

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

JOSEPH DEPAOLO, ERIC HOWELL,
FRANK SANTORA, JOSEPH SEIBERT,
SCOTT SHAY, VITO SUSCA, STEPHEN
WYRMESKI, and KPMG INTERNATIONAL
LIMITED,

Defendants.

Civil Case No. 1:23-cv-01921-FB-JRC

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOSEPH SEIBERT'S
MOTION TO DISMISS THE CONSOLIDATED COMPLAINT**

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Defendant Joseph Seibert moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Consolidated Complaint (“Complaint” or “CC”) filed by Plaintiff Sjunde Ap-Fonden on behalf of itself and a putative class.

PRELIMINARY STATEMENT

Joseph Seibert was a client-facing banker at Signature Bank. He was not a part of management; did not have any policymaking authority; did not deal with regulators; and did not participate in any way in the preparation, review, or signing of Signature Bank’s public filings. Nor is he alleged to have done any of these things. He is only alleged to have made one statement at a virtual banking conference a year before the Bank was taken over by the FDIC. The statement, which compares 2 publicly known facts, is not material, is not false, was not the cause of any losses, and was not made with scienter. It is not actionable. Mr. Seibert does not belong in this case, and the claims against him should be dismissed with prejudice.

FACTUAL BACKGROUND AS RELEVANT TO SEIBERT¹

A. Seibert is Barely Mentioned in the Complaint’s Allegations.

Signature Bank (“SBNY,” “Signature,” or the “Bank”) was founded in 2001 by Defendant Joseph J. DePaolo, Defendant Scott A. Shay, and John Tamberlane. CC ¶ 31. In 2018, the Bank decided to expand into the digital asset industry (*id.* ¶¶ 54–55; FDIC’s Supervision of Signature

¹ This statement of facts is based on the Complaint’s allegations, accepted as true only for the purposes of this Motion. Seibert adopts and incorporates by reference the description of Signature Bank’s business, public disclosures, and closure contained in the factual background section of the memorandum of law submitted by Defendants Joseph DePaolo and Eric Howell.

Bank Ex. A² at 8),³ and formed a Digital Asset Banking group to collect cash deposits and maintain operating accounts for digital-asset related businesses. CC. ¶ 55. Signature created this group for the sole purpose of onboarding digital asset clients who needed bank accounts to operate their businesses. Signature took in U.S. dollar deposits from clients operating in the digital asset industry; *at no point in time did Signature solicit or take cryptocurrency deposits*. Ex. A at 2. This distinction is key, as the Bank’s depositors were no different than depositors in traditional industries, like the oil industry, which deposit their cash reserves at a bank independent of the fluctuating value of oil.

To lead its private client group for Digital Asset Banking, Signature recruited Joseph Seibert. *Id.* ¶ 37. Seibert had established himself as an impressive banker in the northeast after having begun his career as a supermarket bank teller, walking up and down aisles asking shoppers if they would like to open bank accounts. Seibert was recruited from Metropolitan Commercial Bank in New York, where he was a Vice President and Market Sales Manager who “specialize[d] in serving companies engaged in digital asset banking and blockchain technology.” *Id.*

The Complaint’s particularized allegations as to Seibert’s role at the Bank are found in only one place: the paragraph at the beginning of the Complaint that identifies him as a party. It

² The term “Ex.” refers to the exhibits to the Declaration of Peter L. Simmons, dated February 13, 2024, (the “Simmons Declaration”) submitted in support of the motion to dismiss filed by Defendants Joseph DePaolo and Eric Howell.

