

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

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

Plaintiff,

-v.-

JOSEPH J. DEPAOLO, ERIC HOWELL,
FRANK SANTORA, JOSEPH SEIBERT,
SCOTT A. SHAY, VITO SUSCA, STEPHEN
D. WYREMSKI, and KPMG LLP,

Defendants.

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

**MEMORANDUM OF LAW IN SUPPORT OF SCOTT A. SHAY'S
MOTION TO DISMISS THE CORRECTED CONSOLIDATED COMPLAINT**

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INTRODUCTION

On March 10, 2023, Signature Bank (“SBNY” or the “Bank”) experienced a bank run that regulators subsequently described as unprecedented in its speed and volume of withdrawals. As a result, the Bank was placed in receivership, and its stock price dropped substantially. Plaintiff now contends that its losses and those of other shareholders are due not to this unforeseen and unforeseeable bank run, but to the Bank’s alleged failure to disclose sufficient information about its liquidity. It asserts claims for securities fraud against various corporate officials, including Defendant Scott A. Shay, SBNY’s Chairman of the Board.

But Plaintiff’s securities fraud claims against Mr. Shay fail, for three separate and independent reasons. *First*, Plaintiff does not identify a single false statement or omission by Mr. Shay; instead, it points only to typical—and inactionable—corporate puffery regarding the company’s internal controls and other matters. *Second*, Plaintiff likewise fails to plead facts supporting scienter; Plaintiff’s identification of three stock sales during the Class Period (during which Mr. Shay’s net stock holdings actually increased), and sweeping generalizations and assumptions based on Mr. Shay’s position as Chairman, fail to plead specific facts demonstrating that he possessed intent to defraud. *Third*, because the statements at issue do not even concern liquidity, let alone the alleged lack of liquidity—the purported risk that Plaintiff contends was not disclosed and that caused Plaintiff’s loss—Plaintiff also fails to plead loss causation.

For these reasons, and the others contained in the Memorandum of Law in Support of Certain Individual Defendants’ Motion to Dismiss Consolidated Class Action Complaint dated February 13, 2024 (hereinafter “Joint Brief”), which Mr. Shay incorporates here by reference, the claims against him should be dismissed.

FACTUAL BACKGROUND

This Section incorporates by reference the factual background set forth in the Joint Brief. *See* Joint Brief at 1–21. For purposes of this motion to dismiss, Mr. Shay treats the allegations of the Corrected Consolidated Complaint (the “Complaint”) as if they were true, except where contradicted by documents referred to in the Complaint.¹

I. SBNY’s Extensive Disclosure of Its Volume of Uninsured Deposits and the Associated Risks.

For over 20 years, SBNY was a full-service, profitable commercial bank that provided a variety of services to clients across several industries. (Declaration of Peter L. Simmons in Support of Certain Individual Defendants’ Motion to Dismiss Consolidated Class Action Complaint, dated February 13, 2024 (“Simmons Decl.”), Ex. EE² at 8; Complaint ¶ 3.) During this time its operations steadily grew, from a single office in New York City to over 40 offices throughout the country, including in Connecticut, California, Nevada, and North Carolina. (Ex. EE at 8–9.)

Plaintiff contends that, from January 21, 2021, to March 12, 2023 (the “Class Period”), SBNY failed to sufficiently disclose that it had substantial uninsured deposits, that these were concentrated among digital asset (cryptocurrency) banking clients, and the liquidity risks associated with these facts. (*See, e.g.*, Complaint ¶¶ 3–10, 213, 276.) In fact, however, SBNY’s annual reports on Form 10-K throughout the Class Period consistently disclosed the risks relating

¹ The Court is permitted to consider any statements contained in the Bank’s public filings or other documents cited by Plaintiff. *See In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 171 (2d Cir. 2021) (“[E]ven at the motion to dismiss stage, courts ‘may consider any . . . statements or documents incorporated into the complaint by reference, legally required public disclosure documents . . . , and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit.’” (quoting *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007))).

² “Ex.” herein refers to the Exhibits to the Simmons Decl. unless otherwise stated.

to the Bank’s expansion into the digital asset space and its high rate of uninsured deposits, including the resulting liquidity risks.

To start, SBNY’s 10-Ks disclosed various risks associated with SBNY’s digital asset business. In its 2021 10-K, the Bank disclosed to investors that its “expansion into the marketplace for digital asset transactions and deposits present[ed] certain operational, financial, and regulatory compliance risks” due to the “nascent” nature of the industry. (Ex. F at 49.)

