

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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**DAVID SGALAMBO, Individually And
On Behalf of All Others Similarly
Situated,**

Plaintiff,

- against -

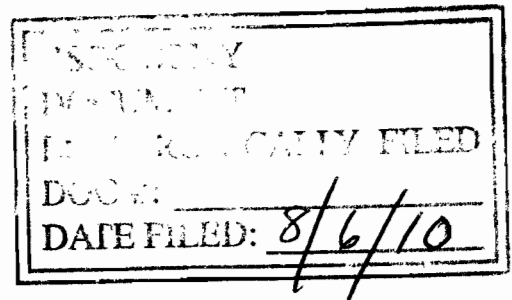
**CRAIG MCKENZIE, LEIF SNETHUN,
MICHAEL E. COOLEN, GREGORY S.
NOVAL AND LEIGH BILTON,**

Defendants.

----- X

OPINION AND ORDER

09 Civ. 10087 (SAS)



SHIRA A. SCHEINDLIN, U.S.D.J.:

Sgalambo v. McKenzie et al

Doc. 47

I. INTRODUCTION

Lead plaintiff Gino Ströker brings this putative securities fraud class action on behalf of himself and all purchasers of Canadian Superior Energy Inc. (“Canadian Superior”) common stock between January 14, 2008 and February 17, 2009 (the “Class Period”).¹ Ströker asserts claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”), and Rule 10b-5 promulgated thereunder, against five former officers of Canadian Superior – Craig

¹ See Amended Complaint (“Compl.”) ¶¶ 1, 22.

McKenzie, Gregory S. Noval, Michael F. Coolen, Leigh Bilton, and Leif Snuthun (collectively, “The Officers”).² The Officers now move to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. For the reasons set forth below, The Officers’ motion is granted in part and denied in part.

II. BACKGROUND³

A. Parties

Canadian Superior is an Alberta-based company⁴ engaged “in the exploration for, acquisition, development, and production of petroleum and natural

² See *id.* ¶¶ 24, 111-117.

³ All facts are drawn from the Amended Complaint (“Complaint”) and are presumed true for the purposes of this motion. In addition, I have taken judicial notice of documents incorporated into the Complaint by reference and public disclosures on file with the Securities and Exchange Commission (“SEC”).

⁴ See 11/19/08 Registration Statement (Form F-3/A), Ex. 1, Row 24 to 6/4/10 Declaration of Damion K.L. Stodola, counsel for Officers, in Support of The Officers’ Motion to Dismiss (“Stodola Decl.”). Instead of providing exhibits of this and other documents incorporated by reference in the Complaint, The Officers submitted an index of twenty-eight web addresses from which this Court could access these documents and proceeded to cite to these documents throughout their briefs. The Officers’ thinly veiled attempt to skirt Rule III.H of this Court’s Individual Rules – which expressly limits parties to a total of fifteen exhibits of fifteen pages each – is offensive. While I nonetheless considered these documents in deciding this motion, all future submissions in this case *must* comply with the Court’s Individual Rules or they will be rejected.

gas . . . in western Canada, offshore Nova Scotia, offshore Trinidad and Tobago, the United States, and North Africa.”⁵ Canadian Superior common stock was traded on the American Stock Exchange (“AMEX”) at all times during the Class Period.⁶ Because Canadian Superior “sought protection under Canadian bankruptcy and reorganization laws and has since reorganized,” the Complaint does not name Canadian Superior as a defendant.⁷

Defendant McKenzie served as Canadian Superior’s Chief Executive Officer (“CEO”) between October 1, 2007 and December 4, 2008 and as a Director of Canadian Superior’s Board of Directors between November 15, 2007 and December 4, 2008.⁸ Defendant Noval served as Chairman and CEO of Canadian Superior from August 2000 to October 2004.⁹ Noval then served as

⁵ Compl. ¶ 23.

