UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re General Electric Co. Sec. Litig.	**Civ. No. 09-CIV-1951 (RJH)** **ECF CASE**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF 1933 ACT RULINGS

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All Defendants respectfully submit this memorandum of law in support of their motion for reconsideration of certain 1933 Act portions of the Court's Memorandum Opinion and Order dated January 11 and entered January 12, 2012 (the "Order").

PRELIMINARY STATEMENT

Defendants do not raise any issues that the Order has already addressed. Rather, Defendants respectfully submit this "memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked." S.D.N.Y. Local Civ. R. 6.3 (Effective Jan. 10, 2012).

First, it was a legal error for the 1933 Act portion of the Order pertaining to commercial paper to rely on statements that GE's "funding position is strong." Pursuant to the language of the Offering Documents and SEC rules, the "strong" statements were *not* incorporated into the Offering Documents. Therefore, as a matter of law, these statements cannot be the basis for a claim under Sections 11 or 12. Because of this error, the Court did not rule on whether the operative statement on commercial paper in the Offering Documents—that "we continue to successfully meet our commercial paper needs"—is inactionable puffery or opinion. Because there is no objective standard of success, that statement is at most an inactionable opinion under *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 113 (2d Cir. 2011) ("*Fait*"), a decision rendered after briefing and oral argument that the Order did not address.[1]

Second, the Order also erred in sustaining the other remaining 1933 Act claim—"that the value of the assets that GE listed in its prospectus was inflated" based on the allegation that GE reclassified assets "in order to avoid" writedowns. No 1933 Act claim could be based on this allegation because the 1933 Act claims expressly disclaim *all* allegations of illicit intent,

[1] Defendants filed an August 26, 2011 letter that apprised the Court of *Fait*.

knowledge, or recklessness. *Fait* held that valuations for subprime mortgage assets are opinions, and dismissed 1933 Act claims attacking valuations and other opinions that, as here, did not properly allege that the opinions were "not honestly believed when they were made." 655 F.3d at 113; *id*. at 110 ("disbelieved by the defendant at the time it was expressed").[2]

Thus, full dismissal of Plaintiff's 1933 Act claims is required by *Fait*, the language of the Offering Documents, and applicable SEC rules limiting incorporation by reference. This ruling would eliminate 42 Defendants—all 26 Underwriter Defendants and 16 outside Director Defendants—from the case.

ARGUMENT

Pursuant to S.D.N.Y. Local Civil Rule 6.3, a motion for reconsideration is proper when "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *FR 8 Singapore Pte. Ltd. v. Albacore Mar. Inc.*, 794 F. Supp. 2d 449, 451 (S.D.N.Y. 2011) (Holwell, J.) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). Under this standard, the two remaining 1933 Act allegations should be dismissed.

I. UNDER *FAIT*, THE ONLY COMMERCIAL PAPER STATEMENT THAT WAS PART OF THE OFFERING DOCUMENTS WAS AT MOST AN INACTIONABLE OPINION.

A. The Order Relied On Unincorporated Statements.

"To state a claim under Sections 11 and 12(a)(2), a security purchaser must allege that an *offering document* contained a false statement of material fact or omitted a material fact

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[2] Defendants' prior briefing raised that the 1933 Act commercial paper and reclassification/valuation claims challenged at most inactionable opinions. (*See* UW Br. at 17-18, 28-29; UW Reply Br. at 11-13, 23-24.) In addition, the Order did not address the showing by the Underwriter Defendants that the SAC fails to allege facts necessary to establish Section 12 standing against the Underwriter Defendants.

'necessary to make the statements therein not misleading.'" (Order at 46 (emphasis added).) The 1933 Act portion of the Order relied principally on statements about commercial paper in a press release attached to GE's September 25, 2008 8-K, that "demand remains strong" for GE's commercial paper and that "GE's funding position is strong and GE has performed well during the recent market volatility." (Order at 48.) As urged by Plaintiff's Opposition at 108, the Order said that these "strong" statements were "incorporated by reference into the Offering Documents." (Order at 48.) But these statements were *not* incorporated into the Offering Documents.