The following year, after the collapse of cryptocurrency exchange FTX, SBNY warned investors of the growing risks in the Bank’s digital asset business as the industry experienced greater volatility. (Ex. D at 47.) Specifically, the Bank disclosed that its “expansion into the marketplace for digital asset transactions and deposits present[ed] certain . . . liquidity . . . compliance risks.” (Ex. D at 47.) The risks posed by the Bank’s digital asset business included “volatility in the value of digital assets, a loss of confidence in the participants of the digital asset ecosystem and negative publicity surrounding digital assets.” (Ex. D at 47.) The Bank explained that “declines in digital asset deposits can occur because of” these same reasons. (Ex. D at 53.) This disclosure reiterated the Bank’s “plans to reduce its digital asset banking deposits,” and the Bank also cautioned that “further volatility in the digital asset markets may adversely affect [its] deposits and, in turn, [its] business, earnings, net interest margin, efficiency ratio, liquidity, capital levels/ratios, the ability to grow [its] loan portfolio, financial condition and results of operations.” (Ex. D at 47.)

SBNY also routinely disclosed that (i) a high percentage of its deposits were not FDIC-insured; (ii) this could lead to substantial withdrawals in the event of market instability; and (iii) this could pose liquidity challenges to the bank. For example:

- (i) The Forms 10-K estimated that 88% of the Bank’s \$63.32 billion in deposits at year-end 2020, 92% of the Bank’s \$106.13 billion in deposits at year-end 2021, and 89.7% of the Bank’s \$88.59 billion in deposits at year-end 2022 were not FDIC-insured. (See Ex. C at 53; Ex. F at 54; Ex. D at 52.) And, contrary to the Complaint’s allegations, these filings made clear that the Bank’s “depositor base [was] more heavily weighted to larger uninsured deposits than many other banks.” (Ex. C at 53; Ex. F at 54; Ex. D at 52.) The Forms 10-Q filed throughout the Class Period also disclosed the Bank’s volume of uninsured deposits and uninsured deposit ratios. *See* Joint Brief at 4–5.
- (ii) The Bank also warned investors that its high uninsured deposit rate could lead to “[d]eposit outflows . . . during prolonged periods of extremely volatile and unstable market conditions” that could cause the Bank “to rely more heavily on more expensive borrowings and other sources of funding to fund [its] business and meet withdrawal demands,” which, in turn, “could materially and adversely affect [the Bank’s] business, results of operations or financial condition.” (Ex. C at 54; Ex. F at 54; Ex. D at 53.)
- (iii) One such funding source was the Federal Home Loan Bank (“FHLB”) of New York, which the Bank “utilize[d] . . . for secondary and contingent sources of liquidity.” (Ex. C at 52; Ex. F at 52; Ex. D at 50.) SBNY disclosed to investors that it “rel[ied] on the FHLB for liquidity” and if the Bank was “unable to borrow from the FHLB, [it] would need to find alternative sources of liquidity, which may not be available” (Ex. C at 52; Ex. F at 52; Ex. D at 50.)

II. The Unprecedented Events of March 10, 2023

The events of early March 2023 that led to the closure of three of the country's largest regional banks were unprecedented in American history. On March 8, California-based Silvergate Bank announced its self-liquidation. (Ex. A at 2.) Subsequently, another California regional bank, Silicon Valley Bank, experienced a massive run on deposits, with customers withdrawing \$42 billion in a single day. (Ex. A at 2.) The contagion spread to SBNY, causing "a run on Signature that was faster than any other bank run in history, save the run that had just taken place at SVB." (Ex. EE at 5.) Fueled by "the rapid spread of information and rumors through social media," on Friday, March 10, SBNY depositors withdrew \$18.6 billion in a matter of hours.