³ In deciding a motion to dismiss, “the Court may consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs’ possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken.” *Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 642 (S.D.N.Y. 2015) (internal quotation marks and citations omitted). The FDIC’s report on the takeover of Signature was referenced throughout the Complaint.

alleges that Seibert was the “Managing Group Director, Senior Vice President of Digital Asset Banking [for the Bank] from January 2018 to April 2023,” and that “he led [the Bank’s] Digital Asset Banking Team and was responsible for onboarding, monitoring, and servicing the Bank’s digital asset industry clientele.” *Id.*

Beyond this, the Complaint alleges virtually *nothing* about Seibert. It does *not allege* that he had any policymaking responsibility at Signature as a board member or that he sat on any board committee; that he was an executive officer; that he in fact participated in crafting Bank policy; that he participated in the Bank’s Long-Term Incentive Plan; that he engaged with regulators; that he had any role in reviewing, approving, or signing Signature’s SEC, FDIC, or other regulatory filings; that he spoke on earnings calls; or that he received or participated in the response to any “matters requiring board attention,” (known as MBRAs) or supervisory recommendations (known as SRs) identified by regulators. The Complaint could not allege these things, despite ample research, access to FDIC, Congressional, and regulatory and law enforcement investigations, and multiple confidential informants (including at least *one on Seibert’s team*, see CC ¶ 119), because they are not true: Seibert held a customer-facing relationship banking role focused on onboarding and servicing bank customers, not a policy or overall bank management role.⁴

In fact, though the Complaint clocks in at 159 pages and 499 paragraphs, Seibert’s name appears only thirteen times, and only *five* of those instances are found among the substantive allegations. See CC ¶¶ 55, 129, 214, 284, 286. Of those five, one relates to a comment made when

⁴ None of the shortcomings in the Complaint can be fixed by amendment. There are no additional facts Plaintiffs can plead to remedy the Complaint’s inadequacies. See *Emerson v. Mut. Fund Series Trust*, 393 F. Supp. 3d 220, 252 (E.D.N.Y. 2019) (“Dismissal with prejudice is appropriate because it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”) (internal quotation marks and citation omitted).

Seibert was hired (that is not alleged to be actionable) and one relates to Seibert's presence at a web forum where he is not alleged to have said anything. Only three instances (CC ¶¶ 129, 284, 286) refer to the single statement Seibert made at a UBS virtual forum that the Complaint incorrectly alleges can form the basis for a securities law claim against him.

1. Seibert is a Client-Facing Banker Without Executive Authority.

The Digital Asset Banking Group that Seibert led was one of Signature's Private Client Groups ("PCGs"), which were the groups within the Bank that were the "sole point of contact for serving SBNY's clients." Ex. A at 7. As of 2021, there were 125 Private Client Groups within the Bank. *Id.* There is no particularized allegation that Seibert played any role outside of his group.

Seibert did not hold an executive role at the bank and did not exercise executive authority. Scott Shay was the Board Chair (CC ¶ 32), Joseph DePaolo was the CEO and a Board member (*id.* ¶ 31), Eric Howell was the COO and a Board member (*id.* ¶33), Stephen Wyremski was the CFO (*id.* ¶ 34), and Vito Susca was the Chief Administrative Officer (*id.* ¶ 35).⁵ Various members of this group are identified as Signature executives in Signature's 10-K, 10-Q, and 8-K filings with the SEC; Seibert's name does not appear *even a single time* in those documents.⁶ Nor does his name appear in the reports issued by the FDIC, the New York State Department of Financial Services, or the Office of the Inspector General (Exs. A, EE, B) following Signature's takeover.

The complaint attempts to blur the distinctions between defendants with wildly different roles and responsibilities by lumping them together as a single group:

⁵ Seibert and co-Defendant Frank Santora are similarly situated in this regard. Santora was the Bank's Chief Payments Officer (CC ¶ 36) and was involved with Signature's trading platform Signet. CC ¶¶ 36, 218; Ex. A at 6-7.

⁶ See generally Signature's relevant SEC filings made during the class period, which are attached as Exhibits C-D, F-L, DD, II, and TTT-VVV to the Simmons Declaration.

These former Directors and/or senior executives and officers of SBNY (collectively referred to herein as “Defendants”), because of their positions within the Bank, possessed the power and authority to control, and did in fact control, SBNY’s public statements to the market, including in filings with the FDIC and SEC, press releases, the Bank’s website, and presentations to securities analysts, money and portfolio managers, institutional investors, and the media. In their respective roles, each Defendant was directly involved in preparing, reviewing, and approving the Bank’s public statements and disclosures to the market.

