UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

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

Defendants.

Civil Action No. 1:23-cv-01921

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT VITO SUSCA'S MOTION TO DISMISS

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Defendant Vito Susca respectfully submits this memorandum of law in support of his motion to dismiss lead plaintiff Sjunde AP-Fonden's ("Plaintiff") corrected consolidated complaint (ECF No. 70) ("FAC") under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Mr. Susca also adopts and incorporates by reference in full the arguments advanced in the Memorandum of Law in Support of Defendants Joseph J. DePaolo and Eric Howell's Motion to Dismiss the Consolidated Class Action Complaint ("Howell/DePaolo Mem.").

PRELIMINARY STATEMENT

As set forth fully in the Howell/DePaolo Memorandum, Plaintiff's false statements claim against Mr. Susca under Section 10(b) of the Exchange Act and Rule 10b-5(b) fails to adequately allege that Mr. Susca made any actionable false or misleading statements. All of the alleged false or misleading statements attributable to Mr. Susca—contained in four regulatory filings in 2021, all approximately two years before the unprecedented run on Signature Bank ("SBNY") and takeover by the FDIC—were in fact not false or misleading at the time they were made, and in any event were non-actionable statements of opinion and/or inactionable puffery. Nor does the FAC adequately allege a strong inference of scienter with respect to Mr. Susca. The FAC further fails to allege any basis to hold Mr. Susca liable for any of the alleged false or misleading statements of others.

Furthermore, Plaintiff's scheme liability claim against Mr. Susca under Section 10(b) and Rule 10b-5(a) and (c) likewise 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.

FACTUAL BACKGROUND

The Howell/DePaolo Memorandum sets forth much of the factual background relevant to the instant motion, which Mr. Susca adopts in full and incorporates by reference. (Howell/DePaolo Mem. at 3–20.) With respect to Mr. Susca specifically, the FAC alleges that during the beginning

of the class period (January 21, 2021) through June 30, 2021, Mr. Susca served as Executive Vice President and Chief Financial Officer ("CFO") of SBNY. (FAC ¶ 35.) During most of the remainder of the class period (*i.e.* from approximately July 1, 2021 until March 12, 2023), the FAC acknowledges that Mr. Susca relinquished his role of CFO and became Chief Administrative Officer ("CAO") of SBNY. (*Id.*)

The FAC alleges that during his tenure as CFO, Mr. Susca co-signed four regulatory filings that contained false or misleading statements beginning on January 21, 2021 and ending May 10, 2021—nearly two years before the unprecedented run on SBNY that led to its takeover by the FDIC during the weekend of March 12, 2023. (*Id.* ¶¶ 205, 207–08, 210, 212, 224-25, 237–38, 349–50.) Mr. Susca is not alleged to have made any other false or misleading statements after May 10, 2021, nor is he alleged to have signed any of SBNY's regulatory filings during his tenure as CAO.

Although the FAC cites to various regulator reports to allege that Mr. Susca and others had "knowledge of the many internal problems and risk management failures and deficiencies" via "the findings of Regulators, which were communicated in meetings, letters, and reports directly to Defendants," at the time of the alleged false statements, (*id.* ¶ 400), this simply is not supported by a fair reading of the entirety of those same reports.

The FAC relies extensively on cherry-picked excerpts from various post-receivership reports recounting findings issued to SBNY before and during the class period by its regulators, the Federal Deposit Insurance Corporation ("FDIC") and the New York State Department of Financial Services ("NYDFS"). These post-receivership reports include those issued by the FDIC (Declaration of Peter L. Simmons in Support of Defendants Joseph J. DePaolo and Eric Howell's Motion to Dismiss Consolidated Class Action Complaint ("Simmons Decl.") Ex. A ("FDIC

Rep.")), NYDFS (Simmons Decl. Ex. EE ("NYDFS Rep.")), and the Office of the Inspector General ("OIG") of the FDIC (Simmons Decl. Ex. B ("OIG Rep.")).[1] (*See* FAC at 1.) In fact, however, Plaintiff conspicuously omits the regulators' consistent conclusion, reflected in those same reports that, during Mr. Susca's time as CFO, SBNY management in fact had sufficiently addressed all the issues noted by the regulators.

