 1MDB—investigations that the market already knew about:

Disclosure	Disclosed Fact	Prior Disclosures of Risk (see also Mot. 15–17)
11/12/2018 <i>Bloomberg</i> (Ex. 36)	Malaysia to seek “full refund” of \$600M in fees	6/8/2018 <i>Reuters</i> (Ex. 3) (Malaysia considering asking DOJ “to get Goldman Sachs . . . to return nearly \$600 M in fees”); 6/14/2018 <i>NYT</i> (Ex. 4) (“Malaysian government intends to seek restitution” from the Firm); 6/22/2018 <i>WSJ</i> (Ex. 5)
11/29/2018 <i>Bloomberg</i> (Ex. 37)	Federal Reserve “ramping up its investigation” into how “executives dodged the bank’s internal controls”	4/7/2016 <i>WSJ</i> (Ex. 38) (Federal Reserve “raised concerns”); 6/10/2016 <i>Bloomberg</i> (Ex. 14) (Federal Reserve “examining Goldman [Sachs]’ dealings with 1MDB”); 11/1/2018 <i>Reuters</i> (Ex. 39) (Leissner admitted “circumventing . . . internal accounting controls”); Q3

		2018 10-Q (Ex. 2) (potential sanctions); Q2 2016 10-Q (Ex. 1) (government investigations)
12/17/2018 <i>NYT</i> (Ex. 40)	Malaysia files criminal charges against the Firm	Q3 2018 10-Q (Ex. 2) (proceedings by “DOJ or other governmental or regulatory authorities could result in the imposition of significant fines, penalties and other sanctions against the firm”); Q2 2016 10-Q (Ex. 1) (government investigations); 6/14/2018 <i>NYT</i> (Ex. 4) (Malaysian government action “could add significantly to the venerable Wall Street bank’s problems in Malaysia, where it has become ensnared in the scandal”)
12/20/2018 <i>FT</i> (Ex. 41)	Malaysia to seek \$7.5 billion from Goldman Sachs	6/14/2018 <i>NYT</i> (Ex. 4) (Malaysia to “seek restitution from Goldman Sachs”); 6/22/2018 <i>WSJ</i> (Ex. 5) (Malaysia’s “mission to recover as much of the missing 1MDB money as possible”); Q2 2016 10-Q (Ex. 1) (investigations by “various governmental . . . bodies”); Q3 2018 10-Q (Ex. 2) (potential for “significant fines, penalties and other sanctions”)
12/21/2018 <i>Bloomberg</i> (Ex. 42)	Singapore to expand criminal probe	Same article reports that investigations of the Firm by authorities in Singapore reach back more than two years; 10/14/2015 <i>WSJ</i> (Ex. 43) (1MDB transactions “under investigation” by authorities in Singapore); 11/7/2017 <i>Economist</i> (Ex. 45) (“Singaporean prosecutors are investigating” the role of Goldman bankers in 1MDB)

Again, well before each “disclosure,” and certainly by November 2, 2018, the risk of significant government sanctions against Goldman Sachs—by Malaysia, Singapore, and the U.S. government—had already been the subject of extensive reporting in the media, a full-length best-seller, and an explicit disclosure by Goldman Sachs itself. As a result, that risk was no longer “concealed”—if it ever had been. It makes no difference that Goldman Sachs did not predict exactly *how* the risks would materialize; it had no obligation “to speculate as to the myriad of consequences” that might befall it, let alone to predict the future. *In re FBR Sec. Litig.*, 544 F. Supp. 2d 346, 357 (S.D.N.Y. 2008) (internal quotations omitted); *see also Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 53 (2d Cir. 1995) (a “lack of clairvoyance” cannot constitute securities fraud).

Attendance at September 2013 Event. The only alleged corrective disclosure that purports to reveal a historical fact (rather than a development in the investigations) is the November 9, 2018

Wall Street Journal article, which identified Defendant Blankfein as the “high-ranking [Firm] executive” who attended a reception in New York in September 2013 that included Prime Minister Najib and Jho Low, among many other attendees. Opp. 10–11, 17. Plaintiff contends that this article somehow corrected the Firm’s statement in December 2016 that it had “found no evidence showing any involvement by Jho Low in the 1MDB transactions.” *Id.* at 19; *see also id.* at 17 (citing SAC ¶ 277). But the mere fact that Mr. Blankfein reportedly attended a reception with Low (and many other non-1MDB related individuals) six months *after* the last of the 1MDB offerings does not “correct” the prior statement, as it provides no basis for concluding that Goldman Sachs’ leadership had identified “evidence” in 2016 that Low was involved in any specific 1MDB transaction.