Id. ¶ 38.

Wholly absent here is any explanation as to why Seibert may be grouped for pleading purposes with the other defendants. This omission is glaring. Seibert was no different than a law firm “rainmaker” who leads a practice group but *wields no firm-wide managerial authority*.

2. Seibert Is Not Alleged to Have Dealt With Signature’s Regulators.

The Complaint spends 17 pages discussing how SBNY’s executives were told by regulators that the Bank lacked critical liquidity and risk management controls (*id.* ¶¶ 77–113) and 10 pages discussing how SBNY’s executives allegedly misled regulators about liquidity and risk management deficiencies which led to the intervention of the New York State Department of Financial Services (*id.* ¶¶ 169–192). Entirely absent from these allegations is Seibert’s name. It similarly fails to allege that Seibert had access to or ever read the written reports or correspondence sent by regulators. Instead, these sections are saturated with broad references to “Defendants” and “the Board and senior management,” without identifying any particular role Seibert was supposed to have played (as in truth, he had no role).

3. Seibert Is not Alleged to Have had Any Role in Signature’s Public Filings.

Seibert is not alleged to have participated in the drafting of any of Signature’s 10-K, 10-Q, or 8-K forms or any other public filings, or reviewed or approved any filings; and their contents

are not even attributed to him. This is consistent with his role as the head of one private client group (CC ¶¶ 37, 55) that had no role related to the Bank’s public filings.

B. Seibert’s Single Statement at a UBS Web Forum.

The Complaint identifies 28 statements that, it alleges, give rise to liability on the part of the “Defendants.” *See id.* ¶¶ 205–348. ***Only one is attributed to Seibert.***

- 13 statements are from Signature’s annual Form 8-K and quarterly Form 10-Q disclosure forms filed with the SEC. *Id.* ¶¶ 205–206, 207–213, 237–239, 252–254, 275–276, 277–283, 288–292, 311–313, 320–322, 332–335, 338–344, 345–348. Seibert is not alleged to have participated in making or approving these filings.
- 6 are “hybrid” statements made both in SEC filings and accompanying earnings calls, or on one occasion, a conference. *Id.* ¶¶ 224–236, 244–251, 255–270, 297–308, 314–319. Seibert is not alleged to have had any role with respect to these statements, either.
- 9 statements were made at conferences, press releases, articles written by third party publishers, and a mid-quarter company update. *Id.* ¶¶ 214–223, 240–243, 271–274, 284–287, 293–296, 309–310, 323–331, 336–337.

Seibert’s lone statement falls into that last category. He participated in a virtual “Digital Asset Day” conference hosted by UBS on March 11, 2022, about a year before Signature was taken over by the FDIC. *See id.* ¶ 284. When asked by an analyst how he would “characterize the growth of the [cryptocurrency banking] industry over the last year and how it’s contrasted to the past bull markets,” *id.* ¶ 285, Seibert responded:

. . . so some institutions are choosing to do custody, which I think helps adoption, and some are actually purely investing in certain digital assets. So we continue to see growth. ***Again the price of Bitcoin doesn’t have anything to do with our growth one way or the other. But we’re just adding more clients, more prospects that we deem a fit for our ecosystem.*** And we’re also continuing to say Signet is going to be that payment mechanism that they need to communicate with each other 24/7 for years to come.

Id. ¶ 286 (emphasis in Complaint). As explained below, there are no allegations that Seibert made this statement with scienter, and no explanation of why it was material, false, or misleading.

ARGUMENT

A. The Heightened Pleading Standard Governing Securities Fraud Claims

Securities fraud claims must be dismissed under Rule 12(b)(6)⁷ if they fail to meet the heightened pleading requirements set forth in Rule 9(b) and the Private Securities Litigation Reform Act (the “PSLRA”). “Pursuant to Rule 9(b), a complaint sounding in fraud . . . must state with particularity the circumstances constituting fraud, and under the PSLRA, it must specify each statement alleged to have been misleading and the reason why the statement is misleading and state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind.” *In re Philip Morris Int’l Sec. Litig.*, 89 F.4th 408, 416-17 (2d Cir. 2023) (cleaned up).