For example, the FAC alleges that during the 2019 regulator examination cycle, which lasted from January 2019 through October 2020, the regulators identified certain areas of weakness regarding the bank's liquidity and risk management. (*See* NYDFS Rep. at 14–18.) Omitted from the FAC, however, is the critical countervailing context in the cited report documenting the steps management took in 2020, before the class period began, to strengthen its liquidity and funds management modeling (thereby ultimately resolving the inconsistency identified by regulators between the Board's low risk appetite and the bank's liquidity stress test results) and to improve the accuracy of its stress testing. (*See id.* at 18, 21.) Additionally omitted from the FAC is that even *before* these remedial steps were taken, in July of 2020, the regulators concluded that overall, "the Board and management adequately monitored the daily liquidity position of the Bank." (*Id.* at 17 (emphasis added).) The regulators issued their overall 2019 Report of Examination ("ROE") in October of 2020, concluding that "the overall condition of the Bank [was] satisfactory." (*Id.* at 18 (emphasis added).) The FAC neglects to mention that, in this 2019 ROE, "[d]espite the liquidity rating downgrade . . . the Regulators found that overall the Board and senior management

[1] Because the FAC relies upon and quotes extensively from these reports, they may be considered by the Court on a motion to dismiss. "[D]istrict courts may permissibly consider documents other than the complaint for the truth of their contents if they are . . . incorporated in it by reference," and "[a] document that is integral to the complaint and partially quoted therein may be incorporated by reference in full." *Ark. Pub. Emp. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 352 n.3 (2d Cir. 2022) (internal quotation marks omitted).

appropriately identified, measured, monitored, and controlled the risks of the institution's activities." (*Id.* at 19 (emphasis added).)

The FAC also references report citations to the 2020 regulator examination cycle, which began in January 2020. (*Id.* at 19.) According to the NYDFS Report, however, the regulators did not hold the management exit meeting or issue their 2020 ROE until November of 2021, which was months after Mr. Susca had left his role as CFO and ceased signing any further SBNY filings. (*Id.* at 20.) During the 2020 cycle, the cited reports reflect that the regulators conducted a targeted review on liquidity risk management that began on November 30, 2020, and that the findings were communicated to bank management in a meeting on June 8, 2021, and a Supervisory Letter issued on July 9, 2021. (*Id.* at 20.) Thus, on their face, the relevant regulatory findings of the 2020 examination cycle were not communicated to SBNY until after Mr. Susca had made his final allegedly false statement in a filing in May 2021. Moreover, after the 2020 examination cycle, "the Regulators concluded [that] the Board and senior management appropriately identified, measured, monitored, and controlled the risks of the institution's activities," (*id.* at 22 (emphasis added)), and that the Bank had made "significant improvements . . . to the funding plan for the most severe stress test scenario," (*id.* at 21).

Finally, although the 2021 examination cycle referenced in the FAC began on April 12, 2021, the regulatory findings were not communicated to bank management until 2022, long after Mr. Susca had left the CFO role in June 2021 and stopped signing SBNY filings. (*Id.* at 23.)

In sum, many of the allegedly adverse regulatory findings relied on by the FAC were not communicated to SBNY management until after Mr. Susca's final alleged false statement in May 2021. Further, the FAC's description of what was communicated before and during the time that Mr. Susca was signing SBNY filings lacks critical context reflecting that, although the regulators

identified areas for improvement, the regulators also reported to bank management that, overall, they generally were satisfied with the bank's risk controls. (*See id.* at 22 ("[T]he Regulators concluded that the Board and senior management appropriately identified, measured, monitored, and controlled the risks of the institution's activities.").)

ARGUMENT

Mr. Susca adopts in full and incorporates by reference each of the Howell/DePaolo Memorandum's arguments as to why the FAC must be dismissed for failure to state a claim—the FAC fails to (1) allege with particularity that Mr. Susca made any actionable misstatements or omissions, (Howell/DePaolo Mem. at Section I); (2) allege with particularity facts giving rise to a strong inference that Mr. Susca acted with scienter, (*id.* at Section II); (3) adequately plead loss causation, (*id.* at Section III); or (4) state a claim under the scheme liability provisions of Section 10(b) and Rules 10b–5(a) and 10b–5(c), (*id.* at Section IV). As argued in the Howell/DePaolo Memorandum, application of those principles requires dismissal of the FAC's claims against Mr. Susca. Additionally, the allegations against Mr. Susca are uniquely deficient in light of the information available to Mr. Susca at the time he made allegedly false statements during the first four months of the class period from January to May of 2021.