B. Plaintiff Cannot Excuse its Pleading Failure by Reframing the Problem as a “Truth-on-the-Market” Defense Unsuitable for a Motion to Dismiss.

Unable to avoid the flood of information already in the market about the Firm’s significant exposure, Plaintiff next tries to avoid dismissal on loss causation grounds by recharacterizing Defendants’ argument as a “truth on the market” defense. Opp. 9. This too misstates the law.

A “truth-on-the-market” defense has to do with a different element of a securities fraud claim: materiality. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167–68 (2d Cir. 2000), *cited in* Opp. 1–2, 9–10, 14–15. As the Second Circuit has explained, this defense is a “corollary” to the principle of “fraud on the market”; it asserts that “a misrepresentation is immaterial if the information is already known to the market because the misrepresentation cannot then defraud the market.” *Id.* at 167 (citations omitted). As a result, a “truth-on-the-market” analysis requires comparing corrective information *against the alleged misstatements*, to assess whether it is “sufficient to counter-balance effectively any misleading information created by” the misstatements. *Id.* (quoting *In re Apple Comp. Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989)).

The issue here is not materiality; it is loss causation—an issue that this Court can and does resolve as a matter of law. *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511–12 (2d Cir. 2010) (making clear that loss causation may be resolved as a matter of law). Plaintiff’s only response to this point is to argue that *Omnicom* is a summary judgment decision and distinguishable on that basis. Yet courts routinely rely on *Omnicom* to dismiss securities fraud claims at the pleading stage where, as here, the alleged corrective disclosures do not in fact correct any alleged misrepresentation. *See, e.g., Cent. States, S.E. & S.W. Areas Pension Fund v. Fed. Home Loan Mortg. Corp.*, 543 F. App’x 72, 75 (2d Cir. 2013) (citing *Omnicom* and affirming dismissal where plaintiff “does not identify how the alleged corrective disclosures ‘even purported to reveal some then-undisclosed fact with regard to the specific misrepresentations alleged in the complaint’”); *Fila v. Pingtan Marine Enter. Ltd.*, 195 F. Supp. 3d 489, 496–97 (S.D.N.Y. 2016) (citing *Omnicom* and granting motion to dismiss on loss causation grounds because plaintiff failed to identify any corrective disclosure that revealed any undisclosed fact linked to a specific alleged misrepresentation); *see also supra* at 4–5 (citing cases); Mot. 19 (citing cases).

In sum, the six alleged corrective disclosures did not reflect the materialization of a concealed risk. Because Plaintiff has failed to plead that any fraud in the alleged misstatements caused its loss, the case should be dismissed on that basis alone.

II. THE OPPOSITION CANNOT OVERCOME PLAINTIFF’S FAILURE TO PLEAD AN ACTIONABLE FALSE STATEMENT.

Loss causation aside, Plaintiff still has not demonstrated that any of the alleged misstatements supports a claim under the securities laws. A plaintiff must “do more than say that the statements . . . were false and misleading; [it] must demonstrate with specificity why and how that is so.” *Fogel v. Vega*, 759 F. App’x 18, 24 (2d Cir. 2018) (internal quotation marks omitted). Plaintiff’s opposition seems to reflect a view that the sheer length of its complaint must be

sufficient to reveal some misstatement about something. Opp. 18–30. But length should not be mistaken for merit. The Second Circuit requires a plaintiff to identify “an actual *statement*, one that is either ‘untrue’ outright or ‘misleading’ by virtue of what it omits to state” (*Vivendi*, 838 F.3d at 239), and it must plead that statement with particularity.