While the Bank's leadership team worked throughout the weekend with regulators to develop a plan for the Bank to reopen the following Monday, on Sunday evening the New York Department of Financial Services ("NYDFS") took possession of the Bank "to stop any further panic and contagion across the broader banking system." (Ex. EE at 39.) The Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver of the bank, and less than an hour later federal regulators announced their decision to invoke the systemic risk exception. (Ex. EE at 39.); *see* 18 U.S.C. § 1823(c)(4)(G) (allowing the FDIC to guarantee uninsured deposits without regard to least-cost requirements to avoid "serious adverse effects on economic conditions or financial stability"). NYDFS later identified the unprecedented and rapid run on the Bank's deposits, instigated by the closures of Silvergate and Silicon Valley Bank, as the "immediate cause" of SBNY's closure. (Ex. EE at 5.) The FDIC called the contagion effect of Silvergate and Silicon Valley Bank the "primary cause" of the Bank's closure. (Ex. A at 2.) SBNY's regulators later described these events as "unprecedented and "unexpected," acknowledging that they even "surprised the regulators and the banking industry." (Ex. A at 40.) Reinforcing that the closure

was due to unprecedented circumstances, NYDFS concluded that it was “unclear whether, if [SBNY] had opened on March 13 in a better liquidity position, [it] could have survived a digital-age deposit run.” (Ex. EE at 41.)

III. Procedural History

Plaintiff filed its consolidated complaint on November 20, 2023. As to Mr. Shay, it asserts two causes of action, both under Section 10(b) of the Exchange Act and Rule 10b-5: Count I, asserting false statement liability, and Count II, asserting scheme liability. (*See* Complaint ¶¶ 485-94.)

ARGUMENT

Neither of Plaintiff’s causes of action against Shay states a claim. As detailed below, none of the statements that Plaintiff attributes to Mr. Shay gives rise to a misstatement or omission claim because Plaintiff fails to allege any facts establishing (i) falsity or (ii) scienter, with the specificity required by Rule 9(b) and the PSLRA, or (iii) loss causation. Because Plaintiff does not plead any conduct by Mr. Shay apart from these alleged misstatements or omissions, it also necessarily fails to state a claim for scheme liability.

I. Plaintiff Fails to Plead a Misstatements or Omissions Claim

To state a claim for securities fraud under Section 10(b) and Rule 10b-5(b), a private “plaintiff must plead ‘(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.’” *In Re Philip Morris Int’l Inc. Sec. Litig.*, 89 F.4th 408, 417 (2d Cir. 2023) (quoting *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 157 (2008)).

Plaintiff also “must state with particularity the circumstances constituting fraud.” *Id.* (quoting Fed. R. Civ. P. 9(b)). In addition, the PSLRA requires that a complaint “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 required state of mind.’” *Id.* (quoting 15 U.S.C. § 78u-4(b)(1), (2)(A)). And to plead loss causation, “plaintiff’s complaint must plead that the loss was foreseeable and caused by the materialization of the risk concealed by the fraudulent statement.” *ATSI Commc’ns, Inc.*, 493 F.3d at 107.

Here, Plaintiff fails to plead that the statements attributed to Mr. Shay constitute actionable misrepresentations or omissions, for at least three reasons. *First*, Plaintiff fails to plead any facts establishing that any of these statements was false or misleading. To the contrary, the statements are precisely the type of generic statements that the Second Circuit has repeatedly held are inactionable puffery. *Second*, Plaintiff fails to carry its burden to plead scienter with particularity and instead simply points to (i) Mr. Shay’s role as Chairman of the Board, and (ii) three sales of SBNY securities over a two-year period, the timing of which are not tied to any material development at the Bank. *Finally*, Plaintiff fails to plead loss causation: while the Complaint emphasizes that the allegedly concealed risk concerned the Bank’s liquidity, none of Mr. Shay’s statements concern liquidity, and therefore none concern the risk Plaintiff contends caused its loss.

A. Plaintiff Fails to Plead Any Actionable Misstatements or Omissions

The complaint fails to identify any actionable statements by Mr. Shay. It pleads no basis to attribute any group statements to him, and those that he did make are either “inactionable corporate puffery” or neither false nor misleading, especially when read in context rather than selectively quoted. *In re Synchrony*, 988 F.3d at 170-71 (“[t]he literal truth of an isolated

statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context").

To begin, Plaintiff pleads no basis for attributing to Mr. Shay any statements that he did not personally make or sign. Mr. Shay hereby incorporates by reference the arguments in the Joint Brief regarding group pleading. *See* Joint Brief at 47–48. In light of *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), the group pleading doctrine is “no longer viable.” *In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 641 (S.D.N.Y. 2017); *see also Orlan v. Spongetech Delivery Sys., Inc., Sec. Litig.*, 2012 WL 1067975, at *10 (E.D.N.Y. Mar. 29, 2012) (*Janus* “casts doubt on the viability of the group pleading doctrine.”).