The Offering Documents incorporated by reference the September 25, 2008 8-K "with respect to Item 8.01 *only*." (GE Prospectus Supplement (Oct. 2, 2008) at S-iii (emphasis added) (Ex. 1).)[3] Item 8.01 stated only that GE was "[r]educing GE Capital's commercial paper debt to a level of 10-20% of GE Capital debt."[4] (GE Form 8-K (Sept. 25, 2008) at 2 (Ex. 2).)

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[3] References herein to "Ex. __" are to the exhibits attached to the accompanying Declaration of Mei Lin Kwan-Gett, dated January 26, 2012 (the "Kwan-Gett Declaration").

[4] The entirety of Item 8.01 of the September 25 8-K states:

> **Item 8.01 Other Events**
>
> On September 25, 2008, the Company revised its guidance for the third quarter and full year, reflecting the unprecedented weakness and unpredictability in the financial services markets. The Company anticipates that the difficult conditions in the financial services markets are not likely to improve in the near future.
>
> GE also reaffirmed its longstanding commitment to its Triple-A rating. It is taking steps to further strengthen its capital and liquidity position, including:
>
> - Increasing capital in GE Capital Corporation ("GE Capital") to reduce leverage ratios through a reduction in the GE Capital dividend to GE from 40% to 10% of GE Capital earnings and by suspending the current GE stock buyback.
> - Having already completed $70 billion in long-term funding year-to-date, GE Capital will not have to raise any additional long-term debt for the remainder of 2008.

In addition, and independently, the "strong" statements in the press release were not incorporated into the September 25, 2008 8-K as a matter of law. Rather, the press release was attached to that 8-K as an exhibit pursuant to Item *7.01*. In these circumstances, "all exhibits to [an 8-K] relating to . . . Item 7.01 will be deemed furnished, and not filed." S.E.C. Form 8-K § B.2. Such furnished information "is *not* incorporated by reference into a registration statement . . . or other report unless the registrant specifically incorporates that information into those documents by reference." *Conditions for Use of Non-GAAP Financial Measures*, S.E.C. Release No. 33-8176, Release No. 34-47226, 2003 WL 161117, at *12 (Jan. 22, 2003) (emphasis added).

In addition to the unincorporated "strong" statements, the Order's 1933 Act ruling also mentioned another statement with regard to commercial paper: "prior disclosures that describe the risk of impaired access as 'unlikely.'" (Order at 49.) The Order properly did not rule that this statement by itself could sustain the 1933 Act commercial paper allegations. As a matter of law, it cannot.

GE's 10-Ks for 2005 to 2007 stated that "alternative sources of liquidity are sufficient to permit an orderly transition from commercial paper in the unlikely event of impaired access to those markets." (*E.g.*, 2005 10-K at 59; SAC ¶ 138a.) The last of these 10-Ks was issued February 20, 2008. Although these 10-Ks were incorporated by reference into the Offering Documents, the October prospectus supplement specifically explained that "documents that we file later with the SEC [including the prospectus supplement] will automatically update and *supersede* information contained in documents filed earlier with the SEC"—such as these prior

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- Reducing GE Capital's commercial paper debt to a level of 10-20% of GE Capital debt.
- Accelerating the attainment of GE's goal of a 60-40 industrial-financial services earnings split to the end of 2009.

10-Ks—*and* that investors "should not assume" that statements in incorporated documents such as 10-Ks were "accurate as of any date other than their respective dates. " (Ex. 1 at S-ii, S-iii (emphasis added).)

