

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SJUNDE AP-FONDEN, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

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

Defendants.

No. 1:23-CV-01921-FB-JRC

ORAL ARGUMENT
REQUESTED

**MEMORANDUM OF LAW IN SUPPORT OF
STEPHEN WYREMSKI'S SUPPLEMENTAL MOTION TO
DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT**

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PRELIMINARY STATEMENT¹

“The weekend of March 10, 2023, was unprecedented. The speed with which depositors withdrew funds from [Signature Bank] and [Silicon Valley Bank] was unexpected and surprised the regulators and the banking industry.” Ex. A,² at 4 (emphasis added). The unprecedented bank run on Signature Bank (“Signature” or the “Bank”) was prompted by the closure of two other banks in the days prior—Silvergate Bank and Silicon Valley Bank (“SVB”). Then, on March 12, 2023, Signature was placed into receivership and its stock price fell precipitously. Plaintiff ignores these obvious events and instead alleges that various former Signature executives and officers, including Mr. Wyremski, issued numerous false or misleading statements to investors and engaged in a scheme to defraud investors between January 21, 2021 and March 12, 2023. Not so. Plaintiff fails to state a claim against Mr. Wyremski for several independent reasons.

First, Mr. Wyremski cannot be liable for statements under Rule 10b-5(b) that were made by others and are not attributable to him. *Second*, the alleged misstatements in the SEC filings signed by Mr. Wyremski are not material statements or omissions, rather they are puffery or subjective opinions, both of which are inactionable under securities laws. Moreover, when read in context and in conjunction with the risk factors and other cautionary language contained in those filings, the statements were accurate and appropriately qualified, or were forward-looking statements entitled to protection under the PSLRA’s safe harbor. *Third*, Plaintiff has not made plausible and particularized allegations giving rise to a strong inference of scienter as to Mr. Wyremski. Plaintiff pleads no particularized facts about Mr. Wyremski’s motive or recklessness

¹ Mr. Wyremski incorporates and joins into all of the arguments raised in the Memorandum of Law in Support of Certain Individual Defendants’ Motion to Dismiss the Consolidated Class Action Complaint, filed by Defendants Joseph DePaolo and Eric Howell (the “Joint Brief” or “Joint Br.”).

² Cited exhibits are attached to the Declaration of Peter L. Simmons, and include “documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit.” *ATSI Commc ’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

and the failure to allege scienter as to Mr. Wyremski requires dismissal of all of the Section 10(b) claims against him. *Fourth*, Plaintiff’s scheme liability claims fail because the Complaint fails to sufficiently plead any alleged deceptive acts by Mr. Wyremski.

For these reasons, and those set forth in the Joint Brief, the Court should dismiss the Complaint with prejudice.

BACKGROUND³

Mr. Wyremski served as Signature’s Controller from 2015 to 2021. ¶ 34.⁴ From June 30, 2021, until March 2023, Mr. Wyremski served as Signature’s Senior Vice President and Chief Financial Officer (“CFO”). *Id.* As CFO, Mr. Wyremski signed various SEC filings for Signature Bank. *See, e.g.*, ¶¶ 252-53, 255-56, 262, 277-78, 349-50. He is not alleged to have signed any false or misleading statements during the class period prior to June 30, 2021.

Contrary to Plaintiff’s contention that Signature did not sufficiently disclose certain information about uninsured deposits, deposits from digital asset banking clients, and associated liquidity risks, Signature routinely disclosed such information in public filings and statements, including its high percentage of uninsured deposits, associated liquidity risks, and the risk of reliance on the Federal Home Loan Bank (“FHLB”) of New York for secondary and contingent sources of borrowing. *See* Joint Br. at D.3. For example, Signature disclosed that approximately 92% of its \$106.13 billion in total deposits were not FDIC insured as of December 31, 2021. Ex. F, at 42, 54. Further, deposits from digital asset banking customers exceeded \$20 billion at the end of 2021. *Id.* at 49. These disclosures highlighted risks of “deposit outflows” of uninsured deposits, *see, e.g., id.* at 54, and that the FHLB was a “contingent source[] of liquidity” which Signature

³ Mr. Wyremski incorporates the Statement of Facts in the Joint Brief.

⁴ Except where otherwise noted, all facts stated are drawn from the Corrected Consolidated Complaint (Dkt. No. 70) (the “Complaint”), citations to which are styled as “¶ [paragraph number].”

might be unable to borrow from and that “alternative sources of liquidity ... may not be available.” *Id.* at 52.