Additionally, Plaintiff fails to allege particularized facts demonstrating Mr. Shay’s “direct involvement in the everyday business of” SBNY, which the group pleading doctrine would require in order to attribute any group statement to him. *Honig v. Cardis Enterprises Int’l N.V.*, 2016 WL 6304695, at *8 (E.D.N.Y. Oct. 27, 2016) (quoting *Dodona I, LLC v. Goldman Sachs & Co.*, 847 F. Supp. 2d 624, 647 n.13 (S.D.N.Y. 2012)); *see In re Alstom SA*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005) (similar). The Complaint does nothing more than identify Mr. Shay as Chairman of SBNY’s Board of Directors and a member of the Board’s Risk Committee and the asset/liability management committee. (*See* Complaint ¶¶ 406-07.) But this sort of “bare allegation” “does not justify applying the group pleading doctrine.” *In re GeoPharma, Inc. Sec. Litig.*, 399 F. Supp. 2d 432, 445 (S.D.N.Y. 2005); *see also Honig*, 2016 WL 6304695, at *9 (allegations that defendants are directors is insufficient to show “direct involvement in the everyday business of the company”). Further, by failing to allege Mr. Shay’s “particular role” on each committee on which he served, Plaintiff has failed to plead that Mr. Shay was directly involved in SBNY’s day-to-day business. *Alstom*, 406 F. Supp. 2d at 449; *see also In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F. Supp.

2d 256 (S.D.N.Y. 2004) (finding improper group pleading where there were “[n]o allegations containing specific acts by each of the individual Defendants” except one).

That leaves four statements that Plaintiff attributes to Mr. Shay, three of which were in SBNY’s Forms 10-K filed during the Class Period and signed by all of the directors, with the fourth in a press release attached as an exhibit to an SBNY Form 8-K.³ Mr. Shay hereby incorporates by reference the arguments in the Joint Brief regarding Plaintiff’s failure to plead that these statements are actionable. For the reasons stated there, these statements constitute inactionable puffery and opinion and are otherwise protected by the PSLRA’s safe harbor provision. *See* Joint Brief at 24–30, 32–34. Further, as demonstrated below, Plaintiff does not plead facts establishing that any of these statements was false or misleading.

1. The Statements Regarding Risk Mitigation Controls are Inactionable Puffery and Irrelevant to Plaintiff’s Allegations

Each of SBNY’s Forms 10-K filed for the years 2020 through 2022 includes the following statement that Plaintiff alleges is actionable:

“Risk management is an important element of our business. . . . We have put internal controls in place that help to mitigate the risks that affect our business. In addition, we have policies and procedures that further help mitigate risk and regulatory requirements that mandate that we evaluate, test and opine on the effectiveness of internal controls. . . . [W]e believe that our risk management processes will help keep our risks to a manageable level.”

(Complaint ¶¶ 208, 278, 339.)

This statement is not actionable because the assertions it makes are quintessential “[e]xpressions of puffery and corporate optimism[, which] do not give rise to securities violations.”

³ Plaintiff also makes passing reference to pre-Class Period statements by Mr. Shay regarding proposed revisions to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Complaint ¶¶ 49, 52, but does not allege that either of these statements is actionable.

In re Synchrony, 988 F.3d at 170 (quoting *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004)). In *ECA, Loc. 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009), the Second Circuit concluded that a bank’s comparable statement that it had “risk management processes [that] are highly disciplined and designed to preserve the integrity of the risk management process” amounted “to no more than ‘puffery,’” as the statement was “too general to cause a reasonable investor to rely upon” it and did not “amount to a guarantee that its choices would prevent failures in its risk management practices.” *Id.* at 205-06. The same is true of the statement here concerning controls that “help mitigate risk,” which likewise offered no such guarantee; to the contrary, although omitted by strategic ellipses in the Complaint, the relevant passage expressly stated that “[n]o system of internal control or policies and procedures will ever totally eliminate risk.” (Ex. C at 11; Ex. F at 12; Ex. D at 13.)