This "superseding" language in GE's prospectus supplement restates the applicable law found in SEC Rule 412. Rule 412(a) provides that "[a]ny statement contained in a document incorporated . . . by reference . . . shall be deemed to be modified or superseded for purposes of the registration statement or the prospectus that is part of the registration statement to the extent that a statement contained in the prospectus that is part of the registration statement . . . modifies or replaces such statement." 17 CFR § 230.412(a). Indeed, Rule 412(b) states that: "The modifying or superseding statement may, *but need not*, state that it has modified or superseded a prior statement or include any other information set forth in the document which is not so modified or superseded." 17 CFR § 230.412(b) (emphasis added). Rule 412(c) then precludes a 1933 Act claim for statements in incorporated documents that have been modified or superseded. "Any statement so modified shall *not* be deemed in its unmodified form to constitute part of the registration statement or prospectus for purpose of the Act. Any statement so superseded shall *not* be deemed to constitute a part of the registration statement or the prospectus for purposes of the Act." 17 CFR § 230.412(c) (emphasis added); *see also In re AirGate PCS, Inc. Sec. Litig.*, 389 F. Supp. 2d 1360, 1369-70 & n.5 (N.D. Ga. 2005) (dismissing pertinent 1933 Act claims based on Rule 412).[5]

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[5] *Tracinda Corp. v. DaimlerChrysler AG*, 364 F. Supp. 2d 362 (D. Del. 2005), *aff'd*, 502 F.3d 212 (3d Cir. 2007), is instructive even outside Rule 412. In *Tracinda*, the plaintiff alleged that "the Proxy/Prospectus falsely represented that the two non-automotive members of the DaimlerChrysler Board of Management were non-voting members, when in fact these members were voting members." 364 F. Supp. 2d at 414. The source of this alleged misrepresentation was an 8-K incorporated by reference into the Proxy/Prospectus that listed the two Board members in question as "Non-Voting." *Id*. But the Proxy/Prospectus itself contained "no

GE's October 2008 prospectus supplement, as a matter of law and by its plain terms, both modified and superseded the earlier 10-Ks with respect to commercial paper. The expressly "superseding" prospectus supplement specifically stated that the offering "will give us [GE] additional flexibility in the event of *further* deterioration in the commercial paper and other credit markets." (Ex. 1 at S-2 (emphasis added).) It acknowledged that "[i]n recent weeks, the volatility and disruption have reached unprecedented levels" and "that the difficult conditions in the financial markets are not likely to improve in the near future." (*Id*. at S-3, S-1; *see* SAC ¶ 117a (admitting that the preliminary prospectus "acknowledged . . . that current levels of market volatility were unprecedented").) It continued:

> [A]lthough GE Capital has continued to issue commercial paper, there can be *no assurance that such markets will continue to be a reliable source of short-term financing for GE Capital*. If *current* levels of market disruption and volatility *continue or worsen*, or if we cannot lower our asset levels as planned, we would seek to repay commercial paper as it becomes due or to meet our other liquidity needs using the net proceeds of this offering and the Berkshire Investment, by drawing upon contractually committed lending agreements primarily provided by global banks and/or by seeking other funding sources. However, under such extreme market conditions, there can be *no assurance* such agreements and *other funding sources would be available or sufficient*.

(Ex. 1 at S-3 (emphases added).) These statements were neither standardized nor boilerplate. For example, they were *not* in the earlier 10-Ks, and they specifically referenced a "recent" and "unprecedented" level of market disruption and volatility that did not exist when the earlier 10-Ks were issued. In fact, the "Risk Factors" in the prospectus supplement began with a literally current disclosure on the course of the TARP legislation and then proceeded to an up-to-the-

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designation or reference that these members would not be voting." *Id*. "Because the Proxy/Prospectus controls as to any statement incorporated by reference and the Proxy/Prospectus contains no reference that any members of the Board of Management would be non-voting," the court held that the plaintiff could not "establish a misrepresentation based on the incorporation by reference into the Proxy of Chrysler's Form 8-K." *Id*.

minute discussion of the unprecedented volatility and disruption then found in the capital and credit markets. (*See id*. at S-3 to S-4.)

At a minimum, the prospectus supplement modified and superseded the statement in the earlier 10-Ks by replacing the statement that "impaired access" was an "unlikely event" with the October 2008 prospectus supplement's statements that the offering "will give us additional flexibility in the event of further deterioration in the commercial paper . . . markets" and that "there can be no assurance that such markets will continue to be a reliable source of short-term financing for GE Capital." (Ex. 1 at S-2, S-3.) As SEC Rule 412 provides, even though the earlier 10-Ks were incorporated, because their commercial paper statements were modified and superseded by different commercial paper statements in the prospectus supplement, no 1933 Act claim can be based on the earlier 10-Ks' commercial paper statements.