On March 8, 2023, Silvergate Bank announced it was liquidating. Ex. EE, at 5. Two days later, the California banking regulator took possession of SVB, “following an unprecedented run on its deposits.” *Id.* Although Signature and SVB had “vastly different clienteles,” “news and social media coverage associated Signature with SVB, and SVB’s failure provoked a run on deposits at Signature” starting on March 10, 2023. *Id.* at 32. “Driven by advances in digital banking and the rapid spread of information and rumors through social media,” Signature had deposit outflows of \$18.6 billion in deposits in a matter of hours, which reduced the Bank’s deposit base by 20 percent in one day. *Id.* at 5. On March 12, 2023, NYDFS took possession of Signature and named the FDIC as Receiver. *Id.* at 3, 6, 41. In its review of events immediately prior to Signature’s closure, NYDFS observed that “it is unclear whether, if [Signature] had opened on March 13 in a better liquidity position, it could have survived a digital-age deposit run.” *Id.* at 5-6.

LEGAL STANDARDS

Under Rule 12(b)(6), courts accept well pleaded factual allegations as true, but courts are not required “to credit a complaint’s conclusory statements without reference to its factual context.” *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). “[W]here a conclusory allegation in the complaint is contradicted” by a properly considered document, “the document controls and the allegation is not accepted as true.” *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011). A complaint alleging securities fraud “must satisfy the heightened pleading requirements of the Private Securities Litigation Reform Act (“PSLRA”) and Fed. R. Civ. P. 9(b) by stating with particularity the circumstances constituting fraud.” *ECA & Loc. 134 IBEW Joint Pension Tr. Of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009). To satisfy Rule

9(b) “the plaintiff must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” *In re EHang Holdings Ltd. Sec. Litig.*, 646 F. Supp. 3d 443, 456 (S.D.N.Y. 2022). The PSLRA expands upon Rule 9(b) by requiring the plaintiff to “(1) specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading; and (2) state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” *Id.* (citations and quotations omitted). To state a claim for scheme liability, a plaintiff must present facts showing “(1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance.” *Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC*, 277 F. Supp. 3d 500, 517 (S.D.N.Y. 2017) (citations and quotations omitted).

ARGUMENT

I. Mr. Wyremski Is Not Liable for Alleged Misstatements by Others

Only the “maker” of the alleged misstatement of material fact—*i.e.*, the person with “ultimate authority over the statement, including its contents and whether and how to communicate it”—can be liable under Rule 10b-5(b). *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142-43 (2011) (explaining that even “when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it”). The Complaint alleges numerous misstatements by others, where Mr. Wyremski was not the “maker” of such statements, thus, he cannot be liable for those statements under Rule 10b-5(b). *See id.* at 142. For example, Plaintiff does not attribute the statements in the November 15, 2022 Press Release (§ 154), nor the statement on the October 18, 2022 earnings call (§§ 317-18, 323) to Mr. Wyremksi. *See Xu v. Gridsum Holding Inc.*, 624 F. Supp. 3d 352, 362 (S.D.N.Y. 2022) (dismissing claims against co-CFOs,

holding co-CFOs were not “makers” of press release). Moreover, Plaintiff’s conclusory allegation that “each Defendant” “approv[ed]” Signature’s statements (¶¶ 38, 486) is wholly insufficient to plead Rule 10b-5(b) liability as to Mr. Wyremski when there is no allegation that he had “ultimate authority” over the alleged misstatements statements of others. *See Xu*, 624 F. Supp. 3d at 359-60, 364 (holding that the group pleading doctrine no longer viable post-*Janus*).⁵

While Plaintiff alleges in conclusory fashion that “each Defendant” had the ability to correct or prevent the issuance of alleged misstatements (¶ 418), the Supreme Court has never recognized such a duty to correct. *Prodanova v. H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1112 (9th Cir. 2021). But even if a duty to correct were a viable theory, it does not apply “when a person fails to correct a misstatement or misimpression created by another ‘statement maker.’ . . . Rather, speakers are only liable for failing to correct their own omissions.” *Oaktree Principal Fund V, L.P. v. Warburg Pincus LLC*, 2017 WL 3187688, at *8 (C.D. Cal. Jan. 17, 2017) (quotations and citations omitted); *see also Fulton Cnty. Emp. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1051-52 (7th Cir. 2012) (noting that if there were a duty to correct someone else’s errors, “*Janus* . . . itself would have come out the other way”). Claims against Mr. Wyremski which are premised on the alleged misstatements made by others must be dismissed.