⁶ *See id.* ¶ 20. Ströker is a citizen of Belgium who purchased his Canadian Superior shares on the AMEX. *See Sgalambo v. McKenzie*, No. 09 Civ. 10087, 2010 WL 1222062, at *3 (S.D.N.Y. Mar. 29, 2010).

⁷ *Id.*

⁸ *See id.* ¶ 24(a). The Complaint does not identify the date on which McKenzie’s employment with Canadian Superior ended. A record of stock purchases by McKenzie “filed publicly pursuant to the laws of Canada” of which I take judicial notice reveals that McKenzie left Canadian Superior on December 4, 2008. Insider Transaction Detail, Ex. 11 to Stodola Decl.

⁹ *See* Compl. ¶ 24(d).

Executive Chairman of Canadian Superior between June 26, 2007 and April 24, 2009.¹⁰ Defendant Coolen served as President and Chief Operating Officer (“COO”) of Canadian Superior from April 2006 to sometime prior to April 2009, and as a director of Canadian Superior’s Board of Directors from November 2005.¹¹ By April 2009, Coolen was additionally serving as Canadian Superior’s CEO, although exactly when he acquired that title is unclear.¹²

Defendant Snethun served as a Vice President for Canadian Superior’s Western Canada operations from March 2008 to April 30, 2009.¹³ Since April 30, 2009, Snethun has served as President and COO of Canadian Superior.¹⁴ Defendant Bilton served as a Vice President for Canadian Superior’s Western Canada operations between February 5, 2008 and April 29, 2009 and has served as COO since April 29, 2009.¹⁵

¹⁰ *See id.*

¹¹ *See id.* ¶ 24(c).

¹² *See id.* ¶ 97.

¹³ *See id.* ¶ 24(b).

¹⁴ *See id.*

¹⁵ *See id.* ¶ 24(e).

B. The Joint Venture in Intrepid Block 5(c)

Canadian Superior entered into a Production Sharing Contract (“PSC”) with the government of Trinidad and Tobago on July 20, 2005.¹⁶ The PSC granted Canadian Superior the right, beginning Autumn 2007, to drill wells in an offshore area known as Intrepid Block 5(c).¹⁷ Canadian Superior then entered into a Participation Agreement with another oil and gas exploration company, Challenger Energy Corp. (“Challenger”), that gave Challenger the “right to earn a 25% interest in the PSC.”¹⁸ In order to earn the twenty-five percent interest, Challenger agreed to pay one-third of the drilling project’s costs.¹⁹ An August 11, 2007 amendment to the Participation Agreement stated that “Canadian Superior shall use its best efforts to convey to [Challenger] a 25% interest in the [PSC], subject to approval by the Ministry [of Energy of Trinidad and Tobago],

¹⁶ *See id.* ¶ 37.

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *See id.* ¶ 40; 12/30/05 Amended and Restated Participation Agreement (“Participation Agreement”), Ex. 2 to Stodola Decl. § 4.1. Noval served as Chairman of Challenger’s Board of Directors between 2004 and October 23, 2008. *See Compl.* ¶ 24(d).

within 90 days from the date of this letter.”²⁰

In August 2007, Canadian Superior and Challenger announced that BG International Limited (“BG”) – “a global energy company similarly engaged in the exploration, development and production of oil and natural gas”²¹ – would participate in the Intrepid Block drilling project as a Joint Venture pursuant to a Farm-In Agreement²² with Canadian Superior and a Joint Operating Agreement (“JOA”) with Canadian Superior and Challenger.²³ Although Challenger’s twenty-five percent interest in the Joint Venture remained subject to assignment by Canadian Superior, Challenger was nevertheless a party to and was bound by the JOA.²⁴ Regarding the obligations between Canadian Superior and BG, the JOA stated,

As between BG[] and [Canadian Superior], prior to [assignment

²⁰ 8/11/07 Amendment and Ratification to Amended and Restated Participation Agreement (“Participation Agreement Am.”), Ex. 3 to Stodola Decl. ¶ 2(a).