B. "Successfully" Is At Most An Inactionable Opinion.

Without the unincorporated "strong" and superseded 10-K statements, the *only* statement in the Offering Documents regarding commercial paper that Plaintiff can challenge under the 1933 Act is the statement that "in the recent market volatility, we continue to successfully meet our commercial paper needs. The economic environment remains volatile . . ." (UW Br. at 28; SAC ¶ 117.) This statement was attached to an 8-K filed October 1, 2008 pursuant to Item 8.01 and thereby incorporated into the Offering Documents. (GE Form 8-K (Oct. 1, 2008) (Ex. 3); Ex. 1 at S-iii.)

As the Order held, however, the SAC's 1933 Act allegations fail when they challenge "inactionable statements of puffery or opinion." (Order at 50.) Characterizations that something was done "successfully" are, as a matter of law, inactionable statements of puffery or opinion. (UW Br. at 28.) *See In re Razorfish, Inc. Sec. Litig.*, No. 00 Civ. 9474, 2001 WL 1111502, at *3 (S.D.N.Y. Sept. 21, 2001) (Rakoff, J.) (statement about "*successfully* executing our growth

strategy" is inactionable as a "classic 'expression[] of optimism [or] puffery'") (emphasis added); *In re MCI WorldCom, Inc. Sec. Litig.*, 191 F. Supp. 2d 778, 784-86 (S.D. Miss. 2002) ("our Internet business continues to enjoy great success" and company "continues to enjoy success in its focus markets" were inactionable as "[v]ague statements of corporate optimism").

Fait held that to be an actionable factual statement under the 1933 Act, the statement must be amenable "to an objective standard." *Fait*, 655 F.3d at 113. At most, the statement that "we continue to successfully meet our commercial paper needs" is an inactionable opinion. Success is not objective. "'What one man would call a success another might not; there is no certain objective standard to which reference is impliedly made.'" *Stern v. Satra Corp.*, 539 F.2d 1305, 1308 (2d Cir. 1976) (quoting *Taylor v. Burr Printing Co.*, 26 F.2d 331, 334 (2d Cir. 1928) (L. Hand, J.)). What Learned Hand ruled in 1928 has since remained good law: "Value, quality, fitness, *success*, are usually understood as meaning no more than that the objects conform with the declarant's individual yardstick in such matters . . . and his hearer takes it for more at his peril." *Id*. (emphasis added). *Fait* held that, as here, "when a plaintiff asserts a claim under section 11 or 12 based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110. As the Order held, the SAC cannot allege a 1933 Act claim that attacks an opinion because Plaintiff's 1933 Act claims had disclaimed any allegation that GE did not believe an opinion "as a basis of its Securities Act claims." (Order at 51.)

II. UNDER *FAIT*, THE 1933 ACT RECLASSIFICATION/VALUATION CLAIM CHALLENGED AN OPINION BUT DISCLAIMED GE'S DISBELIEF.

Fait also held that when 1933 Act allegations challenge valuations of subprime assets as violating GAAP, they attack opinions. 655 F.3d at 110-11, 113; *see also City of Monroe*

Employees' Ret. Sys. v. Hartford Fin. Serv. Grp., Inc., No. 10 Civ. 2835, 2011 WL 4357368, at *13 (S.D.N.Y. Sept. 19, 2011) (citing *Fait* in dismissing "alleged misstatements [that] relate to defendants' valuations of assets"). In particular, the 1933 Act valuation claims in *Fait* were dismissed under Rule 12(b)(6) because those claims failed properly to "allege that defendants did not believe the statements . . . at the time they made them." 655 F.3d at 112; *id*. at 112 n.5 (although "fraudulent intent" is not required, 1933 Act opinion claims must "allege that defendant misstated his truly held belief"); *id*. at 113 (must allege "subjective falsity").