II. The Statements Attributable to Mr. Wyremski Are Not False or Not Actionable

Plaintiff fails to plausibly allege that any of the statements which can be attributed to Mr. Wyremski were materially misleading. These statements concern Signature’s: (1) capital ratios; (2) liquidity management policies; (3) internal controls; (4) compliance with Generally Accepted Accounting Principles (“GAAP”); and (5) stress testing.

⁵ For the same reasons, Mr. Wyremski cannot be held liable for any alleged misstatements statements before he became an officer of Signature on June 30, 2021. ¶ 34.

A. Statements About Signature’s Risk Profile Are Inactionable Puffery or Opinion

Plaintiff contends that statements about Signature’s “strong risk-based capital ratios reflect the *relatively low risk profile of the Bank’s balance sheet*,” were false and misleading. See ¶¶ 246-47, 256-57, 275-76, 288-89, 297-98, 315-16, 334-35 (emphasis in original).⁶ But “[v]ague positive statements regarding a corporate entity’s risk management strategy [&] asset quality ... are precisely the type of puffery that this and other circuits have consistently held to be inactionable.” *In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 170 (2d Cir. 2021) (citation omitted); see Joint Br. at I.B. But even if such statements are not puffery (which they are), Mr. Wyremski’s characterizations of a “strong” and “relatively low risk profile” are inactionable subjective opinions, not statements of fact. See *Africa v. Jianpu Tech. Inc.*, 2022 WL 4537973, at *5 (S.D.N.Y. Sept. 28, 2022) (quoting *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 528 (S.D.N.Y. 2015); see also *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 194 (2015). Views regarding the Bank’s strength and risk are opinions because they are not objective and determinate verifiable statements like “this ring is 24 carat gold.” *Axar Master Fund, Ltd. v. Bedford*, 308 F. Supp. 3d 743, 755-56 (S.D.N.Y. 2018); see Joint Br. at I.C.3.

While a Plaintiff may attempt to overcome a statement of opinion under *Omnicare* if it sufficiently pleads that “the speaker did not hold the belief she professed,” Plaintiff does no such thing. See *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016) (quoting *Omnicare*, 575 U.S. at 185-86). Plaintiff pleads no facts that Mr. Wyremski did not hold these beliefs. See generally Compl. (no allegations to the contrary about Signature’s “capital ratios”). In fact, for Signature’s 2020 and

⁶ Plaintiff also claims challenges the following statement “deposit declines, which *we overcame with little difficulty, given our robust liquidity position*,” as false and misleading. See ¶ 333 (italicized emphasis in original; bolded emphasis added). While Mr. Wyremski signed the January 17, 2023 Form 8-K attaching a press release with this statement, the challenged statement is, on its face, not attributable to Mr. Wyremski. See Ex. JJJ, at 8. But even if this statement could be attributable to Mr. Wyremski, discussion about a “little difficulty” and “robust” are inactionable puffery or opinion, and Plaintiff pleads no facts that Mr. Wyremski did not hold these beliefs at the time. See also Joint Br. at I.A-B.

2021 review periods, regulators rated the “overall condition of the Bank as satisfactory.” Ex. EE, at 21, 25; *see also* Joint Br. at F.⁷ Further, Plaintiff cannot rely on *Omnicare* to allege “fraud by hindsight” or pursue claims where an opinion is merely irrational or over-optimistic. *See, e.g., Woolgar v. Kingstone Cos.*, 477 F. Supp. 3d 193, 224-26 (S.D.N.Y. 2020).

For liability based on an omission from an opinion, “the investor must identify particular (and material) facts going to the basis for the issuer’s opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.” *Bldg. Trades Pension Fund of W. Pa. v. Insperity, Inc.*, 2022 WL 784017, at *7 (S.D.N.Y. Mar. 15, 2022) (internal citations and quotations omitted). For each of the Form 8-Ks signed by Mr. Wyremski relating to “risk-based capital ratios” and the Bank’s “relatively low risk profile,” those opinion statements are surrounded by factual statements about Signature’s Tier 1 capital ratios and Signature’s common equity ratio. *See* Ex. II, at 7; *see also* Ex. VVV, at 7; Ex. DD, at 10; Ex. UUU, at 9; Ex. TTT, at 10; Ex. JJJ, at 9-10. Plaintiff does not contend any of the statements surrounding these opinions were false (they were not) or that the supporting facts Mr. Wyremski supplied were untrue (they were true). Indeed, the Complaint is “devoid of allegations that [Signature’s] capital ratio was anything other than what [Mr. Wyremski] represented it to be.” *Solow v. Citigroup, Inc.*, 2012 WL 1813277, at *4 (S.D.N.Y. May 18, 2012) (pre-*Omnicare* decision dismissing private civil securities complaint).

