UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION	)	12 MD 2335 (LAK)
	)	ECF Case
This Document Relates to:	)	
Louisiana Municipal Police Employees' Retirement System v. The Bank of New York Mellon Corp.	)	11 Civ. 9175 (LAK)

OFFICER AND DIRECTOR DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs allege various violations of the federal securities laws on the part of The Bank of New York Corporation (collectively with its subsidiaries, "BNYM"; individually, "BNYM Corp."), along with its current and former officers and directors ("Officers" and "Directors"; collectively, the "Individuals").[1] BNYM Corp. demonstrates in a separate brief that Plaintiffs fail to plead claims against any Defendant. *See* Memorandum in Support of the Motion of the Bank of New York Mellon Corporation to Dismiss ("BNYM Mem."), No. 11-cv-09175-LAK (filed Jun. 22, 2012). Those arguments, if successful, also require dismissal of the claims against the Individuals. However, there are additional reasons that Plaintiffs fail to plead claims against any Individual. The Individuals write separately to set forth those reasons here.

Plaintiffs' fraud claims against the Officers and Directors are indiscriminately and inadequately pleaded. In light of the Supreme Court's recent decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301 (2011), Plaintiffs cannot hold a defendant liable under Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. § 240.10b-5) unless that defendant "made" a particular actionable statement. Instead of attempting to meet this requirement, Plaintiffs attempt to attribute responsibility to the Officers for a long list of statements on the basis of general, conclusory allegations, which do not pass muster under *Janus*. Moreover, Plaintiffs' allegations supporting scienter as to any Individual Defendant are even more grossly deficient than they are as to BNYM Corp.

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[1] This brief is submitted on behalf of BNYM Corp.'s officers Robert P. Kelly, Bruce W. Van Saun, Thomas P. Gibbons, Michael K. Hughey, and John A. Park (collectively, "Officers"), *see* Compl. ¶¶ 20-22, 24-25, as well as directors Ruth E. Bruch, Nicholas M. Donofrio, Steven G. Elliott, Gerald L. Hassell, Edmund F. Kelly, Richard J. Kogan, Michael J. Kowalski, John A. Luke, Robert Mehrabian, Mark A. Nordenberg, Catherine A. Rein, William C. Richardson, Samuel C. Scott, John P. Surma, and Wesley W. von Schack (collectively, "Directors"), *see id.* ¶¶ 27-41. Jorge Rodriguez, who was never an officer or director of BNYM Corp., writes separately. Moreover, although the Complaint occasionally refers to Timothy Keaney as "Defendant Keaney," *e.g.*, ¶¶ 107, 121, 128, it does not actually name him as a Defendant and so he is not a party to this action. *See id.* ¶¶ 20-42.

In addition, Plaintiffs' failure to allege a primary violation of the securities laws fatally undermines their allegations that the Individuals are liable as "control person[s]" under § 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. §§ 78j(b), 78t(a)) or under § 15 of the Securities Act of 1933 ("Securities Act") (15 U.S.C §§ 77k, 771, and 77o).

ARGUMENT

I. THE COMPLAINT DOES NOT PROPERLY ALLEGE THAT THE OFFICERS VIOLATED § 10(b) OR RULE 10b-5 (COUNT ONE)

As BNYM Corp. explains, the Complaint fails to state a claim for securities fraud because it does not allege with particularity that any underlying foreign-exchange ("FX") fraud actually occurred, *see* BNYM Mem. 9-16, that any misleading statement was made to investors, *id.* at 16-27, or that anyone acted with fraudulent intent, *id.* at 27-34. The same arguments require dismissal of the Exchange Act claim as to Officers. But this Court should also dismiss the claim against Officers for two independent reasons: the Complaint does not properly allege that an Officer "made" an assertedly misleading statement, and it does not plead facts supporting a strong inference of scienter as to any Officer.