A. Business Principles

Plaintiff’s opposition fails to overcome the Second Circuit’s clear and extensive case law holding that general statements about business principles cannot be the basis for a securities fraud claim. *See, e.g., Singh v. Cigna Corp.*, 918 F.3d 57, 60, 63 (2d Cir. 2019) (“general statements about reputation, integrity, and compliance with ethical norms are inactionable”); *ECA, Local 134 IBEW Joint Pension Tr. v. JP Morgan Chase Co.*, 553 F.3d 187, 205–06 (2d Cir. 2009) (general statements about risk management are inactionable). The challenged statements here are exactly the sort of vague, general pronouncements that cannot constitute the basis of a claim. *E.g.*, SAC ¶ 383 (“We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us.”); *see also id.* ¶¶ 371–73, 375–77, 380, 385, 388.

This is all the more so here, where the general statements do not correspond to the period when the alleged misconduct occurred. As Plaintiff concedes, the alleged policy and integrity statements—all of which are in the present tense—appear in SEC filings starting in November 2014, *eighteen months after* the third and final 1MDB transaction. Opp. 28; *see* SAC ¶¶ 371 *et seq.* Plaintiff does not explain how an investor could possibly have read those statements to relate to the period encompassing 1MDB transactions underwritten between May 2012 and March 2013.²

² Plaintiff argues that these statements coincided with the Firm’s “post-transaction monitoring” of Project Catalyze, the last of the 1MDB offerings. Opp. 28. But Plaintiff pleads no facts to demonstrate a substantive connection between the Project Catalyze monitoring and the general statements at issue here.

In trying to find a way out of this clear line of recent precedent, Plaintiff essentially argues that general statements about compliance or risk management systems are actionable if they misrepresent existing fact. But the statements deemed actionable in Plaintiff's cases bear no resemblance to the vague statements here. For instance, in *Meyer*, the statements “amount[ed] to actionable assurances of actual compliance” (Opp. 26 (quoting *Singh*, 918 F.3d at 63)) because they included descriptions of the nuts and bolts of monitoring systems in place to satisfy particular environmental monitoring regulations—when the company did not disclose that at the time of the disclosures, it had already detected “existing problems” at the monitored facilities. *Meyer v. Jinkosolar Hldgs.*, 761 F.3d 245, 247–48, 251 (2d Cir. 2014), cited in Opp. 26.

The *Freudenberg* case is no different. See Opp. 25. There, the “misstatements regarding risk management” were deemed “misrepresentations of existing facts” because the complaint included “detailed factual descriptions of the Company’s woefully inadequate or non-existent credit risk procedures” at the time of the alleged misstatements. *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 190 (S.D.N.Y. 2010); accord *In re MF Glob. Holdings Ltd. Sec. Litig.*, 982 F. Supp. 2d 277, 317 (S.D.N.Y. 2013), cited in Opp. 26 (statements about risk controls were actionable because complaint “pleads contrary information”); *In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 285 (S.D.N.Y. 2011) (statements were actionable because alleged departures from policies were so significant and frequent that policies must not have existed). Here, neither the alleged misstatements nor the allegations about the true facts at the time are anywhere near as specific. Plaintiff’s insistence that the general statements here were false “does not cure their generality.” *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 97 (2d Cir. 2016).

Nor does Plaintiff benefit from *Fogel*, which it cites for the proposition that “a company’s specific statements that emphasize its reputation for integrity or ethical conduct as central to its

financial condition.” Opp. 29 (quoting 759 F. App’x at 23). In that case, the Second Circuit affirmed the dismissal of a securities complaint against Wal-Mart alleging falsity in its statements that “integrity and ethics were ‘important’ to its ‘business model,’” despite bribery allegations involving its Mexican operations. *Fogel*, 759 F. App’x at 23. There is no meaningful difference between those “integrity” statements and the ones Plaintiff alleges in this case.

Indeed, the challenged statements here are no different from those made by any company. The Second Circuit has been unwilling to interpret such statements as a guarantee of compliance—past or present—that can be transformed into securities fraud anytime a compliance problem arises. *City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) (“Plaintiffs’ claim that these statements [about reputation and compliance] were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment.”); *Singh*, 918 F.3d at 59–60 (squarely rejecting the tactic of combining “vague corporate statements” with “significant regulatory” issues to declare “*voila* . . . securities fraud!”). In that regard, Plaintiff tellingly ignores the slew of recent cases cited in the opening brief, where courts in this Circuit have rejected securities claims predicated on allegations that attempt to link a regulatory problem with a company’s generally stated compliance goals. *See, e.g.*, Mot. 20–21.