²¹ Compl. ¶ 39.

²² “A Farm-In Agreement is an arrangement whereby one operator ‘buys in’ or acquires an interest in a lease or concession owned by another company.” *Id.* at 12 n.2.

²³ *See id.* ¶ 39.

²⁴ *See* Joint Operating Agreement (“JOA”), Ex. 4 to Stodola Decl. § 3.2(c).

of interest to Challenger], and notwithstanding anything in the Challenger Agreement, [Canadian Superior] shall have be [sic] fully responsible for all obligations and liabilities in respect of a 70% Participating Interest and BG[] shall under no circumstances be required to enforce, or make claim in respect of, any obligation or liability of [Challenger] under the any [sic] agreement between [Canadian Superior] and [Challenger] in respect of [Challenger's] rights to such Participating Interest.²⁵

Canadian Superior and its partners (collectively, “The Companies”)

“spudded” – *i.e.*, began drilling – the Victory well, the first of three planned-for wells (“Victory,” “Bounty,” and “Endeavour”) on June 28, 2007.²⁶ The Companies discovered natural gas at the Victory well on June 14, 2008.²⁷ The Companies spudded the Bounty Well on February 20, 2008 and discovered natural gas on August 13, 2008.²⁸ Drilling began on the Endeavour well on August 28, 2008.²⁹

C. Events Leading to Canadian Superior’s Bankruptcy

On February 9, 2009, BG sought an order from a Calgary court

²⁵ *Id.*

²⁶ *See* 2/9/09 Affidavit of Ewen Denning, Vice President, Commercial, BG Trinidad and Tobago, in Support of BG’s Application to Appoint an Interim Receiver (“Denning Aff.”), Ex. 6 to Stodola Decl. ¶¶ 43-44.

²⁷ *See id.* ¶ 44.

²⁸ *See id.* ¶ 45.

²⁹ *See id.* ¶ 46.

appointing Deloitte as “Receiver and Manager of Canadian Superior’s rights, interests, duties and obligations as Operator [of the Joint Venture] under the JOA, pending BG becoming Operator.”³⁰ BG submitted the affidavit of Ewen Denning (“Denning Affidavit”) in support of its Application to Appoint an Interim Receiver.³¹ The Denning Affidavit and its exhibits revealed that Canadian Superior was in severe financial trouble and that neither Canadian Superior nor Challenger had the funds to meet their outstanding obligations to the Joint Venture.³²

Denning’s Affidavit stated that BG conducted an audit of Canadian Superior in November and December 2008³³ and found that Canadian Superior had violated the JOA’s accounting procedures by (1) failing to maintain separate bank accounts; (2) commingling BG’s funds with those of Canadian Superior; and

³⁰ Compl. ¶ 41.

³¹ *See* Denning Aff. ¶ 72.

³² *See id.* ¶ 39; 2/2/09 Meeting Notes, Ex. 7 to Denning Aff. at 8-9; *see also* 3/4/09 Affidavit of Michael Coolen in Connection with Canadian Superior’s Bankruptcy Proceedings (“Coolen Aff.”), Ex. 5 to Stodola Decl. ¶ 24 (“[Canadian Superior] did not have sufficient funds to meet its obligations in November, December, and January.”).

³³ The JOA permitted BG to audit the Joint Venture operator, which was Canadian Superior’s role in the Joint Venture. *See* Denning Aff. ¶ 22.