⁷ Regulatory examinations for 2022 were ongoing at the time Signature closed. *See* Ex. EE, at 28; Ex. B, at 29.

B. Statements About Signature’s Liquidity Processes Are Not False and Are Forward-Looking Statements Covered by the PSLRA’s Safe Harbor

Plaintiff also attempts to hold Mr. Wyremski liable for various statements about Signature’s liquidity management policies in various Forms 10-Q. ¶¶ 252-53, 291-92, 312-13, 320-22. As an initial matter, Plaintiff’s cherry-picked excerpts ignore the context in which such statements were made. *See, e.g., In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 578 (S.D.N.Y. 2014) (considering alleged misstatement in context of surrounding statements from securities filings). Further, all of these alleged misstatements are protected by the PSLRA’s safe harbor because they are “forward-looking statement[s]” “accompanied by meaningful cautionary language” “about factors that realistically could cause results to differ materially.” *Gregory v. ProNAi Therapeutics Inc.*, 297 F. Supp. 3d 372, 397 (S.D.N.Y. 2018) (citations and quotations omitted). The definition of “forward-looking statement,” includes, among other things, “a statement of the plans and objectives of management . . . , including plans or objectives relating to the products or services of the issuer . . . [and] “any statement of the assumptions underlying or relating to [such] statement.” 15 U.S.C. §§ 78u-5(i)(1)(A)-(D).

Plaintiff simply ignores the language surrounding the challenged statements about liquidity management policies, specifically statements that “[l]iquidity is the measurement of our ability to meet our cash needs. Our *objective* in managing liquidity is *to maintain* our ability *to meet* loan commitments and deposit withdrawals . . . without an adverse impact on *our current or future earnings*.... [T]he Bank *may raise* funds through a common stock offering . . . [but] our primary source of liquidity has been core deposit growth.” *See* Ex. H, at 84 (emphasis added). This August 2021 10-Q explicitly stated that it contained “forward-looking statements,” is “subject to risks and uncertainties,” and contain words such as “*may*, believe, expect, anticipate, potential, opportunity, intend, [and] plan” *Id.* at 50-51 (emphasis added) (internal quotations omitted). The other

Signature 10-Qs did as well. *See* Ex. G, at 44-45; Ex. I, at 49-50; Ex. J, at 41-42; Ex. K, at 45-46; Ex. L, at 49-50.

Specific risks and uncertainties detailed in this cautionary language include “*deposit growth*,” “disruption and *volatility in global financial markets*; ... difficult market conditions adversely affecting our industry; ... *illiquid market conditions* and downgrades in credit ratings; ... our *reliance on the Federal Home Loan Bank of New York for secondary and contingent liquidity sources*; our inability to raise additional funding needed for our operations; [and] *soundness of other financial institutions*.” Ex. H, at 50-51 (emphasis added.) All of the securities filings associated with the challenged statements regarding liquidity policies contain such forward-looking statement cautionary language, and incorporate by reference the Forms 10-K filed in the preceding year, which themselves have their own detailed risk factors. *See id.* at 51, 87 (referring investor to March 1, 2021 Form 10-K, which itself expands on each of the above-described risk-factors); Ex. C; *see also* Ex. G, at 44-45, 79; Ex. I, at 49-50, 87; Ex. J, at 41-42, 74; Ex. K, at 45-46, 80; Ex. L, at 49-50, 85; Ex. F. The challenged statements regarding liquidity policies fall squarely in the safe harbor for forward-looking statements about “objectives,” which language was accompanied by “meaningful cautionary statements.” *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d at 530; *see also* Joint Br. at I.D.