Finally, Plaintiff insists that similar statements by Goldman Sachs were found actionable by district court judges in *Lapin* and *Richman*—two pleading-stage decisions in 2012 and earlier (Opp. 29)—but it misstates the significance of those decisions. First, those decisions are contrary to more than a half-dozen cases handed down by the Second Circuit since 2012, including *Singh* in 2019, *Fogel* in 2018, *SAIC* in 2016, and *UBS* in 2014. (The Second Circuit did not review *Lapin*, and the pleading-stage decision in *Richman* has not yet been subject to appellate review.)

Indeed, in the context of a Rule 23(f) appeal in *Richman*, one Second Circuit judge recently analyzed the alleged misstatements in a way that makes clear that the 2012 pleading-stage decision was wrong. *See Arkansas Teacher Ret. Sys. v. Goldman Sachs*, 955 F.3d 254, 278 (2d Cir. 2020) (Sullivan, J., dissenting) (noting that “no reasonable investor would have attached any significance to the generic statements on which [the *Richman*] Plaintiffs’ claims are based”). Second, in both *Lapin* and *Richman*, the courts determined that the complaint alleged contemporaneous facts that were “directly at odds” with the public statements. *See, e.g., In re Goldman Sachs Sec. Litig.*, 2014 WL 2815571, at *5 (S.D.N.Y. June 23, 2014) (denying reconsideration in *Richman* on the ground that the Firm’s “representations about its purported controls for avoiding conflicts were directly at odds with its alleged conduct” of selling products “despite clear and egregious conflicts of interest”); *Lapin*, 506 F. Supp. 2d 221, 240 (S.D.N.Y. 2006) (relying on allegations that the Firm falsely claimed its research was “truly independent” when it knew about “pervasive conflicts and the effects they had on its research reports”). Even if the pleading-stage decisions in *Lapin* and *Richman* were correct—and they are not—Plaintiff points to nothing in the complaint here that shows contemporaneous conduct directly at odds with the challenged public statements.

B. Financial Results

Conceding that Goldman Sachs’ revenues “were accurately reported” (Opp. 30), Plaintiff argues that Defendants were required to disclose that a portion of the Firm’s revenues was derived from “illicit conduct” (*id.* at 29). But the Second Circuit has expressly rejected that argument, holding that accurately reported financial statements “cannot become actionable simply because companies do not simultaneously disclose some wrongdoing that may have contributed to the company’s financial performance.” *Fogel*, 759 F. App’x at 24.

Plaintiff fares no better with its argument that the 1MDB transactions were “the source of [the Firm’s] success” and thus were the subject of additional disclosure obligations. Opp. 29–30

(quoting *Freudenberg*, 712 F. Supp. 2d at 180). Goldman Sachs is a global bank, operating in roughly 30 countries across the world; the transactions here were three specific offerings in Southeast Asia between May 2012 and March 2013. The 1MDB-related revenue of \$600 million was a tiny fraction (less than 2%) of Goldman Sachs' total reported revenues in 2012 and 2013 (Reply Ex. 70 at 54 (2014 10-K)) and was nonexistent every year thereafter. As a result, the 1MDB revenues were not material to the Firm's financial results as a whole. *Acito*, 47 F.3d at 51–52 (alleged concealment of information that affected “less than 1% of [company's] total sales” was immaterial); *see also Masters v. GlaxoSmithKline*, 271 F. App'x 46, 50–51 (2d Cir. 2008) (non-disclosed test results that accounted for less than 3% of product earnings were immaterial).

C. SOX Certifications

Plaintiff does not cite a single case recognizing a securities claim based on a SOX certification. Allegations about third-party bribery do not show flaws in controls over financial reporting, which is what SOX certifications are about. *See, e.g., In re PetroChina Co. Ltd. Sec. Litig.*, 120 F. Supp. 3d 340, 359–60 (S.D.N.Y. 2015) (rejecting fraud claims based on SOX certifications, because “[e]ven if PetroChina officials were engaging in bribery, the SAC does not make any allegations that would imply that the Company had flawed internal controls over financial reporting”); *see also Oklahoma Law Enf't Ret. Sys. v. Telefonaktiebolaget LM Ericsson*, 2020 WL 127546, at *9 (S.D.N.Y. Jan. 10, 2020) (dismissing fraud claims based on SOX certifications because plaintiffs failed to allege facts pertaining to internal controls over reporting).