A. *Janus* Requires Particularized Allegations that an Officer "Made" an Actionable Statement

Section 10(b) of the Exchange Act and Rule 10b-5 make it unlawful for a person "[t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5(b). To state a claim against an Officer, therefore, Plaintiffs must allege facts showing that the particular Officer "made" some actionable misstatement. *See Janus*, 131 S. Ct. at 2301.[2]

[2] Although the Complaint also briefly recites (at ¶ 158) the elements of a cause of action under subsections (a) and (c) of Rule 10b-5, it does not describe with any specificity the presence of a scheme to defraud separate from the alleged misstatements. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) ("Scheme liability under subsections (a) and (c) of Rule 10b-5 hinges on the performance of an inherently deceptive act that is distinct from

Janus held that a person "makes" a statement under Rule 10b-5 only if he possesses "ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 2302. That is because a person only "makes" a statement by actually "stating it," and those who lack ultimate decisionmaking authority over a communication "state" nothing. *Id.* Thus, a person who "prepares or publishes a statement on behalf of another is not its maker." *Id.* Neither is a person who "suggest[s] what to say" – even if he "contribute[s] substantial assistance" to the communication process. *Id.* (internal quotation marks omitted). In light of *Janus*, the Complaint can state a claim against any one of the Officers only by alleging specific facts showing that the particular Officer exercised ultimate authority over an actionable statement. *See* Private Securities Litigation Reform Act ("PSLRA"), codified at 15 U.S.C. § 78u-4(b)(1) (requiring plaintiffs to allege 10b-5 violations with particularity); *Dresner v. Utility.com, Inc.*, 371 F. Supp. 2d 476, 494 (S.D.N.Y. 2005) (noting that "conclusory, vague allegations that [defendants] exercised control" over an alleged statement was "insufficient to satisfy the requirements of Fed. R. Civ. P. 9(b) and the PSLRA").

Before *Janus*, this Court and other courts in this District had recognized the "group pleading doctrine," which allowed securities plaintiffs to "rely on a presumption that statements in prospectuses, registration statements, annual reports, press releases, or other group-published information" reflect the "collective work of those individuals with direct involvement in the everyday business of the company." *In re NTL, Inc. Sec. Litig.*, 347 F. Supp. 2d 15, 22 n.26 (S.D.N.Y. 2004) (Kaplan, J.) (internal quotation marks omitted). Several courts within the Second Circuit, however, have already noted that *Janus* cast doubt on the continuing viability of

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an alleged misstatement."). Accordingly, Plaintiffs must satisfy *Janus* to state a 10b-5 claim. *See id.* at 343 (rejecting SEC's attempt to "bypass" *Janus* by "labeling the alleged misconduct a 'scheme' rather than a 'misstatement'"). *See also* BNYM Mem. 16 n. 30.

this "group pleading doctrine." *See Orlan v. Spongetech Delivery Sys., Inc. Sec. Litig.*, Nos. 10-CV-4093 et al., 2012 WL 1067975, at *10 (E.D.N.Y. Mar. 29, 2012) (calling it "uncertain" whether the doctrine "survived *Janus*"); *Rolin v. Spartan Mullen Et Cie, S.A.*, No. 10 Civ. 1586, 2011 WL 5920931, at *5 (S.D.N.Y. Nov. 23, 2011) (similar). To our knowledge, this Court has not yet opined on the question.

This Court should hold that *Janus* abrogated the group pleading doctrine. That doctrine rested on an assumption that corporate documents generally reflect the "collective work" of corporate insiders. *NTL*, 347 F. Supp. 2d at 22 n.26 (internal quotation marks omitted). But *Janus* has made it irrelevant whether an officer *worked* on a statement – even "preparing" the statement for its maker is not enough. 131 S. Ct. at 2302. What matters now is whether an officer had "ultimate authority over the statement." *Id*. Thus, after *Janus*, the basic inference that the group pleading doctrine permits plaintiffs to draw – that corporate officers generally contribute in some way to group-published statements – has become legally irrelevant. Accordingly, the Court should require Plaintiffs to tie particular statements to the particular officers who made them.

