UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PUDA COAL SECURITIES INC. et al. LITIGATION	CASE NO: 1:11-CV-2598 (KBF)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MACQUARIE CAPITAL (USA) INC.'S MOTION TO DISMISS THE SECOND CONSOLIDATED AMENDED AND SUPPLEMENTAL COMPLAINT

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

ATTORNEYS FOR MACQUARIE CAPITAL (USA) INC.

July 2, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s):**

Defendant Macquarie Capital (USA) Inc. ("Macquarie") respectfully submits this reply memorandum of law in further support of its motion to dismiss Counts I, II and IV of Plaintiffs' April 21, 2014 Complaint (the "SAC").

ARGUMENT

I. PLAINTIFFS FAIL TO STATE A CLAIM UNDER SECTION 10(b)

In its opening memorandum ("Mem."), Macquarie demonstrated that Plaintiffs' Section 10(b) claim fails as a matter of law because the SAC contains no allegations satisfying the Supreme Court's mandate in Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011), that only "makers" of allegedly false and misleading statements can be sued under Section 10(b). Simply put, nothing in their pleading supports Plaintiffs' conclusory assertions that Macquarie made the allegedly false statements at issue, a failing that is fatal to their Section 10(b) claim. Given the numerous pleading opportunities already afforded Plaintiffs (as well as the arguments below which show why the "new evidence" not pled in the SAC but raised in their opposition brief, which they would presumably include in yet another amended pleading to address these deficiencies, would not satisfy Janus), their request for leave to amend should be denied if the Court grants Macquarie's motion.

Macquarie Did Not Make Any of the Alleged Misstatements: As is clear from the face of the Prospectus itself, the Prospectus was Puda's and the statements made therein regarding ownership of Shanxi Puda Coal were made by Puda. This is clear from both the words and the context of the Prospectus, evidenced by, among other things, the explicit references to "we" and "our" (which, as defined in the Prospectus, refer solely to Puda and its subsidiaries). See Mem. at 7-9, citing, e.g., Prospectus (Venezia Decl. Ex. A) at S-5 ("**Our** operations are conducted exclusively in China through **our** 90% owned subsidiary, Shanxi Puda Coal Group Co., Ltd.") (emphasis added); Venezia Decl. Ex. A at S-10 ("**Our** operations are conducted exclusively

through Shanxi Coal, in which **we** own 90% of the equity interest.") (emphasis added). On their face, these are Puda's statements about Puda; they are not Macquarie's statements. In contrast, there are no misrepresentations alleged in the SAC actually attributed to the underwriters or for which Macquarie is identified as the author.

Plaintiffs have no answer for this in their opposition memorandum ("Pls."). Rather, they repeat over and over that Janus does not foreclose the possibility that there can be multiple makers of a fraudulent statement. See, e.g., Pls. at 2, 8. But this is beside the point and not what Macquarie is contending.[1] The burden rests with Plaintiffs to identify a specific false statement actually made by Macquarie, whether on its own or together with Puda. As the Supreme Court held in Janus, "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by – and only by – the party to whom it is attributed." 131 S. Ct. at 2302. And the overwhelmingly strong evidence here, based on the attribution set forth in the Prospectus itself, is that the false statements were made by – and only by – Puda, the entity to whom they were explicitly attributed. Plaintiffs have not cited anything in the SAC overcoming this presumption; their failure to do so is dispositive.

Macquarie Did Not Have "Ultimate Authority" over the Prospectus: Plaintiffs contend that Macquarie should nevertheless be deemed the maker of the misleading statements because it possessed "formal approval authority over the Prospectus not subject to Puda's control." Pls. at 2 (emphasis added); see also id. at 17. Plaintiffs have constructed this "approval" theory out of whole cloth and it finds no support in the SAC. Indeed, if adopted, it would automatically render underwriters liable under Section 10(b) for every underwriting, a result clearly at odds with Janus and its underlying rationale. As shown below, whatever

[1] Plaintiffs are addressing a phantom argument. Macquarie is not arguing that, as a matter of law, there can be only one maker, but rather that a review of the statements here makes clear that they were made only by Puda.

"approval authority" may mean, none of the arguments Plaintiffs proffer on this score demonstrate that Macquarie possessed the requisite "ultimate authority" over the statements at issue.