That this statement is not actionable is reinforced by the Second Circuit’s most recent decision addressing puffery, *Philip Morris*, 89 F.4th 408. There, the Court held that even a defendant’s description of a “methodology as ‘rigorous,’ ‘extensive,’ ‘thorough,’ ‘systematic,’ [. . .] ‘the best science,’ and ‘very advanced,’”—far more qualitative assessments than the description of controls here—constituted inactionable puffery. *Id.* at 417 (citations omitted). The statement that “we believe that our risk management processes will help keep our risks to a manageable level” (Complaint ¶¶ 208, 278, 339) is likewise puffery, because it “offer[ed] only generally optimistic opinions,” which “are precisely the type of puffery that [courts] have consistently held to be inactionable.” *In re Synchrony Fin. Sec. Litig.*, 988 F.3d at 170; *see* Joint Brief at 26–27.

Moreover, even if these statements were not puffery Plaintiff fails to plead facts showing that they were false. The Complaint uses ellipses to selectively quote the 10-K and thus create the impression that these statements concerned the Bank’s controls regarding *liquidity*—and then

contends that the statement was misleading because it failed to disclose “weakness with liquidity contingency planning, liquidity stress testing, and internal controls over liquidity risk management.” (Complaint ¶ 209; *see id.* ¶¶ 279, 340). But the statements do not concern liquidity at all. The first ellipsis omitted the following: “We evaluate the inherent risks that affect our business, including interest rate risk, credit risk, operational risk, regulatory risk, and reputation risk.” (Ex. C at 11; Ex. F at 12; Ex. D at 13.) This makes plain that the Bank’s statement that it had “internal controls” and “policies and procedures” to “help mitigate risk” was not addressing liquidity risk. Thus, Plaintiff’s assertions that the Regulators notified the Bank of deficiencies in its liquidity risk management do not bear on the truth of this statement.

2. Plaintiff Fails to Plead Any Falsity in the Statement Regarding Stress Testing Requirements, Which Does Not Relate to Liquidity

Plaintiff also asserts a misstatement claim against Mr. Shay based on the 2020 Form 10-K’s statement that the Bank “developed a process to comply with the [relevant] stress testing requirements” and would “continue to monitor and stress test its capital in a manner consistent with the safety and soundness expectations of the federal banking agencies and in accordance with applicable internal processes.” (Complaint ¶ 210.) Plaintiff alleges that this statement constituted an actionable misstatement or omission “because Regulators had specifically deemed the Bank’s liquidity stress testing framework to be deficient and in need of remediation.” (Complaint ¶ 211.)

But there is no falsity here, because the representations in the 2020 Form 10-K, “taken together and in context,” show that this statement related to *capital* stress testing, not *liquidity* stress testing. *In re Synchrony*, 988 F.3d at 171 (quoting *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010)). The section header where this statement is found reads: “Capital Planning and Stress Testing.” (Ex. C at 27.) This section goes on to reference the Federal

Reserve’s “plans to continue capital stress testing . . . under its Comprehensive Capital Analysis and Review” and the Bank’s commitment to “continue to perform capital stress testing on a situational and idiosyncratic basis, such as during [its] annual capital planning and budgeting processes.” (Ex. C at 27.) Thus, the “relevant stress testing requirements” quoted in the Complaint unequivocally refer to *capital* stress testing requirements—and the Complaint nowhere alleges that Mr. Shay concealed any issue regarding the Bank’s capital stress testing framework.

Furthermore, the statement that the Bank would “continue to monitor and stress test its capital” related to future operations, and therefore constitutes a non-actionable forward-looking statement under the PSLRA’s safe harbor provision. 15 U.S.C. § 78u-5(i)(1)(B). Additionally, this statement is inactionable puffery. *See* Joint Brief at 26–27.

3. The Statements Regarding Financial Reporting Controls are Inactionable Puffery

Each Form 10-K filed for 2020 through 2022 also included the following statement that Plaintiff alleges is actionable:

The management of Signature Bank (the “Company”) is responsible for establishing and maintaining effective internal control over financial reporting. Our system of internal control is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of the Company’s consolidated financial statements for external reporting purposes in accordance with U.S. generally accepted accounting principles.

(Complaint ¶¶ 212, 282, 343.)