I. THE FAC FAILS TO STATE A CLAIM AGAINST MR. SUSCA UNDER SECTION 10(b) AND RULE 10b–5(b).

A. The FAC fails to plead that Mr. Susca made an actionable false or misleading statement.

1. The statements attributed to Mr. Susca are not false or misleading.

Count I should be dismissed as to Mr. Susca because the FAC fails to allege that any of the statements attributed to Mr. Susca were actionably false or misleading. The Howell/DePaolo Memorandum explains why each of these statements is not actionably false or misleading: first, because allegations of mismanagement are not actionable under the securities laws,

(Howell/DePaolo Mem. at Section I.A); second, because these statements constitute non-actionable puffery, (*id.* at Section I.B–I.B.2); third, because many of these statements are non-actionable opinions, (*id.* at Section I.C.–I.C.3); fourth, because forward-looking statements are non-actionable, (*id.* at Section I.D); fifth, because the FAC fails to plead facts establishing that many of these statements were false, (*id.* at Section I.E.–I.E.4); and sixth, because the challenged representations regarding internal control over financial reporting are non-actionable, (*id.* at Section I.F). Mr. Susca adopts and incorporates by reference each of these arguments. Although the arguments advanced in the Howell/DePaolo Memorandum suffice to establish that Plaintiff has failed to plead falsity with respect to Mr. Susca's statements, the FAC's allegations are especially and uniquely deficient as to Mr. Susca.

The FAC alleges that Mr. Susca made statements contained in four regulatory filings that he signed while he served as CFO during the first half of 2021. (*See* FAC ¶¶ 205, 208, 210, 212, 225, 237–38, 349–50.) Specifically, the FAC alleges that Mr. Susca made statements characterizing the "relatively low risk profile of the Bank's balance sheet," (*id.* ¶¶ 205, 225), affirming the existence of SBNY's internal risk mitigation and financial reporting controls and management's belief in the reasonable reliability of the same, (*id.* ¶¶ 208, 212, 237), affirming the existence of SBNY's process to comply with stress testing requirements and the consistency of that process with the expectations of regulators, (*id.* ¶¶ 210, 237), representing that SBNY's liquidity management policies "t[ook] into account" various factors affecting assets, deposits, borrowing capacity, and loan commitments, (*id.* ¶ 238), and affirming that SBNY's financial statements were prepared in accordance with GAAP, (*id.* ¶¶ 349–50).

Plaintiff's theory of falsity for these statements rests on the assertion that regulators had identified issues with SBNY's capital and liquidity risk management practices so severe as to

fatally undermine the truth of these statements. (*See id.* ¶¶ 206, 209, 211, 213, 226, 237, 239). This theory of falsity cannot be squared with the regulators' ultimate conclusions in the 2019 and 2020 examination reports—the only reports available to Mr. Susca at the time he made these statements—that "the Board and senior management appropriately identified, measured, monitored, and controlled the risks of the institution's activities." (NYDFS Rep. at 19, 22). These statements were therefore not "false when made," and thus not actionable. *Rombach v. Chang*, 355 F.3d 164, 172 (2d Cir. 2004) (internal quotation marks omitted). [2]

In the alternative, many of these statements represent an "inherently subjective . . . assessment" not capable of being proven objectively true or false and are thus statements "of pure opinion." *In re Philip Morris Int'l Inc. Sec. Litig.*, 89 F.4th 408, 418 (2d Cir. 2023) (quoting *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 186 (2015)). Specifically, the characterization of the "*relatively* low risk profile" of the Bank's balance sheet, (FAC ¶¶ 205, 225 (emphasis added)), the affirmation that SBNY's monitoring and stress testing of capital was "*consistent* with the safety and soundness expectations" of regulators, (FAC ¶¶ 210, 237 (emphasis added)), management's "*belie[f]* that [SBNY's] risk management processes [would] help keep . . . risks to a manageable level," (FAC ¶¶ 208, 237 (emphasis added)), the characterization of SBNY's internal controls over financial reporting as "designed to provide *reasonable assurance* regarding the reliability of financial reporting," (FAC ¶¶ 212, 237 (emphasis added)), all represent inherently subjective assessments and are thus statements of opinion. (*See*

[2] Plaintiff also alleges that these statements were false or misleading due to a failure to disclose concentrations of large, uninsured deposits. (*See* FAC ¶¶ 206, 213.) The Howell/DePaolo Memorandum explains how this assertion is flatly contradicted by the repeated public disclosures SBNY made concerning uninsured deposit concentration. (Howell/DePaolo Mem. Statement of Facts at Section B.)

also Howell/DePaolo Mem. at Section I.C.3 (identifying each of the preceding statements as opinion statements).)