Nor do the certifications become actionable simply because Plaintiff baldly insists that internal controls “were disregarded.” Opp. 30. The opposition ignores that the challenged certifications related to the design and evaluation of those controls and did not guarantee their effectiveness. SAC ¶¶ 392–93. Courts in this district have rejected attempts to use a SOX certification to transform a compliance issue into a securities claim, given that SOX certifications

do not guarantee against violations. *See, e.g., Barrett v. PJT Partners Inc.*, 2017 WL 3995606, at *6 (S.D.N.Y. Sept. 8, 2017). Plaintiff attempts to distinguish *Barrett* on the ground that the certifications there “did not relate to . . . whether [the] controls were effective” (Opp. 30), but neither did the certifications here, which were identical to the *Barrett* certifications in all material respects. In both cases, the certifiers swore that they had *evaluated* the controls’ effectiveness, and the complaint failed to allege that the certifiers had not, in fact, conducted that evaluation.

D. 1MDB-Related Statements

As for the few narrow statements about 1MDB, Plaintiff has failed to show that they were materially false or misleading, much less that they concealed the risk that Goldman Sachs would later face investigations and potential sanctions—the risk that Plaintiff alleges was the subject of the “corrective disclosures” in late 2018. *See supra* at 5 & n.1. For example, Plaintiff points to a statement by a Firm spokesman in 2014 that describes the references in 1MDB offering documents to Goldman Sachs’ “fees and commissions” as “standard terms used to describe in part Goldman Sachs’ compensation for the risks assumed in underwriting the bonds.” Opp. 21 (quoting SAC ¶ 377). Plaintiff contends that this statement was false and misleading because it suggests that the *amount* of that compensation was “standard,” as opposed to merely the choice of those *terms*. *Id.* This is simply not what the spokesman said. Mot. 24 (noting that spokesman expressly declined to comment on the relative amount of compensation). And in any event, if the amount of compensation (\$600M) was enough by itself to raise an “inference of corruption” at 1MDB—as Plaintiff now argues (Opp. 22)—the media reported that amount for years (beginning in 2013), so the market could have drawn that “inference” for itself. *See, e.g., Reply Ex. 71 (7/8/2013 Sarawak Report)*; *see supra* at 6. The same can be said of the later 1MDB-related statements, which were made in the midst of media reports that detailed the looting of \$4.5 billion from 1MDB, including \$3.5 billion of the funds Goldman Sachs underwrote. *See also supra* at 8 (discussing lack of

connection between alleged corrective disclosures and the Firm’s 2016 statement that it had found no evidence that Low was involved in specific bond transactions). Importantly, not a single one of these statements denied that the Firm could face significant sanctions or fines resulting from the 1MDB investigations, and as discussed above, the Firm affirmatively disclosed that very risk.

In the end, the gist of Plaintiff’s response on these 1MDB-related statements seems to be that once Goldman Sachs chose to say *anything* about 1MDB, it had an obligation to disclose *everything* the Firm’s leadership and any employees knew at the time. Opp. 18–19. Not surprisingly, Plaintiff cites no authority for this proposition. See *In re Deutsche Bank Aktiengesellschaft Sec. Litig.*, 2017 WL 4049253, at *7 (S.D.N.Y. June 28, 2017) (“revealing one fact about a subject does not trigger a duty to reveal all facts on the subject”) (internal quotation marks omitted). A defendant cannot be held liable for securities fraud simply because it did not confess liability. As the Second Circuit has explained, “disclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing.” *UBS*, 752 F.3d at 184. “By disclosing its involvement in multiple legal proceedings and government investigations and indicating that its involvement could expose” the Firm to “substantial” sanctions, Goldman Sachs “complied with its disclosure obligations” under the Second Circuit’s cases, so it cannot be held liable under Section 10(b). *Id.*

III. THE OPPOSITION’S SCIENTER ARGUMENTS FAIL AS A MATTER OF LAW AND CONFIRM PLAINTIFF’S INABILITY TO PLEAD LOSS CAUSATION.