This, too, is inactionable puffery. The Bank’s statement that its “system of internal control is a process designed to provide reasonable assurance regarding the reliability of financial reporting” is akin to the defendant’s statement in *JP Morgan Chase Co.* that its “risk management processes . . . are highly disciplined and designed to preserve the integrity of the risk management

process.” 553 F.3d at 205-06. Both make generalized statements about a “process” “designed” to preserve the “reliability” or “integrity” of “internal control.” As in *JP Morgan Chase Co.*, the statement here is “too general to cause a reasonable investor to rely upon” it and does not “amount to a guarantee that its choices would prevent failures in its” internal control systems. *Id.* at 206. In fact, in the very same section of the Form 10-K, the Bank cautioned investors that “[a]ll internal control systems . . . have inherent limitations” and “the effectiveness of internal control may vary over time.” (Ex. C at 110; Ex. F at 111; Ex. D at 109.) Likewise, various Forms 10-Q filed by the Bank during the Class Period disclosed that “the design of any control system is based in part upon certain assumptions about the likelihood of future events” and, because of “inherent limitations of control systems, there can be no assurance that any design will succeed in achieving its stated goals under all potential future conditions, regardless of how remote.” (*See, e.g.*, Ex. G at 78; Ex. J at 73.)

Additionally, to plead falsity of a statement regarding the Bank’s internal controls over financial reporting, Plaintiff must show that the Bank’s disclosures contained inaccurate financial data. *See In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 468, 488 (S.D.N.Y. 2018) (dismissing a Section 10(b) claim alleging a misstatement regarding a company’s internal controls over financial reporting where the claim failed to identify inaccurate financial data). But here, Plaintiff does not allege that any financial figures within the Forms 10-K were inaccurate.

Finally, as described above, Plaintiff’s allegation that the statement is misleading on the ground that SBNY’s public disclosures did not “disclose the Bank’s concentration in large, uninsured deposits” is simply untrue. (Complaint ¶¶ 213, 283, 344.) The Bank disclosed not only its percentage of uninsured deposits but also that its depositor base was “more heavily weighted to larger uninsured deposits than many other banks.” (Ex. C at 53; Ex. F at 54; Ex. D at 52.)

4. *The Statement Regarding Prudence in the Deployment of New Funds is Inactionable Puffery*

Finally, Plaintiff fails to adequately allege that the following statement made by Mr. Shay is actionable: “Signature Bank continues to fire on all cylinders as we stay true to our core principles of providing relationship-based, client-centric service and sleep-at-night safety. While our deposit growth has been truly extraordinary, we remain prudent in the deployment of new funds.” (Complaint ¶ 244.)

Plaintiff alleges that this statement was false or misleading because the Bank’s “Fund Banking capital call loans had grown to \$15.9 billion, approximately 15 percent of total assets and Defendants could not confirm whether these assets were pledgeable as collateral to secure short-term borrowings from the Federal Reserve in the event of a liquidity crunch.” (Complaint ¶ 245.) But Plaintiff fails to specify why the growth of the Bank’s Fund Banking division or whether these assets were pledgeable as collateral rendered misleading a general statement regarding prudence “in the deployment of new funds.”

To start, the statement “offers only generally optimistic opinions” that amount to inactionable puffery. *See In re Synchrony*, 988 F.3d at 170 (holding that statements that a company was “‘pretty confident’ and ‘pretty positive’ are best characterized as inactionable corporate puffery”); *see also In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 370 (E.D.N.Y. 2013) (description of a company’s financial reporting as “very conservative” constituted puffery).

In addition, the Bank repeatedly disclosed risks associated with the Fund Banking business line. Regarding several recent ventures, including Fund Banking, the Bank disclosed that “we may not be as successful in managing new business lines as we have been for business lines with which we have more experience” and “[a]ny failure to successfully manage this integration may

adversely affect our future financial condition and results of operations.” (Ex. C at 49; Ex. F at 48; Ex. D at 46.) Further, the Bank never represented that its Fund Banking capital call loans were pledgeable as collateral with the Federal Reserve. To the contrary, when the Bank estimated its potential borrowings from the Federal Reserve, it stated that such borrowings were “collateralized by mortgage-backed and collateralized mortgage obligation securities, along with commercial real estate loans,” not Fund Banking capital call loans. (Ex. D at 102.)

B. Plaintiff Fails to Plead Scienter

Plaintiff has failed to either “(a) [. . .] alleg[e] facts to show that defendants had both motive and opportunity to commit fraud, or (b) [. . .] alleg[e] facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness,” and thus has failed to adequately plead scienter. *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

1. Plaintiff Fails to Show Mr. Shay had Motive and Opportunity to Defraud

First, Plaintiff attempts to establish Mr. Shay’s motive by pointing to SBNY’s incentive-based compensation plan. But courts have repeatedly held that motives “possessed by virtually all corporate insiders,” such as increasing compensation, are insufficient to demonstrate motive. *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000); *see also Kalnit v. Eichler*, 264 F.3d 131 (2d Cir. 2001). Were the law to be otherwise, nearly every corporation and executive “could be subject to fraud allegations.” *Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1107 (D. Conn. 1991) (“[I]ncentive compensation can hardly be the basis on which an allegation of fraud is predicated.”)