The Order sustained Plaintiff's 1933 Act claim "that the value of the assets that GE listed in its prospectus was inflated" based solely on Plaintiff's allegation that GE "had shifted its assets around on the books *in order to avoid writing them down*." (Order at 51-52 (emphasis added).) Earlier, the Order ruled this was an allegation that "GE moved its assets with the *intent* of 'hid[ing] assets until the market turned around.'" (Order at 30 (emphasis added; quoting SAC ¶ 73); *see id.* at 30 (describing allegations "that the purpose of these transactions was to avoid taking a loss on the assets").) *Cf. S.E.C. v. Patel*, No. 07-cv-39, 2008 WL 782483, at *2, *5 (D.N.H. Mar. 24, 2008) (allegation that defendants acted "*in order to avoid* a revenue reversal" sounded in fraud) (emphasis added); *In re Bank of America Corp. Sec., Deriv., and ERISA Litig.*, 757 F. Supp. 2d 260, 316 (S.D.N.Y. 2010) (describing allegation "that a definitive agreement was reached between Bank of America and federal regulators but was intentionally not memorialized *in order to avoid* public disclosure" as an allegation of fraud) (emphasis added).

Critically, however, unlike Plaintiff's 1934 Act claims, Plaintiff's 1933 Act claims rest on a repeated disclaimer: "the Securities Act claims are not based on *any* allegation that any Securities Act Defendant engaged in fraud or any other deliberate or intentional misconduct and Lead Plaintiff expressly disclaims any reference to or reliance upon allegations of fraud in

connection with the Securities Act claims." (SAC ¶ 74 (emphasis added).) Plaintiff further stated that the "Securities Act claims . . . are not based on any allegations of knowing or reckless misconduct on the part of any Defendant." (SAC ¶ 14.) Accordingly, the "in order to avoid writing them down" allegation cannot be any part of or provide any basis for any 1933 Act claim. The Court enforced Plaintiff's global disclaimer in dismissing the 1933 Act claims concerning the quality of GE's loan portfolio, (Order at 50 (dismissed as "inactionable puffery or opinion")), and the 2009 dividend, (*id*. at 51 (dismissed as "opinion"). The Court should equally enforce Plaintiff's disclaimer with respect to the 1933 Act reclassification/valuation claim and dismiss that claim pursuant to *Fait* for failure to allege disbelief.

III. THE SAC FAILS TO ALLEGE THE FACTS NECESSARY FOR SECTION 12 STANDING AGAINST THE UNDERWRITER DEFENDENTS.

If the Court agrees with Defendants on Points I and II, all 1933 Act claims would be dismissed, and this third point would be moot. The Underwriter Defendants otherwise respectfully request that the Court address their argument that the SAC fails to allege the facts necessary to establish standing pursuant to Section 12(a)(2) against any underwriter because it does not identify any underwriter from whom this Plaintiff purchased its securities or that solicited this Plaintiff. The Underwriter Defendants hereby incorporate by reference the arguments set forth on page 34 of their opening brief and pages 27-28 of their reply brief. *See also In re Barclays Bank PLC Sec. Litig.*, No. 09 Civ.1989, 2011 WL 31548, at *5 (S.D.N.Y. Jan. 5, 2011) ("To bring a Section 12 claim, a plaintiff must adequately allege that he or she purchased *the relevant shares directly from the defendant*.") (emphasis added). Plaintiff addressed this point on pages 117-118 of its opposition memorandum. For the convenience of the Court, the above-cited pages are appended to this motion at Exhibit 4.

CONCLUSION

The Court should grant reconsideration and dismiss Plaintiff's remaining 1933 Act allegations.

Dated: New York, New York
January 26, 2012

Respectfully Submitted,

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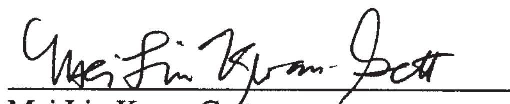

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CONCLUSION

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