Finally, Plaintiff still has not explained how it could possibly satisfy the heightened pleading standard for scienter. Plaintiff must allege particular facts “giving rise to a strong inference” that each Defendant acted with “an intent to deceive, manipulate, or defraud” Goldman Sachs shareholders. *In re Pretium Res. Inc. Sec. Litig.*, 256 F. Supp. 3d 459, 473 (S.D.N.Y. 2017) (Broderick, J.) (quotations and citations omitted). This inference “must be more than merely

plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

As the opening brief explains, Defendants’ own stock purchasing activity precludes any inference of fraudulent intent. Each Individual Defendant increased his holdings of Goldman Sachs stock during the class period (Reply Exs. 72–74 (2014–17 Form 4s)), and Goldman Sachs itself spent more than \$22 billion on share repurchases in the same period. Mot. 39 n.26. This fact alone is sufficient to defeat any inference of scienter. *Kalnit v. Eichler*, 264 F.3d 131, 140–41 (2d Cir. 2001) (“Where plaintiff’s view of the facts defies economic reason, . . . [it] does not yield a reasonable inference of fraudulent intent.”) (internal quotation marks omitted). Plaintiff relegates its response to a footnote, citing a twenty-year-old unpublished decision and taking the court’s comments out of context. *In re Guilford Mills, Inc. Sec. Litig.*, 1999 WL 33248953, at *5 (S.D.N.Y. July 21, 1999), *cited in* Opp. 35 n.10. The court in that case was not making a statement of the law; it was addressing the specific allegations before it, which involved an “unusual insider trading” scheme as well as “other allegations” that gave rise to a strong inference of scienter. *Id.* at *4–5 (“unusual insider trading . . . alone may permit an inference of bad faith and scienter”).

Here, in contrast, the complaint does not contain a single allegation supporting an inference that the Individual Defendants intended to deceive, or describing what they knew and when they knew it. There is no smoking gun and no confidential informant. Nor is there any allegation here that would provide “strong circumstantial evidence of conscious misbehavior or recklessness” on the part of each Defendant. *ECA*, 553 F.3d at 198; *see also Pretium*, 256 F. Supp. 3d at 473 (in the absence of motive, “the strength of the circumstantial allegations must be correspondingly greater”). The cases Plaintiff cites involved particularized allegations of what the defendants knew and how they came to know it. *See, e.g., In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 652

(S.D.N.Y. 2007) (noting that the “size of the transactions, their recurrent nature, and their obvious lack of business purpose may not themselves be sufficient to support an inference of scienter,” but plaintiff had sufficiently alleged scienter as to some defendants based on their alleged roles and access to information). The complaint here alleges nothing of the kind—not generally, and certainly not in connection with the particular statements that Plaintiff challenges. This is not surprising, as Leissner has admitted that he concealed his misconduct from others at the Firm.

As to Mr. Blankfein, Plaintiff again relies primarily on three meetings he purportedly attended with Jho Low and/or Najib between 2009 and 2013—interactions that Plaintiff concedes were for the purpose of developing business. Opp. 35–36. Yet the complaint does not allege that these meetings provided Mr. Blankfein with any knowledge about the 1MDB conspiracy itself, much less about any falsity in Defendants’ statements to Goldman Sachs shareholders relating to 1MDB. Without “specific allegations as to the information actually discussed,” merely alleging that a meeting took place is not sufficient to plead scienter. *Jackson v. Halyard Health, Inc.*, 2018 WL 1621539, at *9 (S.D.N.Y. Mar. 30, 2018). Plaintiff offers no response to this authority.

As to Mr. Cohn, Plaintiff focuses on allegations that he was privy to a colleague’s “concerns” about 1MDB. Opp. 36–37. Again, this does not show scienter with respect to an alleged fraud against Goldman Sachs shareholders. Further, most of those allegations rely on unsourced or anonymous sources from newspaper articles, which are insufficiently “particular and detailed to indicate their reliability” and thus cannot serve as a basis for scienter. *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 690 (S.D.N.Y. 2008) (quotations omitted); Mot. 33. And in any event, even if those sources could be credited, they reflect no more than “differences of opinion” between Mr. Cohn and Mr. Ryan that “do not reveal scienter.” *Pretium*, 256 F. Supp. 3d at 481.