C. Statements About Signature’s Internal Controls Are Not Actionable

Plaintiff claims that statements about Signature’s internal controls were misleading, specifically statements about Signature’s “commit[ment] to a sound risk management process,” and that it has “*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.” ¶¶ 252-53, 277-79, 338-40 (italicized emphasis in original; bolded emphasis added). But Plaintiff ignores the surrounding text, which explicitly states “[n]o system of internal control or policies and procedures will ever totally eliminate risk.” *See, e.g.*, Ex. D, at 13. Such statements about the potential future effect of internal controls, which were accompanied by the same meaningful cautionary language discussed in Part II.B, *supra*, make these challenged statements forward-looking statements subject to the PSLRA’s safe harbor. Furthermore, as explained in Part II.A, *supra*, Mr. Wyremski’s statements about his “beliefs” regarding Signature’s internal controls are not actionable as puffery or as opinion statements under *Omnicare*. *See, e.g., In re Liberty Tax, Inc. Sec. Litig.*, 435 F. Supp. 3d 457, 467 (E.D.N.Y. 2020) (“statements regarding [a public company’s] internal controls are puffery”) (collecting cases); *see also* Joint Br. at I.B.2.

Even if these challenged statements were statements of fact (which they are not), Plaintiff has “failed to allege specific facts concerning the purportedly deficient internal controls, including how they were deficient, when and why.” *Janbay v. Canadian Solar, Inc.*, 2012 WL 1080306, at *9 (S.D.N.Y. Mar. 30, 2012). Specifically, Plaintiff does not allege that Signature did not have any internal controls, or that there were any misstatements in the financial results Signature reported, which falls short of the exacting pleading requirements of Rule 9(b) and the PSLRA. *Id.* Further, as Signature stated that no internal controls system would completely eliminate future risk, no reasonable investor would view Signature’s internal controls as perfect. *See* Joint Br. at I.B.2.

D. Allegations About Signature’s Internal Controls Regarding Compliance with GAAP Are Inactionable

Plaintiff claims that statements about Signature’s “internal controls over financial reporting” were false and misleading, and allegedly did not comply with GAAP because they failed to disclose an alleged concentration in “large, uninsured deposits.” ¶¶ 282-83, 343-44, 350-51. But Plaintiff’s premise for this claim has nothing to do with GAAP or internal controls—it relates to

the FDIC report about uninsured deposits, *see id.*—and the challenged statements were not false.

First, the challenged statements concern internal controls *over financial reporting* and the Complaint “does not concretely allege that any of [Signature’s] financial reports were in any way inaccurate.” *In re Braskem S.A. Sec. Litig.*, 246 F. Supp. 3d 731, 758 (S.D.N.Y. 2017). Further, Plaintiff ignores the surrounding text of the challenged statements that “internal control over financial reporting may not prevent or detect misstatements on a timely basis ... [and] it is [not] possible ... to eliminate [] this risk,” and that management “*believes* that the Company’s internal control over financial reporting ... is effective.” *See, e.g.*, Ex. D, at 109 (emphasis added); Ex. F, at 111; *see Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 299 (S.D.N.Y. 2019) (dismissing complaint and finding “statements did not state that the Company’s internal controls were effective—they stated only that management had *concluded* as much.”) (emphasis in original); *see also* Joint Br. at I.F.

Second, Signature *did disclose* a large concentration of uninsured deposits and the associated risk. For example, in its Form 10-K for 2021, under its “Risk Factors,” Signature described its 92% uninsured depositor base and that the risks associated with uninsured deposits, including the risks of deposit outflows and how these risks could materially impact Signature’s business. Ex. F, at 54 (emphasis added); *see also* Ex. D, at 52-53. Indeed, in Signature’s March 1, 2023 Form 10-K, Signature noted that as of December 31, 2022, “approximately 89.7% of our total deposits of \$88.59 billion were not FDIC-insured.” Ex. D, at 52-53; Ex. F, at 42, 54. Signature also disclosed that deposits from digital asset banking customers exceeded \$20 billion at the end of 2021. Ex. F, at 49. Further, Signature expanded its Risk Factors in 2023, stating “declines in digital asset deposits can occur because of volatility in the value of digital assets, a loss of confidence in the digital asset ecosystem and negative publicity surrounding digital assets.” Ex.

D, at 53. The “risk [of uninsured deposits] was adequately described, as was its potential impact on the Company’s business.” *Ong v. Chipotle Mexican Grill, Inc.*, 2017 WL 933108, at *17 (S.D.N.Y. Mar. 8, 2017); *Gissin v. Endres*, 739 F. Supp. 2d 488, 508 (S.D.N.Y. 2010).