B. The Complaint Lacks the Particularized Allegations Required by *Janus*

Broadly speaking, the Complaint relies on four categories of statements in attempting to state a claim under Rule 10b-5: (1) statements on a BNYM website; (2) press releases; (3) earnings calls; and (4) SEC filings. *See* Compl. ¶¶ 84-112. Plaintiffs fail to allege facts showing that the press releases and website statements were "made" by *any* Officer. Plaintiffs also improperly attempt to attribute the earnings calls and SEC filings to the Officers as a group, rather than tying them to specific authors and speakers.

1. Website Statements

Plaintiffs fail to allege that any Officer made the statements alleged to have appeared on BNYM's website. *See* Compl. ¶¶ 109-112. As BNYM Corp. has shown, Plaintiffs' allegations about the website generally lack particularity. *See* BNYM Mem. 10-13. The vagueness with which Plaintiffs describe the website is particularly problematic because BNYM Corp. did not even exist an entity until its merger with Mellon Financial Corporation in July 2007. *See* BNYM Mem. 5 & n.8. The Complaint does not specify which version of which predecessor's website contained the allegedly misleading language. In addition, the Complaint does not allege facts showing whether, how, or when the Officers even *knew* of the alleged website statements – much less that they *made* the statements or exercised ultimate control over the website's content. Accordingly, *Janus* forecloses any possibility that any Officer could be held liable for the website's contents. *See also In re GeoPharma, Inc. Sec. Litig.*, 399 F. Supp. 2d 432, 445 (S.D.N.Y. 2005) (rejecting claim that defendant "made" statement based on "bare allegation that" he "is Chairman of the Board," because complaint lacked "any specific allegation that he played a role in the preparation" of the document at issue).

Even leaving *Janus* aside, the group pleading doctrine would not apply to a website. That doctrine was "extremely limited in scope, and one such limitation is that it applies only to group-published documents, such as SEC filings and press releases." *In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d 621, 637 (S.D.N.Y. 2008) (internal quotation marks and alterations omitted).[3] A marketing website describing a service offered by BNYM subsidiaries is nothing like an SEC

[3] For the same reason, the group pleading doctrine is wholly inapplicable to statements made on earnings calls. *See Camofi Master LDC v. Riptide Worldwide, Inc.*, No. 10 Civ. 4020, 2011 WL 1197659, at *6 (S.D.N.Y. Mar. 25, 2011) (noting that the group pleading doctrine "does not apply to oral statements"). Accordingly, for each alleged statement made on an earnings call, the Complaint must identify the speaker with particularity, and Plaintiffs can assert a claim only against the actual speaker. *See Powers v. Eichen*, 977 F. Supp. 1031, 1040 (S.D. Cal. 1997) (noting that the securities laws do "not hold individual defendants liable for . . . oral remarks made by others").

filing or a press release, and there is no reasonable basis to infer that it was the work of any Officer. *See SEC v. Czarnik*, No. 10 Civ. 745, 2010 WL 4860678, at *8 (S.D.N.Y. Nov. 29, 2010) (dismissing a fraud claim based on a website for lack of any allegation that the "defendant himself knew of . . . the promotion on the website or that any statements . . . on the website were attributed to or adopted by him").

2. Press Releases

Plaintiffs similarly fail to allege that any Officer made the alleged misstatements in press releases. *See* Compl. ¶ 88. In fact, the press releases themselves (attached as Exhibits 15–27) belie any suggestion that they were "made" by the Officers. No Officer signed those press releases, and none of the releases attributes its contents to any Officer. Rather, each release indicates that BNYM Corp. – and not any individual – bears responsibility for its overall authorship. *See, e.g.*, 2011 1Q Press Release (Apr. 19, 2011) (Ex. 27) at 9 (stating that "BNY Mellon has included in this release" relevant financial information, and that "BNY Mellon has provided a measure of tangible book value"). Such "attribution within a statement" provides "strong evidence that a statement was made by – and only by – the party to whom it is attributed." *Janus*, 131 S. Ct. at 2302. In addition, when BNYM Corp. intended to attribute a press release statement to an Officer, it did so explicitly. *See, e.g.*, *id.* at 1 (quoting Robert Kelly). None of the press-release statements mentioned in the Complaint were attributed in this way.