The notion that Macquarie had any authority over the Prospectus "not subject to Puda's control" is absurd on its face. Not surprisingly, Plaintiffs point to nothing in the SAC that supports this assertion. Puda was the issuer. Macquarie was one of two underwriters. Macquarie could not, on its own, have made the determination that the offering should or should not proceed. An underwriter cannot force an issuer to sell shares to the public nor stop the issuer from doing so. That is the issuer's call. If the underwriter wants to go forward, but the issuer does not, the offering does not happen. And if the underwriter decides to withdraw, that does not preclude the issuer from proceeding with a different underwriter and including these same statements. Plaintiffs concede as much in their brief. Pls. at 16. As the SAC acknowledges, Puda made the same false representations in numerous prior SEC filings in which Macquarie played no role. See, e.g., SAC ¶¶ 77-79. Puda therefore is the only person who made it "necessary and inevitable" that false or misleading statements would be made in an offering prospectus and accordingly the person with ultimate authority under Janus. 131 S. Ct. at 2303.

Plaintiffs' reliance on an email from Macquarie "signing-off" on filing the Prospectus fails for similar reasons. See Mem. at 15-18. Ignoring much of Macquarie's argument, Plaintiffs offer the bizarre assertion that underwriter counsel's sign-off is subject to the "control of the underwriter," and thus Macquarie possessed ultimate authority over the statements at issue. Pls. at 16. But nothing in the SAC supports the notion that the client can compel counsel to give a

10b-5 opinion. No underwriter can force counsel to sign off – that is a decision made by the lawyers, not the client.[2]

The Underwriting Agreement Did Not Confer "Ultimate Authority": Plaintiffs remaining "ultimate authority" arguments, which reference the Underwriting Agreement (the "Agreement"), are equally unavailing. These provisions are nowhere cited in the SAC and accordingly should be disregarded for purposes of this motion. Plaintiffs have known about this Agreement since the outset of the litigation (as they acknowledge, it was filed with the SEC as part of the offering (Pls. at 2)); there is simply no reason justifying their failure to plead them in the SAC. But even if considered, the Agreement does not support their argument.

First, Plaintiffs assert that the Prospectus states that "under the Underwriting Agreement, 'the obligations [of the Underwriters] to pay for and accept delivery of the common stock offered by [the Prospectus] are subject to the approval of certain legal matters by their counsel and to certain other conditions.'" Pls. at 16; see also Pls. at 4. But this says nothing about the substantive statements in the Prospectus and hardly suggests that Macquarie had any control over them. Quite to the contrary, it puts approval by a third party – counsel – between Macquarie and the offering moving forward. Similarly, the provision in the Agreement that Puda will "'prepare the prospectus in a form approved by [Macquaire]'" (Pls. at 16) (emphasis omitted) does not show the requisite ultimate authority to make the statements. As the saying goes, form is not substance; it is the statements themselves that matter under Janus.

[2] Neither Ho v. Duoyuan Global Water, Inc., 887 F. Supp. 2d 547 (S.D.N.Y. 2012) nor McIntire v. China MediaExpress Holdings, Inc., 927 F. Supp. 2d 105 (S.D.N.Y. 2013) (Pls. at 15) support Plaintiffs' position; each considered the relationship among accounting firms and turned on whether the defendant possessed "final authority to decide whether" the statement would be made. As set forth above, that "final authority" here rested with Puda, the issuer, not the underwriters.

These contentions, much like all of Plaintiffs' arguments specifically addressed above and in the next section, offer a construction of Section 10(b) that depends not on whether Macquarie actually made the statements at issue, the inquiry Janus mandates, but rather on the role an underwriter plays in any offering. This is precisely the type of argument foreclosed by Janus. Plaintiffs even go so far as to ask the Court to ignore the leading Second Circuit decision in this area, Pacific Investment Management Company LLC v. Mayer Brown LLP, 603 F.3d 144 (2d Cir. 2010) ("PIMCO"), which foreshadowed Janus, because "it is far from obvious than an underwriter was the type of secondary actor the Second Circuit had in mind" that should not be held liable under Section 10(b). Pls. at 11. Plaintiffs offer no reason to distinguish between underwriters and other secondary actors for purposes of Section 10(b). Indeed, Judge Crotty recently found PIMCO "consistent with Janus, and instructive" in considering Section 10(b) claims against an underwriter.[3] In re Fannie Mae 2008 Sec. Litig., 891 F. Supp. 2d 458, 483 (S.D.N.Y. 2012), aff'd, 525 F. App'x 16 (2d Cir. 2013).