E. Allegations About Signature’s Stress Testing Do Not Give Rise to 10b-5 Liability

Plaintiff challenges two statements about Signature’s stress testing, specifically statements about stress testing policies. ¶¶ 280-81, 341-42. These statements were neither false nor misleading. Again, when read in the context of the surrounding language of the accompanying disclosures, it is clear that Signature was speaking about “Capital Planning and Stress Testing” under the “Dodd-Frank Act Stress Tests (‘DFAST’),” which apply when a bank has \$250 billion in total consolidated assets. *See* Ex. F, at 22. Signature expressly said that DFAST did not apply to it. *Id.* at 26, 107. Signature’s statements about “capital stress-testing” were about “a process to comply” with *forthcoming* regulatory requirements. *Id.* at 26 (Signature’s board “receives quarterly updates as to the progress and challenges in complying with this new regulatory requirement.”). While Signature discussed monitoring and capital stress testing, this entire paragraph concerns future requirements, and Signature expressly stated that while it would “no longer be required to file and report annual company-run stress tests until the minimum asset threshold is reached,” it would perform capital stress testing on “a situational and idiosyncratic basis.” *Id.* In any event, whatever deficiencies that either the FDIC or NYDFS may have identified as to Signature’s capital stress testing, Signature (and by extension, Mr. Wyremski, if he had received such regulatory communications) was prohibited by law from disclosing regulatory findings and discussions under those agencies’ respective regulations. *See* N.Y. Banking Law § 36(10) (reports of examinations and related correspondence and memoranda of a New York-chartered bank are “confidential and shall not be public absent NYDFS authorization);

3 N.Y.C.R.R. § 7.2 (NYDFS regulations providing same); 12 C.F.R. § 309.6 (FDIC regulation providing same); *see also* Joint Br. at I.A.

III. Plaintiff Pleads No Allegations Giving Rise to a Strong Inference of Scienter

Plaintiff fails to adequately plead that Mr. Wyremski acted with knowledge or recklessness as to either the material misstatement or scheme liability claims.

A. Plaintiff Pleads No Allegations of Scienter as to Mr. Wyremski

Under the PSLRA, a plaintiff must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” *City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) (citation omitted); 15 U.S.C. § 78u-4(b)(2)(A). A complaint can survive a motion to dismiss “only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 324 (2007). A plaintiff must allege “facts to show either (1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness.” *ECA*, 553 F.3d at 198. This means an “a mental state embracing intent to deceive, manipulate, or defraud,” *Tellabs, Inc.*, 551 U.S. at 319, and for conscious misbehavior or recklessness, “an *extreme* departure from the standards of ordinary care . . . that the danger was either known to the defendant or is *so obvious* that the defendant must have been aware of it.” *In re PXRE Grp., Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 535 (S.D.N.Y. 2009) (emphasis added). But the 159-page, 499 paragraph Complaint fails to allege that Mr. Wyremski acted with fraudulent motive or intent.

B. Plaintiff Completely Fails to Plead Motive as to Mr. Wyremski

While none of Plaintiff’s allegations of motive are sufficient as to any defendant, the

absence of *any* allegations of motive as to Mr. Wyremski is particularly telling. *See generally* ¶¶ 422-42. Indeed, Plaintiff identifies no “concrete and personal way” in which Mr. Wyremski benefited from the alleged fraud. *ECA*, 553 F.3d at 198.

C. Plaintiff Fails to Plead Recklessness as to Mr. Wyremski

Where, as here, “there is no motive,” “the strength of the circumstantial allegations [of conscious misbehavior or recklessness] must be correspondingly greater.” *Id.* at 199 (quoting *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001)). The Second Circuit has interpreted “reckless disregard for the truth,” to mean “conscious recklessness—*i.e.*, a state of mind *approximating actual intent*, and *not merely a heightened form of negligence*.” *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (quoting *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000) (emphasis in original)). The Complaint alleges no such thing.

As an initial matter, while Plaintiff has allegedly received information from numerous purported former employees of Signature (Compl. at 2, ¶¶ 97, 119-20, 150, 408, 420), not one of these purported confidential witnesses claims any contact or discussions with Mr. Wyremski during the class period to give rise to a strong inference of scienter as to Mr. Wyremski. *Woolgar*, 477 F. Supp. 3d at 238 (S.D.N.Y. 2020) (dismissing 10b claims when plaintiff “failed to allege any facts showing that the confidential sources ... had any contact with the Individual Defendants or would have knowledge of what they knew or should have known during the Class Period.”) (internal citation omitted); *Bd. of Trustees of City of Ft. Lauderdale Gen. Employees’ Ret. Sys. v. Mechel OAO*, 811 F. Supp. 2d 853, 880 (S.D.N.Y. 2011) (same, dismissing complaint).