B. The Complaint’s Attempt to Attribute Statements to Seibert That He Did Not Make Violates This Circuit’s Restrictions on Group Pleading.

It is black-letter law that a person can only be held liable under the securities laws for statements they actually make. *See Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (“One ‘makes’ a statement by stating it,” and “[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over that statement, including its content and whether and how to communicate it.”). The only statement identified in the Complaint that Seibert actually made was his brief observation in March 2022 about the

⁷ A complaint cannot survive a motion to dismiss under Rule 12(b)(6) unless it pleads “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility, in turn, requires allegations of “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

relationship between the price of Bitcoin and Signature’s deposit growth for the previous year. CC ¶ 286.

The Complaint’s attempts to nevertheless tie Seibert to 27 other statements—allegedly made by the “Defendants” as a group—fall far short of the detailed allegations required to take advantage of the “group pleading” doctrine in this circuit. *See Honig v. Cardis Enterprises Int’l N.V.*, 2016 WL 6304695, at *8 (E.D.N.Y. Oct. 27, 2016) (holding that plaintiffs cannot rely on the group pleading doctrine unless they demonstrate a “tight weave of connections between all [of] the Defendants.”) (quoting *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010)).

1. Seibert Cannot Be Held Liable for The Oral Statements of Others.

As a matter of law, Seibert cannot be held liable for oral statements he did not make. *See Levy v. Maggiore*, 48 F. Supp. 3d 428, 451 (E.D.N.Y. 2014) (“Because the group pleading doctrine does not extend to oral statements, however, [individual defendant] cannot be said to have made the oral statements made by [company] brokers to Plaintiff.”); *see also Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 808-09 (S.D.N.Y. 2018) (“Since the group pleading doctrine does not apply to oral statements, however, statements on earnings calls could not be attributed to any non-speaking Defendants.”). Therefore, the 14 oral statements identified in the complaint as made by others, all of which were made on earnings calls or at conferences, cannot be attributed to Seibert.

2. Seibert Cannot Be Held Liable for Signature’s Written Statements.

The Complaint fares no better when it attempts to tie Seibert to written statements in Signature’s SEC filings. Post-*Janus*, “an executive may be held accountable where the executive had ultimate authority over the company’s statement; signed the company’s statement; ratified and approved the company’s statement; or where the statement is attributed to the executive.” *See In*

re Fannie Mae 2008 Sec. Litig., 891 F. Supp. 2d 458, 473 (2d Cir. 2012), *aff'd* 525 F. App'x 16 (2d Cir. 2013).

In other words, group pleading is unavailable as to a company's written statements unless the defendant had "direct involvement in the everyday business of the company." *See Honig*, 2016 WL 6304695 at *8 (emphasis omitted); *Orlan v. Spongetech Delivery Sys., Inc., Sec. Litig.*, 2012 WL 1067975, at *9 (E.D.N.Y. Mar. 29, 2012) (recognizing that the group pleading doctrine is "extremely limited in scope, applying only to clearly cognizable corporate insiders with active daily roles in the relevant companies or transactions.") (internal quotation marks and citation omitted). And "direct involvement" cannot be pled generally; it must be detailed with particularized allegations against the defendant. *See Behrendsen v. Yangtze River Port & Logistics Ltd.*, 2021 WL 2646353, at *10 (E.D.N.Y. June 28, 2021) (finding bare allegations that executives were "directly involved" in the company's day-to-day affairs insufficient to tie executives to statements in SEC filings they did not sign).