The FAC falls short of *Omnicare*'s standard for pleading falsity of opinions. (*See id.* at Section I.C. (explaining *Omnicare* standard).) The maker of an opinion statement need only ensure that the statement "fairly align[s] with the information in the [maker's] possession at the time." *Tongue v. Sanofi*, 816 F.3d 199, 212 (2d Cir. 2016) (quoting *Omnicare*, 575 U.S. at 189) (opinion statements expressing optimism about the prospects for FDA approval of a drug were not rendered misleading by the defendants' failure to disclose repeated statements of concern by FDA concerning the defendants' methodology for conducting clinical studies required for FDA approval). In light of regulators' repeat finding during the time period relevant to Mr. Susca's statements that, overall, management was appropriately monitoring and controlling risk, and in light of the improvements in risk management made by SBNY and acknowledged by the regulators over the 2019 and 2020 examination cycles, (*see supra* at 3–5), the alleged facts that the FAC points to in an effort to establish falsity fail to "substantially undermine the conclusion a reasonable investor would reach from [these] statement[s] of opinion." *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165, 177 (2d Cir. 2020). These opinion statements are therefore not actionable.

2. Mr. Susca Cannot Be Held Liable for Statements Made By Others.

Mr. Susca cannot be held liable for any of the remaining alleged false statements recounted in the FAC purportedly made by others. Under *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), liability for a false statement under Rule 10b–5 is limited to the "maker" of such statement, defined as "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus*, 564 U.S. at 142. The FAC contains no nonconclusory allegations that Mr. Susca exercised ultimate authority over

any of the alleged false statements in the FAC aside from those contained in the four regulatory filings he signed.

Plaintiff's only attempt to tie Mr. Susca to these statements is the boilerplate, fact-free allegation that "[t]hese Defendants' high-level positions, and their involvement with SBNY's core operation, allowed them to control the contents of the material misstatements alleged in Section V." (FAC ¶ 418.) After *Janus*, such an attempt must fail because the "group-pleading doctrine is no longer viable." *Xu v. Gridsum Holding Inc.*, 624 F. Supp. 3d 352, 364 (S.D.N.Y. 2022) (Woods, J.). That doctrine, which "significantly predates *Janus*, . . . created a presumption that group-published documents are the collective work of corporate insiders." *Id.* (internal quotation marks omitted). However, multiple district courts within the Second Circuit have recognized that "a theory of liability premised on treating corporate insiders as a group cannot survive a plain reading of the *Janus* decision."[3] *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012) (Sullivan, J.) (collecting cases). Thus, Mr. Susca cannot be held liable for any of the alleged false statements outside of the regulatory filings he signed in the first half of 2021 in his capacity as CFO.

B. <u>The FAC fails to plead a strong inference of scienter as to Mr. Susca.</u>

Plaintiff's scienter allegations are deficient for the reasons stated in the Howell/DePaolo Memorandum, which Mr. Susca adopts in full and incorporates by reference. (Howell/DePaolo

[3] *Contra City of Pontiac Gen. Emps. Retirement Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) (Rakoff, J.). Even if the group pleading doctrine survives *Janus*, Plaintiff's conclusory allegation that Mr. Susca was among the Defendants whose "high-level positions, and their involvement with SBNY's core operation, allowed them to control the contents of the material misstatements alleged in Section V," (FAC ¶ 418), would not suffice to invoke it, *Behrendsen v. Yangtze River Port and Logistics Ltd.*, No. 19 Civ. 00024 (DLI), 2021 WL 2646353, at *10 (E.D.N.Y. June 28, 2021) (Irizarry, J.) (acknowledging split among courts as to whether group pleading doctrine remained viable after *Janus*, but holding that, even if the doctrine remained viable, conclusory allegation that individual defendants were "directly involved" in managing business did not "give rise to an inference that the Individual Defendants were involved in [the business's] day-to-day operations such that the group pleading doctrine would apply to them").

Mem. at Section II.) Specifically, Plaintiff's motive and opportunity allegations are deficient, (*id.* at Section II.A.–II.A.2(c)), and Plaintiff has failed to plead strong circumstantial evidence of conscious misbehavior or recklessness, (*id.* at Section II.B–II.B.5). Further, the FAC's allegations are uniquely deficient as to Mr. Susca because, at the time of his statements in early 2021, the regulators' interactions with SBNY management were affirming of the company's overall approach, a fact that fails to establish— and indeed, even rebuts—any inference that Mr. Susca's statements were made recklessly.

1. The FAC's recklessness allegations are deficient because, at the time of his challenged statements, regulators had not raised substantial concerns to Mr. Susca.

Because the FAC's scienter allegations sound in recklessness[4], Plaintiff must "do more than allege that the Individual Defendants had or should have had knowledge of certain facts contrary to their public statements simply by virtue of their high-level positions" and instead "must allege facts showing that (i) *specific* contradictory information was available to the defendants (ii) *at the same time* they made their misleading statements." *In re Citigroup Sec. Litig.*, No. 20 Civ. 9132 (LAP), 2023 WL 2632258, at *22 (S.D.N.Y. March 24, 2023) (Preska, J.) (internal quotation marks omitted). Thus, although the FAC makes sweeping allegations about what regulators brought to the attention of SBNY in calendar year "2021," the Court must more closely parse whether, at the time Mr. Susca made the statements attributed to him in early 2021, regulators had yet raised concerns to SBNY that specifically contradicted those statements.