Plaintiff’s group pleading allegation that “Defendants” had “control over the entire Bank and access to non-public information” fare no better. ¶¶ 417-19.⁸ This is because scienter “cannot

⁸ The group pleading doctrine “does not permit plaintiffs to presume the state of mind of [the] defendants at the time the alleged misstatements were made.” *Orlan v. Spongetech Delivery Sys., Inc., Sec. Litig.*, 2012 WL 1067975, at *11

be inferred solely from the fact that, due to the defendants’ ... executive managerial position, they had access to the company’s internal documentation as well as any adverse information.” *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 407 (S.D.N.Y. 2016). Yet by alleging that “because of their high-level positions, each Defendant was provided with, or had access to” press releases, regulator reports, and related communications (§§ 417-19), Plaintiff impermissibly attempts to do just that. *See also In re DraftKings Inc. Sec. Litig.*, 650 F. Supp. 3d 120, 178 (S.D.N.Y. 2023); *Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 816 (S.D.N.Y. 2018) (questioning viability of the “core operations” theory under PSLRA, noting it “does not independently establish scienter”).

Moreover, nowhere in the Complaint does Plaintiff allege with specificity that Mr. Wyremski ***received and reviewed*** any specific report during the class period that would give rise to knowledge of the falsity of the allegedly misleading statements. *See, e.g., In re DraftKings*, 650 F. Supp. 3d at 177 (“pleadings are sufficiently specific where the plaintiffs have alleged who prepared the reports, how frequently they were prepared, and who reviewed them”) (citation and alterations omitted); *In re PXRE Grp., Ltd., Sec. Litig.*, 600 F. Supp. 2d at 536 (“a plaintiff must allege that the speaker was aware of adverse information at the time he spoke”) (quotation and citation omitted).

Further dooming the Complaint are claims that alleged misstatements by Mr. Wyremski were false and misleading ***based on statements by others and events occurring prior to Mr. Wyremski becoming CFO***. For example, ¶ 276 alleges Mr. Wyremski had scienter by cross-referencing Complaint paragraph 206, which in turn, cites a January 20, 2021 Form 8-K ***not signed*** by Mr. Wyremski and which paragraph discusses alleged regulatory findings ***pre-dating*** Mr. Wyremski’s tenure as CFO. *See also* §§ 257 and 276 (both citing ¶ 206); §§ 281, 289, 292, 298,

(E.D.N.Y. Mar. 29, 2012) (dismissing complaint and requiring plaintiff to plead scienter as to individual defendant with specificity); *see also* Joint Br. at II.B.1.

313, 316, 322 (all citing ¶ 276); ¶¶ 252 and 262 (citing ¶¶ 208-13); ¶ 254 (citing ¶ 239). Knowledge of others at Signature may not be imputed to Mr. Wyremski, and Plaintiff pleads no particularized facts as to Mr. Wyremski giving rise to a strong inference of scienter. *See* Joint Br. at II.B.1.

Plaintiff's claims of scienter as to alleged misstatements relating to internal controls (¶¶ 277-83, 338-44)—which were not misstatements—fail for the simple reason that such statements about the “design[] and implement[ation of] internal control procedures, without corresponding evidence that they knew or should have known about weaknesses in the controls, does not support an inference of recklessness.” *Saraf v. Ebix, Inc.*, 632 F. Supp. 3d 389, 400 (S.D.N.Y. 2022).

As it relates to the alleged misstatements pertaining to GAAP (¶¶ 282-83, 343-44, 349-56), Plaintiff fails to plead a strong inference of scienter. *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 270 (2d Cir. 1996) (“Allegations of a violation of GAAP provisions[,] . . . without corresponding fraudulent intent, are not sufficient to state a securities fraud claim.”). *First*, these were not false or misleading. *See* Part II.D, *supra*. *Second*, Mr. Wyremski did not act with “conscious recklessness” because the alleged risk that Plaintiff now complains was not disclosed was, in fact, disclosed and squarely addressed by regulators as a future supervisory recommendation *after* Signature closed.