(3) failing to account for interest.³⁴ Denning further revealed that Maersk Contractors (“Maersk”), the drilling contractor operating the rig, had not received, as of January 26, 2009, a payment of \$12,075,000.00 due January 2.³⁵ Letters attached to the Denning Affidavit showed that Maersk was threatening to remove its rig from Intrepid Block 5(c) if it did not receive payment³⁶ – an event that BG estimated would cost the Joint Venture a year of delay and thirty-five million dollars in additional expenses.³⁷ The Denning Affidavit additionally stated that Canadian Superior first informed BG on February 2, 2009 that the Minister of Energy of Trinidad and Tobago had rejected Challenger’s twenty-five percent interest in the Joint Venture.³⁸

Finally, the Denning Affidavit stated BG’s position as to the economic viability of the three wells in the Intrepid Block. With regard to the Victory well, Denning stated that “tests indicated that there are only limited

³⁴ *See id.*

³⁵ *See id.* ¶ 23.

³⁶ *See* 1/26/09 Letter from Maersk to Canadian Superior, Ex. 7 to Stodola Decl. at 1-2; 1/30/09 Letter from Maersk to Canadian Superior, Ex. 7 to Stodola Decl. at 3-4.

³⁷ *See* Denning Aff. ¶ 58.

³⁸ *See id.* ¶ 27.

reserves connected to the well and it is BG[]’s view that the Victory well is likely to be a sub-economic discovery.”³⁹ Regarding the Bounty well, Denning stated,

In BG[]’s opinion, the Bounty discovery on its own is not economic. BG[] believes that the Bounty well may become economic if the Endeavour Well discovers sufficient reserves to make the joint development of the two prospects together economic by reason of costs savings realized through shared infrastructure.⁴⁰

And with respect to the Joint Venture overall, Denning stated that “BG[]’s opinion is that the currently discovered reserves in the Intrepid Block are below the economic threshold for development.”⁴¹

On February 11, 2009, the District of Calgary appointed Deloitte as Interim Receiver of Canadian Superior’s interest in the Joint Venture.⁴² When Canadian Superior announced the Interim Receivership on February 12, 2009, the AMEX price of Canadian Superior’s common stock fell forty-four percent from \$0.90 per share to \$0.40 per share.⁴³ The stock fell an additional thirty percent, from \$0.54 per share to \$0.38 per share, on February 17, 2009, when Canadian

³⁹ *Id.* ¶ 44.

⁴⁰ *Id.* ¶ 45.

⁴¹ *Id.* ¶ 49.

⁴² *See* Compl. ¶ 48.

⁴³ *See id.* ¶¶ 49-50.

Superior announced that Canadian Western had demanded repayment of monies outstanding under Canadian Superior’s forty-five million dollar credit facility.⁴⁴ Canadian Superior filed for protection under Canada’s bankruptcy laws on March 6, 2009.⁴⁵

D. Allegedly False and Misleading Statements of Omissions

1. Test Results at the Victory and Bounty Wells

Ströker alleges that The Officers issued over twenty materially false and misleading statements between January 14, 2008 and February 17, 2009.⁴⁶ Many of these statements reported positive test results – indicating that the wells would be productive and/or economical to develop – from either the Victory well, the Bounty well, or both.⁴⁷

a. The Victory Well

Canadian Superior issued a press release on January 14, 2008, in which McKenzie reported “positive” initial test results from the Victory well, stating, “The ‘Victory’ well has an estimated flowing rate of over 100 mmscf/d of

⁴⁴ See *id.* ¶¶ 51-52.

⁴⁵ See *id.* ¶ 53.

⁴⁶ See *id.* ¶¶ 55-89.

⁴⁷ See, e.g., *id.* ¶¶ 55, 57, 74.

natural gas and is condensate rich. . . . The flowing wellhead pressure on a restricted basis and bottomhole pressures are comparable or better than other producing wells and fields in the immediate area.”⁴⁸ McKenzie reported further positive results from the Victory well testing in a February 4, 2008 press release, and stated that “[Canadian Superior] estimate[s] on a preliminary basis that the ‘Victory’ discovery contains up to 1.1 tcf gross natural gas sales reserves with associated liquid natural gas of 3.70 million barrels, with the most likely case being 615 bcf gross sales reserves with associated natural gas liquids of 2.37 million barrels.”⁴⁹ A March 31, 2008 press release reported further positive results from the Victory well and stated that “[Canadian Superior] estimates that the well is capable of producing at sales gas flow rates of well over 100 mmcf/d from the lower zone alone.”⁵⁰