Plaintiffs' suggestion that underwriters are somehow more deserving of Section 10(b) liability than lawyers ignores Section 11 of the 1933 Act, which creates a cause of action against underwriters, not lawyers, that does not require a plaintiff to attribute any statements to the underwriter; liability under Section 11 is imposed for the role underwriters play in an offering. If lawyers cannot be held liable under Section 10(b) even though they have no Section 11 liability, there is simply no policy reason to extend Section 10(b) to underwriters who do have Section 11

[3] Plaintiffs' reliance on cases such as Scott v. ZST Digital Networks, Inc., 896 F. Supp. 2d 877 (C.D. Cal. 2012), In re National Century Financial Enterprises, Inc., 846 F. Supp. 2d 828 (S.D. Ohio 2012) and In re Allstate Life Insurance Co. Litigation, 2012 WL 176497 (D. Ariz. Jan. 23, 2012) is unavailing. See Mem. at 17-18 n.11. Plaintiffs offer faint endorsement of each (Pls. at 9), but contend that they have additional facts upon which to impose Section 10(b) liability here. But those grounds, as shown below, do not satisfy Janus. In any event, we respectfully submit that these cases, as with Gabriel Capital, L.P. v. NatWest Finance, Inc., 94 F. Supp. 2d 491 (S.D.N.Y. 2000) (Pls. at 13-14), cannot be squared with the controlling Supreme Court precedent addressing claims under Section 10(b).

liability. See Janus, 131 S. Ct. at 2302 (courts should be "mindful" to give "'narrow dimensions … to [private actions under Section 10(b),] a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law'"); cf. In re Optimal U.S. Litig., 2011 WL 4908745, at *6 n.50 (S.D.N.Y. Oct. 14, 2011) ("[I]mposing liability on an entity that influenced or controlled the 'maker' of the statement would improperly broaden the scope of Rule 10b-5 liability, where Congress has already enacted a provision for such a scenario – section 20(a).").[4]

The Alleged Misstatements Cannot Be Implicitly Attributed to Macquarie: Plaintiffs next argue that they have satisfied Janus because Puda's false statements can be "implicitly" attributed to Macquarie under the circumstances. Pls. at 12-15. None of these "circumstances" – all of which relate to the general role and responsibilities of an underwriter and none of which connect Macquarie to any particular statement – demonstrate that Macquarie made any of the misrepresentations at issue.

First, Plaintiffs assert, again for the first time in their opposition memorandum, that the Prospectus "indicated to investors that [the underwriters] and Puda were jointly responsible for the representations made therein." Pls. at 13 (citing Venezia Decl. Ex. A at S-2: "*[Puda has] not, and the underwriters have not, authorized anyone to provide you with different information*")

[4] Plaintiffs rely on City of Roseville Employees' Retirement System v. EnergySolutions, Inc., 814 F. Supp. 2d 395 (S.D.N.Y. 2011), in support of their contention that Macquarie should be held to have made the statements even if made in Puda's "voice." Pls. at 12. But the circumstances here are vastly different: defendant ENV's control over the issuer was so pervasive that attribution was appropriate. ENV owned 100% of the issuer's stock (Macquarie owned none); ENV retained a controlling interest in the issuer after the offering (Macquarie had no such relationship with Puda); the registration statement "made clear that the Sponsors controlled the actions of [the issuer] and that the Sponsors exerted their control through ENV" (Macquarie had no such power). Roseville, 814 F. Supp. 2d at 417-19; Mem. at 7. Given that indicia of control – not present here – Judge Koeltl found that notwithstanding the absence of attribution, ENV had the requisite "ultimate authority." Id. at 418. Indeed, Judge Scheindlin distinguished City of Roseville on similar grounds in Optimal. In re Optimal U.S. Litig., 2011 WL 4908745, at *6 n.50.