Here, there is no allegation that Seibert, individually, had any direct involvement in running Signature's day-to-day business. He is not alleged to have participated in the drafting of any of Signature's 10-K, 10-Q, or 8-K filings or any other public filings, or reviewed or approved the filings; and their contents are not even attributed to him. Nor would such allegations be plausible—Seibert was not a senior executive at the Bank, he was the head of a private client group. CC ¶¶ 37, 55. Even C-suite executives, like those Seibert reported to, are not automatically saddled with liability for a company's written statements that they did not create. *See In re Braskem S.A. Sec. Litig.*, 246 F. Supp. 3d 731, 764 (S.D.N.Y. 2017) (holding the title of CFO, without more, did not demonstrate defendant had "any concrete role in connection with the creation or dissemination of"

statements in SEC filings he did not sign). Accordingly, none of the 16 statements contained in Signature’s regulatory filings can serve as the basis for a Rule 10b-5 claim against Seibert.

C. The Complaint Does Not State a Claim For Scheme Liability Against Seibert Because It Does Not Allege That He Participated in Any Scheme.

Count II of the Complaint alleges that Defendants, including Seibert, engaged in deceptive conduct and therefore violated Rule 10b-5’s “scheme liability” provisions. *See* 17 C.F.R. § 240.10b-5(a) (barring the use of “any device, scheme, or artifice to defraud); *id.* at 10b-5(c) (barring the use of “any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security”). As with the portion of Rule 10b-5 prohibiting misleading statements or omissions, 17 C.F.R. § 240.10b-5(b), claims alleging scheme liability must be dismissed absent particularized allegations of materiality and scienter. *See Plumber & Steamfitters Loc. 773 Pension Fund v. Danske Bank*, 2020 WL 4937461, at *7 n. 10 (S.D.N.Y. 2020), *aff’d* 11 F.4th 90, 105 (2d Cir. 2021).

The law in this Circuit is clear that misstatements and omissions cannot form the “sole basis” for a scheme liability claim because that would dissolve the boundaries between Rule 10b-5 subsections (a) and (c) on the one hand, and subsection (b) on the other. *SEC v. Rio Tinto plc*, 41 F.4th 47, 53-54 (2d Cir. 2022) (holding that the Supreme Court’s decision in *Lorenzo v. SEC*, 139 S.Ct. 1094 (2019) did not abrogate the line of cases requiring “something extra” beyond a misstatement or omission to create scheme liability). Indeed, when the only allegations in a complaint are that a defendant made a false or misleading statement or omission, that defendant “is either liable as a maker under Rule 10b-5(b) or is not liable to investors at all.” *In re Turquoise Hill Resources Sec. Litig.*, 625 F. Supp. 3d 164, 248-49 (S.D.N.Y. 2022).

While there is no comprehensive list of what would constitute “something extra” to give rise to scheme liability, “something” is plainly required, and the Complaint alleges *nothing* against Seibert other than that he made a statement at a virtual panel in March 2022. CC ¶ 286. Instead, it simply lumps him in with the other Defendants to allege that they all acted in concert, CC ¶ 491 despite not identifying any *actions* taken by Seibert whatsoever. This is fatal to plaintiff’s scheme liability claim against him. *See In re Eastman Kodak Co. Sec. Litig.*, 632 F. Supp. 3d 169, 190 (W.D.N.Y. 2022) (stating that to establish scheme liability, a plaintiff “may not simply clump defendants together in vague allegations to meet the pleading requirements of Rule 9(b).”) (internal citation omitted).

D. The Complaint Fails to State a Claim Against Seibert Under Rule 10b-5(b).

Count I of the Complaint alleges that “Defendants” as a group violated Rule 10b-5(b) by making misleading statements regarding Signature. To state a claim under Rule 10b-5(b), plaintiff must plead with particularity “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Stoneridge Inv. Partners, LLC v. Sci-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). Nothing in the Complaint, however, explains why Seibert’s March 2022 statement is actionable. Thus, the Rule 10b-5(b) claim against him must be dismissed.

1. Seibert’s Statement Was Not Materially Misleading.

At a basic level, Plaintiff’s individual securities fraud claim against Seibert fails because the statement he made was neither material nor misleading.

A statement is only material if “a reasonable investor would have considered [it] significant in making investment decisions.” *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir. 2000)

(internal citations omitted). The Complaint does not explain why any investor would have considered Seibert’s view that there had been no relationship between the price of Bitcoin and the growth of Signature’s cash deposits from digital asset customers for the previous year to be “significant.” See CC ¶¶ 285-87.