3. SEC Filings and Earnings Calls

Plaintiffs do allege that certain Officers made certain statements in SEC filings and in earnings calls. None of these statements were actionable. *See* BNYM Mem. 16-25. However, each Officer whom Plaintiffs have accused of fraud is entitled to an independent evaluation of

whether *that particular* Officer's statements were actionable. Thus, for example, Plaintiffs' allegations – which are inadequate as to all Defendants – are particularly underdeveloped as to Van Saun and Hughey, who held positions as Officers only at the very beginning of the class period and whose names are linked by the Complaint to especially few statements. *See* Compl. ¶ 84 (one 10-K filing signed by Van Saun and Hughey); *id.* ¶ 88 (one 10-Q Form signed by Van Saun); *id.* ¶ 92 (one earnings call by Van Saun). Accordingly, though the case for dismissing the claims against all Defendants is strong, it is even stronger for these Individuals.

C. The Complaint Does Not Raise a Strong Inference of Scienter as to Any Officer

To state a 10b-5 claim against any Officer, the Complaint must allege facts giving rise to a strong inference of scienter with respect to that particular Officer. *See, e.g., Brecher v. Citigroup, Inc.*, No. 09 Civ. 7359, 2011 WL 5525353, at *6 (S.D.N.Y. Nov. 14, 2011). In doing so, it may not rely on the group pleading doctrine (to the extent that doctrine remains viable); only facts particularized to a specific Officer will suffice. *See In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 440 (S.D.N.Y. 2005) (Kaplan, J.) (emphasizing that "the group pleading doctrine has no effect on the PSLRA's *scienter* requirement"). For each Officer, then, the Complaint must allege that the Officer had a motive or opportunity to defraud, or it must allege "'strong circumstantial evidence of conscious misbehavior or recklessness.'" *Id.* at 441 (quoting *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001)); *see also id.* at 443 (holding that allegations of scienter as to company or one individual [did] not "give rise to an inference of *scienter* as to any of the other . . . Individual Defendants").

The only motive that the Complaint alleges – a desire to earn more revenue for the corporation as a whole – weighs *against* scienter in the context of a securities fraud case. *See* BNYM Mem. 28. The Complaint's attempt to allege circumstantial evidence of recklessness

fares no better, because the facts that Plaintiffs provide fall well short of demonstrating the sort of conscious and extreme deviation from reasonable behavior that precedent demands. *See id.* at 29-34. That is particularly true with regard to the Complaint's allegations against the Officers.

The Complaint takes the approach that the Officers, collectively, *must* have known that BNYM Corp.'s statements were misleading "[b]ecause of their positions and access to material non-public information." Compl. ¶ 26. Such "boilerplate allegations" that defendants "should have known of fraudulent conduct based solely on their . . . executive positions are insufficient to plead scienter." *In re Sotheby's Holdings, Inc.*, No. 00 Civ. 1041, 2000 WL 1234601, at *7 (S.D.N.Y. Aug. 31, 2000); *see also Brecher*, 2011 WL 5525353 at *6 (calling defendant's chairmanship of corporate audit committee a "meager fact[]" that "fall[s] well short of establishing [a] strong inference of scienter"). Similarly, Plaintiffs' assertions that the alleged fraud was sufficiently important that the Officers must have known of it, *see* Compl. ¶ 144, are inadequately supported[4] and run afoul of this Court's admonition that "it is clear that the size of the fraud alone does not create an inference of scienter." *BISYS*, 397 F. Supp. 2d at 447 (internal quotation marks omitted).