(emphasis in original).[5] This cited statement, hardly unique to the Puda offering, advises investors that, in deciding whether to buy Puda shares in the offering, they should look only to the information contained in the Prospectus. This language says nothing about who made any of the statements actually contained in the Company's filing. This is clear from the language surrounding the highlighted phrase. See Venezia Decl. Ex. A at S-2 ("You should rely only on the information contained in, or incorporated by reference in, this prospectus supplement and the accompanying prospectus. We have not, and the underwriters have not, authorized anyone to provide you with different information. If anyone provides you with different or inconsistent information, you should not reply [sic] on it."). Plaintiffs' spin aside, this language hardly suggests that any of the alleged misrepresentations in the Prospectus were made by Macquarie.

Plaintiffs' reliance on the fact that the offering was a firm commitment underwriting and that Macquarie subsequently disseminated the Prospectus to sell those Puda shares is equally unavailing. These are typical features of the underwriting process and do not in any way suggest that Macquarie made any statements in the Prospectus. They amount (at most) to the type of assistance and participation in the preparation and publication of a false statement that Janus (and numerous other Supreme Court decisions) have held insufficient to impose Section 10(b) liability. See Mem. at 11; Fannie Mae, 891 F. Supp. 2d at 484.[6] And Plaintiffs' contention that Macquarie's name on the cover of the Prospectus somehow converts Puda's statements into

[5] Plaintiffs' effort to transform this sentence into an "authorization" to make statements in the Prospectus (Pls. at 13-14) proves nothing. It does not authorize Macquarie to say anything; even if it did, Plaintiffs have not identified any specific statement made by Macquarie pursuant to that "authorization."

[6] Plaintiffs effort to distinguish Fannie Mae on grounds that "the relevant misrepresentations … were not contained in the prospectus itself but were found in previous SEC filings that the prospectus incorporated by reference" (Pls. at 9) is belied by both the decision and the underlying pleading. As here (see SAC ¶ 116), that case did involve statements contained in offering documents that incorporated the issuer's SEC filings. But the plaintiffs also sought to hold the underwriter liable for other misrepresentations contained in the offering documents. See Goodchild Decl. Ex. A ¶ 53; 891 F. Supp. 2d at 484 ("[T]he alleged misstatements in the Series S Offering Circular and Series P Private Placement Memorandum concerning FNMA's core capital financials ….").

statements by Macquarie does not satisfy Janus. See Mem. at 12; Optimal, 2011 WL 4908745, at *4-5 (entity is not the maker of a statement even where listed on the cover page of the offering memorandum and where it suggested changes to that document). Macquarie, referred to in the third person, is listed as a joint book manager, not the issuer, and its role in connection with the underwriting is plainly described. Nothing on the cover or elsewhere in the document indicates that the statements about the Company's ownership of its subsidiaries "came from" Macquarie. 131 S. Ct. at 2305. As above, Plaintiffs' effort to impose liability upon Macquarie simply because it is an underwriter, without focus on the statements themselves, fails. See supra at 4-6.

The infirmities in Plaintiffs' attribution argument are perhaps best illustrated by their own authority, Biotechnology Value Fund, L.P. v. Celera Corp., 2014 WL 988913 (N.D. Cal. Mar. 10, 2014) (Pls. at 9). There, the court denied a motion to dismiss brought by Credit Suisse, a financial advisor, with respect to a recommendation statement filed by an issuer because the complaint specifically identified "several misrepresentations" that were explicitly attributable to the investment banking firm. Each statement was specifically linked to Credit Suisse and thus satisfied Janus. See 2014 WL 988913, at *4 ("'Credit Suisse calculated the present value of the Company[]' … 'Credit Suisse combined traditional cash flow methodology'… 'Credit Suisse chose this range.…'"). Based on these words in the recommendation statement, the court concluded that "the descriptions of the Credit Suisse's valuation analysis are attributable to, and thus made, by Credit Suisse." Id. Here, in contrast, none of the misleading statements relating to the ownership of Shanxi Coal are actually attributed to Macquarie, nor does the Complaint plead any facts linking Macquarie to any specific misstatement.[7]

[7] Plaintiffs' reliance on their putative expert does not satisfy their pleading obligations. Mem. at 19-20. None of the cases they cite (in a footnote in opposition to Brean's motion, at 8 n.12) suggest that an expert's conclusory opinions can take the place of particularized factual allegations. Plaintiffs' assertion in its Brean opposition that Macquarie

Plaintiffs' Dissemination and Duty to Disclose Arguments: Departing even further from Janus, Plaintiffs contend that Macquarie should be deemed to have made the statements because it disseminated the Prospectus despite knowing about the Kroll report. Pls. at 17-19. Plaintiffs acknowledge that the First Circuit rejected their dissemination theory in SEC v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010), but urge the Court to follow instead National Century because it is "more faithful" to Janus. Pls. at 18. It is not.[8] That court's holding – that it could focus on "knowledge" (not "attribution") because the defendant had played a role in preparing and distributing the document – ignores Janus, which refused to visit Section 10(b) liability upon those who assist in disseminating false information but who themselves do not actually make a statement. 131 S. Ct. at 2301-03.