As to Mr. Schwartz, Plaintiff asserts only that he “‘failed to check information [he] had a duty to monitor’ as the attesting CFO, despite his access to [contrary] information.” Opp. 37 (quoting *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000)). But where, as here, the plaintiff “contend[s] defendant had access to contrary facts, [it] must specifically identify the reports or statements containing this information.” *Novak*, 216 F.3d at 309. Plaintiff has failed to do so.

As for Goldman Sachs itself, Plaintiff cannot succeed in charging the Firm with any culpable knowledge by a handful of bankers in Asia and the Middle East, based on what Plaintiff describes as their “direct involvement in the underlying fraud.” Opp. 38. Again, Leissner has sworn that he worked to conceal the embezzlement at 1MDB from others at Goldman Sachs. Mot. 11. And in any event, the “1MDB fraud” in which these individuals were involved is not the alleged “fraud against shareholders” for which Plaintiff is suing Goldman Sachs. Before imputing knowledge in this context, courts require “some connection at the corporation” between the person holding the knowledge and the misstatements underlying the claims. See *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 248 F. Supp. 3d 428, 440–41 (S.D.N.Y. 2017). This generally requires that the employee bearing the relevant knowledge “enjoy[s] some oversight over the company’s public-facing representations.” *Liu v. Intercept Pharm., Inc.*, 2020 WL 1489831, at *17 (S.D.N.Y. Mar. 26, 2020) (citation omitted). Plaintiff has not alleged any such connection here, relying solely on these individuals’ titles to advance its position. Yet those titles are irrelevant, as they did not come with oversight authority over the alleged misstatements at issue. See Mot. 37–38.

Unable to plead or impute any actual knowledge of fraud, Plaintiff focuses on alleged “red flags” that it says “should have” put Defendants on notice that something was amiss at 1MDB. Opp. 31 (citation omitted). But allegations of what executives “should have” realized are insufficient to plead recklessness. See, e.g., *Novak*, 216 F.3d at 309 (“fraud by hindsight”

allegations are insufficient as a matter of law). And even if these alleged “red flags” should have raised Defendants’ suspicions about 1MDB, they provide no basis for a “strong inference” of scienter with respect to any alleged misstatements *in this case*. Again, the “fraud” as to which Plaintiff must plead scienter is a series of alleged misstatements against Goldman Sachs’ shareholders, supposedly concealing the risk faced by the Firm itself.

In any event, Plaintiff’s argument leaves it in a bind. As revealed by the complaint’s own detailed citations, every one of the alleged red flags is drawn from media reports, *Billion Dollar Whale* (which collected prior media accounts and recounted the 1MDB story and Goldman Sachs’ involvement in great detail), and a litany of well-aired criticisms and concerns that others leveled over time. *See, e.g.*, Opp. 31–34 (addressing “red flags” relating to the terms of the offerings, the amount of Goldman Sachs’ compensation, the turnover on 1MDB’s board and among its auditors, rumors and accusations about its business partners, and the involvement of Low, Prime Minister Najib, and Malaysians generally). Even the alleged red flags arising from the involvement of certain Goldman Sachs bankers were the subject of extensive discussions in media reports beginning as early as 2013. Opp. 33–34 (citing SAC ¶¶ 67–74, 107–10, and 136–38, which in turn cite *Billion Dollar Whale* and media reports from 2013, 2014, and 2016). If these “red flags” were sufficient to put Defendants on notice of the risk that the 1MDB scandal posed to the Firm—as Plaintiff insists they were (Opp. 31–34)—then the same risk was necessarily well known to the market long before the alleged corrective disclosures began in late 2018. This underscores the fatal insufficiency of Plaintiff’s claims.

CONCLUSION

Plaintiff has failed to plead loss causation, to identify an actionable misstatement that is false or misleading by omission, and to plead particularized facts that raise a strong inference of scienter. Defendants urge the Court to dismiss the complaint with prejudice.

Dated: May 4, 2020

Respectfully submitted,

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