Ströker claims that the statements regarding the Victory well were

⁴⁸ *Id.* ¶ 55; *see also id.* ¶ 57 (January 28, 2008 press release quoting McKenzie as stating, “We are very pleased with the natural gas tests from our ‘Victory’ well on Block 5(c) offshore Trinidad. Although drilling of the ‘Victory’ well took longer than initially anticipated, we feel the results were well worth waiting for.”). The January 28 press release was titled, “Canadian Superior Tests Second Prolific Natural Gas Zone in ‘Victory’ Well on ‘Intrepid’ Block 5(c) Offshore Trinidad.” *See* 1/28/08 Press Release, Ex. 1, Row 5 to Stodola Decl.

⁴⁹ Compl. ¶ 59.

⁵⁰ *Id.* ¶ 65; *see also id.* ¶ 68 (May 14, 2008 press release).

false and misleading by omitting material facts because “The Officers [] only reported the positive test results for the Victory well but failed to report other essential data, such as initial and final flowing rates and pressure and the shut-in pressure build-up data, which *indicated there were only limited reserves connected to the well and that the well would likely be a sub-economic discovery.*”⁵¹ The assessment that the Victory well was likely to be sub-economic derives from the Denning Affidavit.⁵² Ströker further claims that The Officers knew of this “other essential data” at the time they reported the positive test results from the Victory well.⁵³

b. The Bounty Well

In a press release issued August 13, 2008, Noval stated, “We are very pleased with the results of the ‘Bounty’ well and production testing indicates that we have drilled one of the best natural gas wells offshore Trinidad and Tobago.”⁵⁴ In that same press release, McKenzie stated, “I am confident the ‘Bounty’ well

⁵¹ *Id.* ¶ 60(a) (emphasis added).

⁵² *See id.*; Denning Aff. ¶ 44.

⁵³ *See* Compl. ¶ 60.

⁵⁴ *Id.* ¶ 74; *see also id.* ¶ 70 (June 26, 2008 press release in which McKenzie stated, “We are very pleased with what we see on the logs that indicate encouraging hydrocarbons prior to fully penetrating all objectives in the well.”).

will initially produce at approximately 200 mmcf/ of sales natural gas This compares favorably with production from the nearest analogous field, Dolphin Deep”⁵⁵ On January 23, 2009, a press release quoted Coolen as stating, with respect to all three wells, “Having information from three successful wells along with extensive 3D seismic coverage we have over the block and the nearby fields really makes a difference and encourages us to initiate the further appraisal of resources discovered.”⁵⁶

Ströker alleges that these statements were false and misleading because The Officers knew that the Bounty well “on its own would not be economic to develop”⁵⁷ – an important factor given the probable “sub-economic” nature of the Victory well.⁵⁸ Ströker bases his claims as to the Bounty well’s

⁵⁵ *Id.* ¶ 74; *see also id.* ¶ 76 (August 15, 2008 press release stating, “Given the magnitude of the ‘Bounty’ discovery, [Canadian Superior] plans to move forward expeditiously with appraisal and development drilling and production”); *id.* (McKenzie stating, “With high-potential exploration continuing offshore Trinidad . . . we believe the best is still to come for our shareholders.”); *id.* ¶ 83 (November 17, 2008 press release reporting Bounty test results and production estimates).

⁵⁶ *Id.* ¶ 88.

⁵⁷ *Id.* ¶ 75.