Likewise, to be actionable, a statement must be either “‘untrue’ outright or ‘misleading’ by virtue of what it omits to state.” *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016). Simply pointing to a statement and labeling it false is insufficient—a complaint must (among other things) explain why the statement was false. See *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007).

Seibert stated that “the price of Bitcoin doesn’t have anything to do with our growth one way or the other,” and that Signature is “adding more clients, more prospects that we deem a fit for our ecosystem.” CC ¶ 286. ***The Complaint does not try to demonstrate that this statement was false or plead that Seibert secretly believed otherwise.*** See *Tongue v. Sanofi*, 816 F.3d 199, 210, 214 (2d Cir. 2016) (holding that false statements of opinion are actionable only if “the speaker did not hold the belief she professed” or “the supporting fact she supplied were untrue,” or if there were particularized and material facts alleged challenging the basis of the opinion) (internal quotation marks and citations omitted).

Instead, by lumping in Seibert’s high-level observation with much more detailed statements made by Eric Howell, the Complaint alleges that Seibert had no basis to reach his conclusion because Signature did not have any sophisticated modeling tools (which Seibert does

not claim they had) and did not complete a thorough regression analysis (which Seibert does not claim they did) to compare the price of Bitcoin and deposit growth. *See id.* ¶¶ 222-23, 251, 270.⁸

This is insufficient to show that Seibert’s statement was false or misleading. The statement reflects Seibert’s own opinion as to the relationship between two public facts, shown in Fig. 1 below⁹: the price of Bitcoin (which is widely available) and the growth of Signature’s digital asset base over the preceding year (which was reported in Signature’s SEC filings). *See Ark. Pub. Empl. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) (“[O]pinions cannot substitute for facts under the PSLRA.”) (internal citation omitted). Statements like this are not actionable unless they contain “one or more embedded factual statements that can be proven false.” *Id.* at 355 (internal citations omitted).

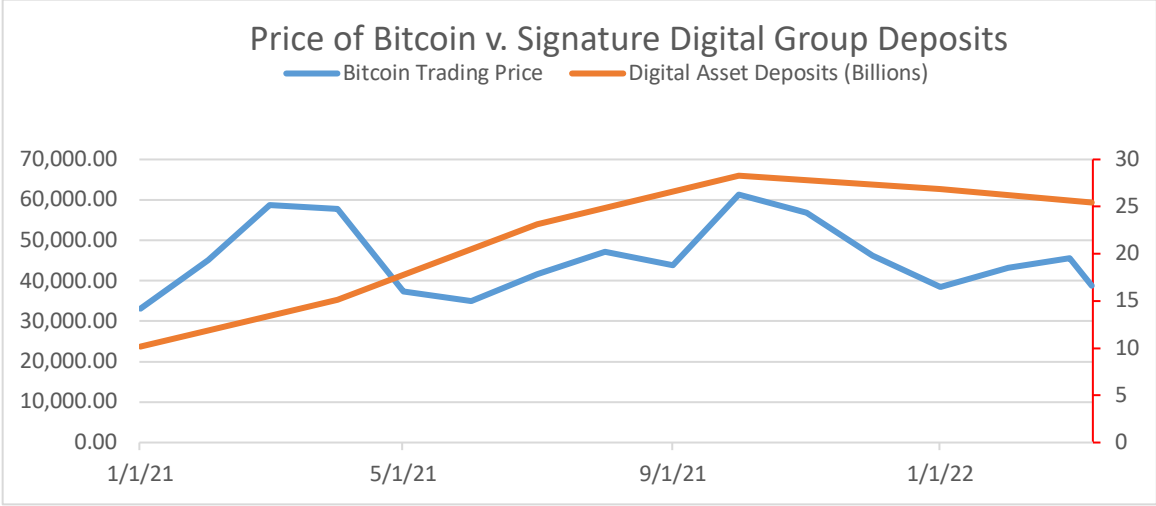


Fig. 1

⁸ Despite featuring it in bold and italics, the Complaint ignores the portion of Seibert’s statements that Signature is onboarding clients it deems a fit for its ecosystem. We therefore do not address it here.