According to NYDFS, banking rules did not contemplate the speed at which deposits would leave Signature. Indeed, the agency noted that the events at Signature “underscore[] the need to revisit the assumptions used to model and manage liquidity risk. . . ., both the types of Signature’s depositors that ran and the speed at which they initiated withdrawals far outpaced assumptions many institutions use to model and assess liquidity risk.” Ex. EE, at 44. NYDFS concluded that the behavior it observed with Signature’s depositors “did not align with [liquidity coverage ratio] assumptions, in many instances exceeding them, despite the fact that the rule is

intended to provide a uniform and conservative liquidity risk-management framework. Indeed, Signature’s customers withdrew their deposits despite existing longstanding relationships and despite the fact that some customers also held operating accounts at the Bank.” *Id.* at 45; *see also* Ex. B, at 36 (“[P]reviously, no one had modeled for this catastrophic of an event.”).

At bottom, Mr. Wyremski could not have acted with conscious recklessness in his statements about internal controls and GAAP when the very speed of deposit flight was never anticipated by Signature’s banking regulators, and therefore could not have been required for Signature’s management to consider. *See, e.g., Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 120-21 (2d Cir. 1982); *SEC v. Price Waterhouse*, 797 F. Supp. 1217, 1240 (S.D.N.Y. 1992) (recklessness standard in a securities fraud action “requires more than a misapplication of accounting principles”); *see also* Joint Br. at II.B.2.

IV. Plaintiff Has Not Adequately Pled Scheme Liability

Plaintiff’s entire theory of scheme liability as to Mr. Wyremski fails because Plaintiff has not identified any “deceptive act” apart from his alleged misrepresentations. *Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC*, 164 F. Supp. 3d 568, 586 (S.D.N.Y. 2016). Every allegation as to Mr. Wyremski relates to an alleged misstatement he made or securities filings he signed. That Mr. Wyremski served on Signature’s asset/liability committee (¶¶ 253, 291, 312, 321, 407-08) is wholly insufficient to give rise to scheme liability when the Complaint fails to plead any “specific acts” “in furtherance of” a fraud (the “what”), or “when” they allegedly occurred, let alone Plaintiff’s reliance on such acts. *Plumber & Steamfitters Loc. 773 Pension Fund v. Danske Bank A/S*, 11 F.4th 90, 105 (2d Cir. 2021). This is fatal to Plaintiff’s scheme liability claims because the failure to allege an “inherently deceptive act,” coupled with the failure to allege a strong inference of scienter, *see* Part III, *supra*, means the claims under Rules 10b-5(a) and (c) must be dismissed.

SEC v. Rio Tinto, 41 F.4th 47, 49 (2d Cir. 2022) (“misstatements and omissions--without more” cannot form basis for scheme liability claims); *see also* Joint Br. at IV.A.

V. Plaintiff Has Not Adequately Pled Loss Causation

The Complaint fails to allege facts showing that the alleged economic harm that Plaintiff suffered occurred “as a result of” statements or omissions attributable to Mr. Wyremski, and therefore, fails to plead loss causation. *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005). To the extent Plaintiff claims Signature’s stock price dropped, that is insufficient if nothing in the purported “corrective disclosure” disclosed an alleged fraud. *See* Joint Br. at III.A. But even if the alleged statements attributable to Mr. Wyremski were false (and they were not), the “immediate cause” of the Bank’s closing and the corresponding stock price drop was the “propulsive run on deposits instigated by” the announcements of the Silvergate Bank liquidation on March 8, 2023 and SVB’s closing on March 10, 2020, which resulted in the second-fastest bank run in history. Ex. EE, at 5; *In re DraftKings Inc. Sec. Litig.*, 650 F. Supp. 3d at 152 (complaint must plead that the “misstatements and omissions concealed the circumstances that bear upon” plaintiff’s loss). Finally, Plaintiff has failed to plausibly allege any disclosure of a fraud that “corrected” an allegedly false statement attributable to Mr. Wyremski “regarding ... [Signature’s] financial condition.” *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010); *see also In re Merrill Lynch & Co. Rsch. Reps. Sec. Litig.*, 568 F. Supp. 2d 349, 363 (S.D.N.Y. 2008) (plaintiff must allege “facts sufficient to support an inference that it was defendant's fraud—rather than other salient factors—that proximately caused plaintiff's loss”).

CONCLUSION

For the foregoing reasons, and those set forth in the Joint Brief, the Complaint should be dismissed with prejudice.

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