In an attempt to bolster this insufficient claim, Plaintiff also raises Mr. Shay’s stock sales during the Class Period. As with general compensation incentives, however, insider stock sales

are insufficient to plead motive absent further “unusual” factors concerning the trades. *Acito*, 47 F.3d at 54. Such factors “include the amount of profit from the sales, the portion of stockholdings sold, the change in volume of insider sales, and the number of insiders selling.” *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 74-75 (2d Cir. 2001). Here, Plaintiff does not allege anything regarding any of these factors, and offers only conclusory claims that Mr. Shay’s stock sales were “suspicious” and “opportunistic,” without providing any particularized supporting facts. For example, Plaintiff does not allege that the stock sales preceded any negative disclosures or fall in stock price. On the contrary, after Mr. Shay sold shares at a price of \$226 in April 2021, the share price actually *increased* over the next ten months, indicating the timing of the sale was plainly not “calculated to maximize personal benefit from inside information.” *Ressler v. Liz Claiborne, Inc.*, 75 F. Supp. 2d 43, 58 (E.D.N.Y. 1998), *aff’d sub nom. Fishbaum v. Liz Claiborne, Inc.*, 1999 WL 568023 (2d Cir. 1999).

Plaintiff alleges that the timing of Mr. Shay’s 2021 sales were suspicious in relation to the filing of the 10-K, but similarly fails to offer any particularized support for this claim. Plaintiff states that the sales in March and April 2021 were made “shortly after the Company filed its March 1, 2021 10-K,” but the March sale occurred on March 23, three weeks after the 10-K filing, and the April sale occurred over a month after the filing. (Complaint ¶¶ 435, 438). Courts have found similar lapses in time between an alleged misrepresentation and a sale of stock to weigh against a finding of scienter. *See Ressler*, 75 F. Supp. 2d 43 (finding no inference of suspicion where sales took place “over two weeks” after statements at issue); *In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 385 (E.D.N.Y. 2003) (finding a lapse of four to six weeks to negate the inference that defendants sought to benefit from a falsely positive statement).

Plaintiff describes these sales (of over 24,000 shares) as “uncharacteristically large,” but it does not substantiate that assertion because it compares the sale only to a single year in which Mr. Shay had no sales, and excludes years in which Mr. Shay made sales of similar volumes. For example, in March 2016, March 2017, and March 2019, Mr. Shay sold 15,856, 15,408, and 15,338 shares, respectively. (Declaration of Jonathan M. Sperling in Support of Scott A. Shay’s Motion to Dismiss the Corrected Consolidated Complaint (“Sperling Decl.”) Ex. 1; Sperling Decl. Ex. 2; Ex. FFF.) Similarly to Mr. Shay’s March 2021 sales, the 2016, 2017, and 2019 sales were made shortly after the vesting of stock awards, indicating this was a typical practice for Mr. Shay. In any event, that the “proceeds of [a] stock sale are [. . .] considerable” is insufficient “to give rise to a strong inference” of scienter. *In re Lululemon Sec. Litig.*, 14 F.Supp. 3d 553, 585 (S.D.N.Y. 2014), *aff’d*, 604 F. App’x 62 (2d Cir. 2015).

Finally, Plaintiff ignores the fact that Mr. Shay *acquired* shares during the class period, including a purchase of 5,000 shares of common stock for \$413,850 on March 10, 2023, *after* Silvergate and SVB’s collapse. (Ex. LLL.) This purchase of shares immediately preceding the Bank’s closure strongly undercuts the notion that Mr. Shay was acting with fraudulent intent when making stock transactions. In fact, Mr. Shay ultimately owned more shares when the Bank closed (499,532 as of March 10, 2023) than he did at the beginning of the Class Period (488,046 as of January 25, 2021)—and courts have found that a net acquisition of shares undermines Plaintiff’s claim of scienter. (Ex. LLL, Sperling Decl. Ex. 3.) *See In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d at 383 (“The net acquisition of shares cuts against the notion that defendants sought to unload their holdings of [. . .] stock before their likely diminution in value following the disclosure of negative insider information.”); *Ressler*, 75 F.Supp. 2d at 60 (similar). In short, Plaintiff has failed to show Mr. Shay’s 2021 stock sales are indicative of intent to defraud.