⁹ Figure 1 is based on publicly-available data: the price of Bitcoin (which is widely available) and the growth of Signature’s cash deposits from customers in the digital asset space (which was included in the FDIC’s Report, Ex. A at 11).

Even if Plaintiff disagreed with Seibert’s conclusion, the Second Circuit has “rejected the proposition that a mere disagreement over the proper interpretation of data can form a basis for liability” under Rule 10b-5. *See In re Philip Morris*, 89 F.4th at 420 (rejecting liability for statements drawing conclusions about the relative safety of vaping compared to smoking based on clinical trials) (internal citation omitted). Absent an allegation that Seibert’s conclusion was “irrational or unreasonable” when it was made—which the Complaint does not even attempt to make and could not make—it cannot form the basis for a securities fraud claim. *See id.* at 422 (quoting *Tongue v. Sanofi*, 816 F.3d 199, 214 (2d Cir. 2016)).

At bottom, Plaintiff is alleging “fraud by hindsight,” which this Circuit forbids. *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 528 (S.D.N.Y. 2015), *aff’d sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016) (“The Second Circuit has firmly rejected this ‘fraud by hindsight’ approach.”) (internal citation omitted). Investors looking at public information might (or might not) draw a different conclusion than Seibert as to whether the two measures were correlated at a level that mattered to them, but that does not make Seibert’s statement actionable.

Plaintiff therefore fails to satisfy this element of a Rule 10b-5(b) claim against Seibert.

2. The Complaint Does Not Allege That Seibert Acted With Scienter.

The Complaint falls far short of pleading that Seibert acted with scienter in connection with his March 2022 statement. “In order to plead scienter adequately under the PSLRA, a plaintiff must plead with particularity facts giving rise to a *strong* inference that the defendant acted with the required state of mind. The requisite state of mind in a section 10(b) and Rule 10b–5 action is an intent to deceive, manipulate, or defraud,” or recklessness. *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009) (internal citations omitted).

Allegations of scienter are not strong enough to sustain a securities fraud claim unless they are “more than merely ‘plausible or reasonable’”—it must be the case that “a reasonable person would deem [them] cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 324 (2007). Where, as here, a complaint’s allegations are “consistent with [a] more plausible, non-culpable” explanation for a defendant’s alleged conduct, the fraud claim should be dismissed. *See In re Gen. Elec. Sec. Litig.*, 844 Fed. App’x 385, 389 (2d Cir. 2021).

This Circuit recognizes that scienter may be alleged in two ways: either (i) that a defendant had the “motive and opportunity” to commit fraud, or (ii) via “strong circumstantial evidence of conscious misbehavior or recklessness.” *Ark. Pub. Empl. Ret. Sys.*, 28 F.4th at 355. “If no motive or opportunity (other than a generalized business motive) is shown, the circumstantial evidence of conscious misbehavior must be correspondingly greater and show highly unreasonable behavior or that which evinces an extreme departure from the standards of ordinary care.” *Id.* (internal quotation marks and citations omitted). The level of knowledge required to meet this pleading requirement is high; a complaint must “detail specific contemporaneous data or information known to the defendant that was inconsistent with the representation in question.” *Ressler v. Liz Claiborne, Inc.*, 75 F.Supp.2d 43, 52 (E.D.N.Y.1998).