⁵⁸ *See id.* ¶ 4.

economic viability on the Denning Affidavit.⁵⁹

2. Violation of the JOA's Accounting Procedures

Ströker further claims that Canadian Superior's statements regarding the Joint Venture were materially false and misleading throughout the Class Period because The Officers failed to disclose that Canadian Superior was violating the JOA by failing to comply with the JOA's mandated accounting procedures. Ströker alleges that Canadian Superior's failure "to maintain a separate joint account for funds associated with the JOA;" its commingling of "funds received from BG with Canadian Superior's general funds;" and its failure "to maintain the joint funds in a separate interest-bearing account," "jeopardiz[ed] [Canadian Superior's] role in the Joint Venture."⁶⁰

3. Financial Liability Under the JOA

Nearly every Canadian Superior press release regarding the Joint Venture included the following description of the participating parties' interests and obligations vis-à-vis the Joint Venture:

Canadian Superior is paying 26-2/3% of the Block 5(c) exploration cost to maintain a 45% working interest in Block 5(c),

⁵⁹ See *id.* ¶ 75; Denning Aff. ¶ 45.

⁶⁰ Compl. ¶¶ 58(c), 60(c), 62(b), 64(a), 67(a), 69(c), 73(b), 77(c), 79(a), 82(e), 84(d), 87(e), 89(e).

with its partners, BG [], a wholly owned subsidiary of the BG Group plc, paying 40% for a 30% working interest and Challenger [] paying a 33-1/3% for a 25% working interest through Canadian Superior.⁶¹

Ströker contends that this statement was false and misleading because Canadian Superior was in reality liable for sixty percent of the Joint Venture's costs, because "Challenger Energy was required to, but never did, receive approval from the Minister [of Energy of Trinidad and Tobago] prior to participating in the drilling on Intrepid Block 5(c)."⁶²

4. Inability to Satisfy Financial Obligations to the Joint Venture and Failure to Pay Maersk

Ströker finally alleges that Canadian Superior's statements from November 2008 through January 2009 were each materially false and misleading because Canadian Superior failed to disclose that it lacked sufficient funds to meet its obligations to the Joint Venture and did not have a reasonable probability of being able to raise additional funds.⁶³ Moreover, Ströker alleges that Canadian Superior failed to disclose the risk that Maersk would abandon the rig due to non-

⁶¹ *Id.* ¶¶ 55, 57, 59, 61, 68, 70-72, 74, 81, 85-86, 88. At other times, Canadian Superior press releases contained substantially similar language. *See, e.g., id.* ¶ 65.

⁶² *Id.* ¶¶ 58(b), 60(b), 62(a), 69(b), 73(a), 77(b), 81(d), 87(d), 88(d).

⁶³ *See id.* ¶¶ 84(a)-(b), 87(a)-(b), 89(a)-(b).

payment.⁶⁴

III. LEGAL STANDARD

A. Motion to Dismiss

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the court must “accept as true all of the factual allegations contained in the complaint”⁶⁵ and “draw all reasonable inferences in the plaintiff’s favor.”⁶⁶ However, the court need not accord “[l]egal conclusions, deductions or opinions couched as factual allegations . . . a presumption of truthfulness.”⁶⁷

In deciding a motion to dismiss, the court is not limited to the face of the complaint. The court “may [also] consider any written instrument attached to the complaint, statements or 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

⁶⁴ See *id.* ¶¶ 82(c), 84(c), 87(c), 89(c).

⁶⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007). *Accord Rescucom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009).

⁶⁶ *Ofori-Tenkorang v. American Int’l Group, Inc.*, 460 F.3d 296, 298 (2d Cir. 2006).

⁶⁷ *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007) (quotation marks omitted).

bringing the suit.”⁶⁸

1. Pleading Requirements

“Federal Rule of Civil Procedure 8(a)(2) requires . . . ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”⁶⁹ To survive a 12(b)(6) motion to dismiss, the allegations in the complaint must meet the standard of “plausibility.”⁷⁰ A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁷¹ Plausibility “is not akin to a probability requirement;” rather, plausibility requires “more than a sheer possibility that a defendant has acted unlawfully.”⁷² Pleading a fact that is “merely consistent with a defendant’s liability” does not satisfy the plausibility standard.⁷³

⁶⁸ *ATSI Commc 'ns v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

⁶⁹ *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting Fed. R. Civ. P. 8(a)(2)).