As to Officers Kelly and Van Saun, the Complaint alleges only *one* communication concerning FX which they received: Richard Mahoney's email broadly describing the industry-wide implications of a growing customer acceptance of electronic trading platforms. *See id.* ¶¶ 70-71, 143; *see* Ex. 37. As BNYM Corp. explains, Mahoney's email suggests only that Kelly and Van Saun knew that BNYM's standing instruction services were a profitable channel of execution, and that structural trends toward increased pricing transparency might compress BNYM's foreign-exchange margins. *See* BNYM Mem. 13-15. Far from suggesting any

[4] *See* BNYM Mem. 32 (explaining that Plaintiffs' allegation of the size of the fraud are based improperly on the New York Attorney General's unadjudicated "determin[ation]" of BNYM's foreign-exchange margins).

fraudulent intent, therefore, the email shows Mahoney advising Kelly and Van Saun that (1) "[s]tanding instruction margins are higher because we provide value-added services surrounding trade execution," but that (2) BNYM should also "embrace[] . . . new technologies" (which offered "greater rate transparency") and use them "to attract new customers." *See id.* at 1; Ex. 37. The document simply will not bear the interpretation that Plaintiffs attempt to place on it.

As to Officers Gibbons, Hughey, and Park, the Complaint does not allege that they received *any* specific communications or knew *any* specific facts whatsoever about BNYM's standing instruction service. Plaintiffs do not allege that any of these Officers received any foreign-exchange-related email. Nor do Plaintiffs allege with particularity that any were responsible for (or even aware of) the marketing language on BNYM's website. Other than conclusory assertions that are patently insufficient under settled law, the Complaint lacks *any* justification for accusing Gibbons, Hughey, and Park of personal involvement in a fraud.

II. THE COMPLAINT DOES NOT STATE A CLAIM AGAINST THE OFFICERS UNDER SECTION 20(A) OF THE EXCHANGE ACT (COUNT TWO)

To state a claim under section 20(a) of the Exchange Act, Plaintiffs must show: "(1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007). Because the Complaint does not properly allege any primary violation of Rule 10b-5 as to BNYM Corp., it states no claim under § 20(a) as to the Officers. *See id.*

Moreover, for the same reasons that the Complaint fails to allege scienter as to any particular Officer, it also fails to allege that any Officer acted with the requisite culpability. *See In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 661 (S.D.N.Y. 2007) (stating that § 20(a)'s

"culpable participation requirement is similar to the scienter requirement of Section 10(b)"); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 490, 491 (S.D.N.Y. 2005) (holding that "recklessness is the minimum standard of culpability that plaintiffs must plead under Section 20(a)", and "culpable participation must be pled with particularity"). Defendants acknowledge, however, that this Court has previously held that specific allegations supporting culpable participation are not required at the pleading stage for a § 20(a) violation, *see, e.g.*, *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 307-10 (S.D.N.Y. 2005) (Kaplan, J.), and respectfully raise this argument to preserve it in the record for purposes of potential further review.

III. THE COMPLAINT DOES NOT STATE A CLAIM AGAINST ANY INDIVIDUAL UNDER SECTION 15 OF THE SECURITIES ACT (COUNT FIVE)

To state a claim under § 15 of the Securities Act, the Complaint must plead at a minimum a "primary violation" of the Securities Act and "control of the primary violator by defendants." *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 185 (2d. Cir. 2011) (internal quotation marks omitted). The § 15 claims in this case should be dismissed because Plaintiffs have failed to state a claim for any primary violation.

Further, Plaintiffs have also failed to allege culpable participation with regard to both the Officers and the Directors. *See Public Employees' Ret. Sys. of Mississippi v. Merrill Lynch & Co.*, 714 F. Supp. 2d 475, 485 (S.D.N.Y. 2010) (holding that such allegations of culpable participation are required for § 15 claims). Again, Defendants acknowledge this Court's previous rulings that culpable participation need not be pleaded, *see, e.g.*, *Neubauer v. Eva-Health USA, Inc.*, 158 F.R.D. 281, 284 (S.D.N.Y. 1994) (Kaplan, J.), and respectfully raise this argument to preserve it in the record.

CONCLUSION

The Motion to Dismiss should be granted.

Dated: June 22, 2012

Respectfully submitted,

OFFICER AND DIRECTOR DEFENDANTS

/s/ Reid M. Figel

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