2. *Plaintiff Fails to Adduce Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness*

Plaintiff's failure to plead facts showing that Mr. Shay's statements were false necessarily means that the Complaint also fails to plead facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness on his part. Simply put, because Plaintiff has not presented "facts or access to information contradicting [Mr. Shay's] public statements," it cannot demonstrate that he "knew or [. . .] should have known that" he was "misrepresenting material facts" relating to the Bank. *Novak*, 216 F.3d at 308. Plaintiff's reliance on regulator reports fails to raise an inference of scienter and, at most, alleges mismanagement, which is inactionable under the federal securities laws. *See* Joint Brief at 48–51. And KPMG's unqualified audits of the Bank, of which Mr. Shay was entitled to take account, further undercut Plaintiff's scienter argument with respect to Mr. Shay's statements about internal control over financial reporting. *See* Joint Brief at 53–54.

II. Plaintiff Fails to Plead Loss Causation

Plaintiff has failed to plead loss causation because the Complaint does not allege facts showing that "the subject of the fraudulent statement[s] or omission[s]" that it attributes to Mr. Shay was "the cause of the actual loss suffered." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005) (quoting *Suez Equity Invs., L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001)). In particular, Plaintiff fails to demonstrate that any disclosure or event constituted either a corrective disclosure of an alleged misstatement, or the materialization of a risk concealed by any statement attributable to Mr. Shay. *See In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511, 513 (2d Cir.2010) (disclosure of the resignation of a corporation's audit committee did not constitute a corrective disclosure or establish loss causation under a materialization of risk theory).

Plaintiff alleges that the March 12, 2023 closure of SBNY served as the materialization of the liquidity risks concealed by the Bank. (Complaint ¶¶ 454, 469–71.) As described above, however, none of the statements at issue by Mr. Shay concerned liquidity risks. *Supra* at Section I.A. As there is no causal connection between the content of the alleged misstatements and omissions by Mr. Shay and liquidity risk—the alleged source of “the harm actually suffered”—Plaintiff has failed to allege loss causation. *Lentell*, 396 F.3d at 174 (quoting *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 199 (2d Cir.2003)). Thus, even if the statements were false (which they were not), they do not concern the risk that Plaintiff alleges ultimately materialized and caused its loss.

Plaintiff also points to purported corrective disclosures in 2022 regarding the Bank’s deposit levels. (Complaint ¶¶ 455-68.) But Plaintiff has failed to sufficiently allege that through these disclosures, “available public information regarding the [Bank]’s financial condition” from Mr. Shay was corrected, because the Complaint does not allege that any of these disclosures corrected purportedly false statements attributable to him. *In re Omnicom*, 597 F.3d at 511.

III. Plaintiff Fails to Plead a Claim for Scheme Liability

Finally, Plaintiff’s scheme liability claim under Rule 10b-5(a) and (c) fails to state a claim because it does not allege any conduct beyond the alleged misstatements or omissions on which the misrepresentation claim is based. “[W]here the sole basis for [scheme liability] claims is alleged misrepresentations or omissions, plaintiffs have not made out a . . . claim under Rule 10b-5(a) and (c)” *Lentell*, 396 F.3d at 177. To be sure, “misstatements and omissions can form *part of* a scheme liability claim, but an actionable scheme liability claim *also* requires something beyond misstatements and omissions, such as dissemination.” *Sec. & Exch. Comm’n v. Rio Tinto plc*, 41 F.4th 47, 49 (2d Cir. 2022) (emphasis added).

Here, Plaintiff fails to allege that Mr. Shay engaged in any conduct beyond his alleged misstatements or omissions. While the Complaint invokes the buzzword of “dissemination,” it alleges no *facts* at all concerning how Mr. Shay disseminated false or misleading information separate from the purported misrepresentations or omissions in the Forms 10-K and 8-K that are attributed to him. It thus fails to plead with particularity any deceptive or manipulative act by him. And, for the reasons stated above, *see supra* at Section I.B, Plaintiff has also failed to plead scienter. Accordingly, the scheme liability claim against Mr. Shay must be dismissed.

CONCLUSION

For the above reasons, Mr. Shay respectfully requests that the Court dismiss both causes of action asserted against him in the Complaint.

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