As of May 2021, the time of Mr. Susca's last allegedly false or misleading statement, they had not. Although the FAC states that "in their 2019 and 2020 ROEs, Regulators identified

[4] The FAC does not attempt to advance a scienter theory based on "strong circumstantial evidence of conscious misbehavior." *See Ark. Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 355 (2d Cir. 2022).

'numerous, recurring liquidity risk management concerns,'" (FAC ¶ 83), the FAC omits the fact that the 2019 and 2020 examination cycles concluded with the ultimately favorable finding that "the Board and senior management appropriately identified, measured, monitored, and controlled the risks of the institution's activities," (NYDFS Rep. at 19, 22). The FAC also claims that "[i]n a July 6, 2020 supervisory letter, Regulators deemed the Bank's liquidity risk management deficiencies a 'critical' new finding and issued Defendants with a MRBA and 18 related SRs." (FAC ¶ 88.) This is apparently a reference to a Supervisory Letter issued by the NYDFS and described on pages 15-18 of the NYDFS Report. What the FAC fails to include, however, is that SBNY responded to the supervisory letter with various commitments to remediate areas highlighted by NYDFS and that, at the conclusion of the 2019 examination cycle, regulators ultimately rated SBNY as "satisfactory." (NYDFS Rep. at 18.) Given this favorable disposition of the July 6, 2020 supervisory letter, this allegation in the complaint also does not give rise to an inference that Mr. Susca's acted recklessly. For this and all of the other reasons identified above, (*see supra* at 3–5), the information communicated to SBNY during the 2019 and 2020 examination cycles—the only cycles that matter with respect to whether the FAC has established Mr. Susca's scienter—fails to specifically contradict Mr. Susca's alleged public statements.

Many other allegations in the FAC also occurred after Mr. Susca stopped signing SBNY filings and therefore do not support an inference that he acted with scienter. For example, the FAC repeatedly alleges that SBNY had an internal 10% concentration limit for digital asset deposits but, rather than turn away more deposits, SBNY increased the concentration limit to 35%. (FAC ¶¶ 10, 71, 128, 232.) The FDIC Report, however, states that SBNY did not increase the risk limit for digital asset deposits until December 2021—more than half a year after the last statement from Mr. Susca that is alleged to be false or misleading. (FDIC Rep. at 53.) Thus, the FAC's allegation

about SBNY's change to risk limits—even if true—is entirely irrelevant to proof of Susca's scienter at the time he signed the early–2021 filings.

Finally, the FDIC Report opines that, even with the benefit of hindsight, the first point in time at which it could have been "prudent" for the FDIC to downgrade its evaluation of SBNY's management was not until "*as early as the second half of 2021*." (FDIC Rep. at 3 (emphasis added).) In other words, even performing a backward-facing review in 2023 following the bank's seizure, the FDIC did not see grounds for downgrading its evaluation of SBNY management until after all of Mr. Susca's allegedly false statements had been made.

In sum, when the set of information available to Mr. Susca during the less than four months in early 2021 of the almost twenty-six-month class period during which he signed filings is isolated, it becomes clear that the FAC fails to establish a strong inference of scienter as to Mr. Susca, warranting a dismissal of the claims against him.

C. The FAC fails to adequately plead loss causation.

Plaintiff also fails to allege loss causation for the reasons stated in the Howell/DePaolo Memorandum, which Mr. Susca adopts in full and incorporates by reference. (Howell/DePaolo Mem. at Section III–III.B.)

II. THE FAC FAILS TO STATE A SCHEME LIABILITY CLAIM UNDER SECTION 10(b) AND RULES 10b–5(a) and 10b–5(c).

Finally, Count II of the FAC should be dismissed as to Mr. Susca for failure to state a claim. Plaintiff has failed to state a claim for scheme liability for the reasons stated in the Howell/DePaolo Memorandum, which Mr. Susca adopts in full and incorporates by reference. (Howell/DePaolo Mem. at Section IV–IV.B.) Specifically, the FAC fails to plead any deceptive act beyond alleged misstatements, (*id.* at Section IV.A), and further fails to plead reliance, (*id.* at Section IV.B).

CONCLUSION

For the foregoing reasons, Mr. Susca respectfully requests that the Court dismiss the FAC in its entirety against him.

Dated: February 13, 2024
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