⁷⁰ *See Twombly*, 550 U.S. at 564. *Accord Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949 (2009) (noting that *Twombly*’s standard of plausibility is not limited to antitrust cases).

⁷¹ *Iqbal*, 129 S. Ct. at 1949 (quotation marks omitted).

⁷² *Id.* (quotation marks omitted).

⁷³ *Id.* (quotation marks omitted).

2. Securities Fraud

“Securities fraud claims are subject to heightened pleading requirements that the plaintiff must meet to survive a motion to dismiss.”⁷⁴ These heightened pleading requirements are imposed by Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (the “PSLRA”).⁷⁵

a. Rule 9(b)

A complaint alleging securities fraud must satisfy Rule 9(b)’s requirement that “the circumstances constituting fraud . . . be stated with particularity.”⁷⁶ “This pleading constraint serves to provide a defendant with fair notice of a plaintiff’s claim, safeguard his reputation from improvident charges of wrongdoing, and protect him against strike suits.”⁷⁷ To comply with the requirements of Rule 9(b), a 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

⁷⁴ *ATSI*, 493 F.3d at 99.

⁷⁵ *See* 15 U.S.C. § 78u-4(b).

⁷⁶ Fed. R. Civ. P. 9(b). *Accord ATSI*, 493 F.3d at 99.

⁷⁷ *ATSI*, 493 F.3d at 99 (citing *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004)).

fraudulent.”⁷⁸ “Allegations that are conclusory or unsupported by factual assertions are insufficient.”⁷⁹

b. The PSLRA

The PSLRA requires plaintiffs to state with particularity “both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant’s intention to deceive, manipulate, or defraud.”⁸⁰ The PSLRA specifies that the plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”⁸¹ When evaluating allegations of scienter, the court must look at the complaint as a whole and “take into account plausible opposing inferences.”⁸²

“[A]n inference of scienter must be more than merely plausible or

⁷⁸ *Rombach*, 355 F.3d at 170 (quotation marks omitted). *Accord ATSI*, 493 F.3d at 99 (citing *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000)).

⁷⁹ *ATSI*, 493 F.3d at 99.

⁸⁰ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (quotation marks omitted) (citing 15 U.S.C. § 78u-4(b)(1), (2)). *Accord ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009).

⁸¹ *Tellabs*, 551 U.S. at 314 (quoting 15 U.S.C. § 78u-4(b)(2)).

⁸² *Id.* at 323. These plausible opposing inferences may be based only on the complaint and other public documents on which courts ordinarily rely in deciding a motion to dismiss, “while constantly assuming the plaintiff’s allegations to be true.” *Id.* at 322, 326-27.

reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.”⁸³ In other words, a plaintiff must present a “strong inference” of scienter.⁸⁴ The inference need not, however, be “irrefutable, *i.e.*, of the ‘smoking-gun’ genre, or even the most plausible of competing inferences.”⁸⁵ The inquiry on a motion to dismiss is as follows: “When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?”⁸⁶ “If the plaintiff alleges a false statement or omission, the PSLRA also requires that ‘the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.’”⁸⁷

⁸³ *Id.* at 314.

⁸⁴ *ECA*, 553 F.3d at 196.

⁸⁵ *Tellabs*, 551 U.S. at 324 (citation omitted).

⁸⁶ *Id.* at 326. *Accord id.* at 324 (“A complaint will survive . . . 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.”).

⁸⁷ *ATSI*, 493 F.3d at 99 (quoting 15 U.S.C. § 78u-4(b)(1)).