Indeed, the Supreme Court has repeatedly rejected efforts to apply Section 10(b) to those who provide even knowing assistance in a fraudulent offering. See cases discussed, Mem. at 6, 13. The Court just recently reaffirmed Janus and its underlying principle that Section 10(b) liability should not be extended "to entirely new categories of defendants who themselves have not made any material, public misrepresentation." Halliburton Co. v. Erica P. John Fund, Inc., 2014 WL 2807181, at *2 (U.S. June 23, 2014). Tambone's adherence to this narrow application of Section 10(b) correctly reflects this precedent; Plaintiffs' approach would take Section 10(b) down a path both Congress and the Supreme Court have refused to travel.[9]

"concedes the element of scienter" (id. at 10 n.16) is mystifying; not moving under Rule 12(b)(6) is hardly a concession that Plaintiffs have proven an element of their claim.

[8] While Plaintiffs dismiss Tambone as generally inapplicable distinguishable pre-Janus authority (Pls. at 9), Judge Crotty cited it with approval in Fannie Mae. 891 F. Supp. 2d at 483-85.

[9] As Plaintiffs offer nothing new in arguing that their 1933 Act claims are not time-barred, Macquarie relies on its prior submissions previously incorporated by reference. Plaintiffs' contention that Macquarie has waived its ability to challenge Trellus's ability to represent a subclass of 1933 Act purchasers (Pls. at 22) is both more properly addressed (if necessary) at a later stage and inconsistent with the Court's prior rulings. See Mem. at 20 n.15.

Finally, Plaintiffs offer what can only be considered a "hail mary" pass: that by reason of the "non-public information" contained in the Kroll report, Macquarie became a temporary insider, assumed fiduciary duties to Puda investors, and thus could sell not shares without disclosing what it knew. Pls. at 20. This unsupported self-described "alternative" theory is baseless. Even if supportable as a matter of law, and Plaintiffs offer no case applying it, the SAC does not allege that Macquarie actually received any such information from Puda. Any such allegation would strain credulity given that Plaintiffs plead Kroll gave Macquarie the report and the SAC refers only to public sources used by Kroll (in particular SAIC records). SAC ¶¶ 34, 57, 149-51. These are not the circumstances envisioned in Dirks v. SEC, 463 U.S. 646 (1983).

II. TRELLUS LACKS SECTION 12 STANDING

Plaintiffs do not dispute that Trellus purchased its offering shares from Brean, but nevertheless argue that Macquarie is liable under Section 12(a)(2) because it solicited that purchase. None of the allegations in the SAC that Plaintiffs rely upon are sufficient; they fail to link Macquarie to Trellus and merely mimic the relevant legal standard or offer vague generalities true of any underwriting. Mem. at 22. The one allegation purporting to provide a link – that a Macquarie representative accompanied Puda's chairman "to meet personally with Trellus" (Pls. at 24) – cannot salvage Plaintiffs' claim as it does not appear in the SAC. Plaintiffs must stand on their pleading as it exists.[10]

CONCLUSION

For the foregoing reasons, and those in its opening memorandum, Macquarie respectfully requests that Counts I, II and IV of the SAC be dismissed with prejudice as against it.

[10] Plaintiffs ask the Court to take judicial notice of this testimony. None of their cases suggest that a party can supplement its pleading with deposition testimony raised for the first time in its brief. Pls. at 24 n.16. Plaintiffs could have included this testimony in the SAC. But even if considered, the testimony does constitute the requisite direct solicitation. See Crowell Decl. Ex. 3 at 84-85 (underwriters "had [Puda's Chairman] available to meet with U.S. investors … I think there was a banker from Macquarie" in attendance).

Dated: New York, New York
July 2, 2014

Respectfully submitted,

By: */s Greg Danilow*
Greg A. Danilow
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorneys for Defendant Macquarie Capital (USA) Inc.