Plaintiff ***does not plead a single fact, never mind particularized ones***, suggesting that Seibert had such motive and opportunity, engaged in conscious misbehavior or recklessness¹⁰, or

¹⁰ To allege scienter under the “conscious misbehavior or recklessness,” a plaintiff must “allege[] that defendants . . . had access to ***non-public*** information contradicting their public statements.” *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001) (emphasis added).

knew and believed his statement to be incorrect. Its scienter allegations fall broadly into three categories:

- Regulator Reports (CC ¶¶ 401-02): Plaintiff alleges that Defendants received notice of MBRAs and SRs from Signature’s regulators and ignored them. Seibert himself is not alleged to have received these reports, or had any responsibility for addressing them, and Seibert’s March 2022 statement had nothing to do with Signature’s regulators.
- Risk Management Processes (CC ¶¶ 403-05, 410, 413-14, 420-21): Plaintiff alleges that Defendants touted Signature’s risk management processes, despite knowing that Signature employed no such sophisticated processes. The first half of Seibert’s statement has nothing to do with risk management processes, and the second simply alleges that Signature continues to onboard clients that “we deem a fit for our ecosystem.” It offers no judgment about the methods by which Signature evaluates those clients.
- Seniority (CC ¶¶ 417-419): Plaintiff alleges that by virtue of their senior positions, Defendants had access to non-public information that undermined their public statements. Seibert was below the other defendants (besides Santora) in Signature’s hierarchy, is not alleged to have possessed any specific information that contradicted his public statement, or to have been involved in any discussions with regulators that could call any portion of his statement into question. And even if Seibert were a senior executive, merely grouping him with the other Defendants cannot establish scienter. *See In re Sotheby's Holdings, Inc.*, 2000 WL 1234601, at *7 (S.D.N.Y. Aug. 31, 2000) (“It is well established that boilerplate allegations that defendants knew or should have known of fraudulent conduct based solely on their board membership or executive positions are insufficient to plead scienter.”)

The fact that Seibert’s statement was based on publicly-available data further undermines any finding of scienter against him because it precludes a finding that he acted recklessly. *See In re Pfizer, Inc. Sec. Litig.*, 538 F. Supp. 2d 621, 637 (S.D.N.Y. 2008) (finding, consistent with

The Second Circuit recognizes that **public** contradictory information cannot raise the inference of intent necessary to plead scienter. *See In re Pfizer, Inc. Sec. Litig.*, 538 F. Supp. 2d 621, 637 (S.D.N.Y. 2008) (finding scienter insufficiently pled when “factual allegations about [a drug]’s efficacy and safety could be understood as contradicting defendants’ statements, the contradictory information was publicly available.”); *see also In re GeoPharma, Inc. Sec. Litig.*, 399 F. Supp. 2d 432, 452 (S.D.N.Y. 2005) (“Cases in this Circuit assume that the contradictory information in question must be non-public.”). Both sets of data from Seibert’s statement – the historical price of Bitcoin and SBNY’s deposit levels – are, and always have been, publicly available.

“[n]umerous courts,” that scienter was insufficiently pled under recklessness theory when “factual allegations about [a drug]’s efficacy and safety could be understood as contradicting defendants’ statements,” and “the contradictory information was publicly available.”).

Finally, the Complaint also lobs the catch-all allegation the Bank’s “named executive officers,” or NEOs, had their compensation tied to Signature’s ability to hit actual deposit growth goals, and therefore possessed a motive and opportunity to deceive investors. CC ¶¶ 422-23. But Seibert was not an NEO, and was not alleged to have been one. And mere allegations that executives were driven by a profit motive are insufficient to establish scienter as a matter of law. *See ECA, Local 134 IBEW*, 553 F.3d at 198 (“[I]ncentive compensation can hardly be the basis on which an allegation of fraud is predicated.”); *id.* at 201 (“If scienter could be pleaded solely on the basis that defendants were motivated because an inflated stock price or improved corporate performance would increase their compensation, ‘virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.’”) (internal citations omitted).

3. The Complaint Does not Allege Seibert’s Statement Caused Plaintiff’s Losses.

The claims against Seibert must also fail because the Complaint does not (and cannot) allege loss causation. “A private plaintiff who claims securities fraud must prove that the defendant’s fraud caused an economic loss.” *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 338 (2005). Only losses that are both “foreseeable” and “caused by the materialization of the concealed risk” can support a securities fraud claim. *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005); *see id.* at 173 (requiring pleading that “the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered, *i.e.*, that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security.”).