B. Section 10(b) and Rule 10b-5

To state a claim under Rule 10b-5 for misrepresentations, a “plaintiff must allege that the defendant (1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff’s reliance was the proximate cause of its injury.”⁸⁸

1. Misstatements or Omissions of Material Fact

In order to satisfactorily allege misstatements or omissions of material fact, a complaint must “state with particularity the specific facts in support of [plaintiffs’] belief that [defendants’] statements were false when made.”⁸⁹ In situations “[w]here plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.”⁹⁰ Mere “allegations that defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim

⁸⁸ *Id.* at 105 (affirming the dismissal of plaintiffs’ misrepresentations claims) (citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005)).

⁸⁹ *Rombach*, 355 F.3d at 172 (quotation marks omitted).

⁹⁰ *Novak*, 216 F.3d at 309 (citation omitted).

of securities fraud.”⁹¹

Certain statements are protected by the PSLRA’s safe harbor provision and the bespeaks caution doctrine. Under the PSLRA’s safe harbor provision, forward-looking statements are deemed immaterial and non-actionable when they are accompanied by “meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements.”⁹² “To avail themselves of safe harbor protection under the meaningful cautionary language prong, defendants must demonstrate that their cautionary language was not boilerplate and conveyed substantive information.”⁹³ Moreover, statements are not protected where defendants “had no basis for their optimistic statements and already knew (allegedly) that certain risks

⁹¹ *Id.* (citation omitted). *Accord Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000) (“The fact that management’s optimism about a prosperous future turned out to be unwarranted is not circumstantial evidence of conscious fraudulent behavior or recklessness: People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business that they manage.”) (quotation marks omitted).

⁹² 15 U.S.C. §78u-5(c)(1)(A).

⁹³ *Slayton v. American Express Co.* (“*Slayton II*”), 604 F.3d 758, 772 (2d Cir. 2010).

had become reality.”⁹⁴ Similarly, under the judicially created bespeaks caution doctrine, “alleged misrepresentations . . . are deemed immaterial as a matter of law [if] it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language. . . .”⁹⁵ Under the “truth-on-the-market” doctrine, information already known on the market is also immaterial.⁹⁶ Statements may also be deemed immaterial as merely vague expressions of optimism or puffery.⁹⁷ Lastly, pleadings based on fraud by hindsight are not actionable as a matter of law.⁹⁸

⁹⁴ *In re Nortel Networks Corp. Sec. Litig.*, 238 F. Supp. 2d 613, 629 (S.D.N.Y. 2003). *Accord Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 122 F. Supp. 2d 407, 419 (S.D.N.Y. 2000) (observing that the bespeaks caution doctrine “does not apply where a defendant knew that its statement was false when made”).

⁹⁵ *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002).

⁹⁶ *See Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 159 (2d Cir. 2000) (“The truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a § 10(b) complaint for failure to plead materiality.”); *see also Lapin v. Goldman Sachs Group, Inc.*, 506 F. Supp. 2d 221, 238 (S.D.N.Y. 2006).

⁹⁷ *See ECA*, 553 F.3d at 206; *In re Gildan Activewear, Inc.*, 636 F. Supp. 2d 261, 274 (S.D.N.Y. 2009); *In re NTL, Inc. Sec. Litig.*, 347 F. Supp. 2d 15, 34 (S.D.N.Y. 2004).

⁹⁸ *See Caiafa v. Sea Containers, Ltd.*, 525 F. Supp. 2d 398, 410-11 (S.D.N.Y. 2007).

2. Scierter

A plaintiff may plead scierter by “alleging facts (1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness.”⁹⁹ “Sufficient motive allegations entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.”¹⁰⁰ “Motives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud.”¹⁰¹ “To prove liability against a corporation . . . a plaintiff must prove that an agent of the

⁹⁹ *ATSI*, 493 F.3d at 99 (citing *Ganino*, 228 F.3d at 168-69). *Accord In re Scottish Re Group Sec. Litig.*, 524 F. Supp. 2d 370, 398 (S.D.N.Y. 2007) (holding that plaintiffs adequately pleaded scierter because the allegations supported the inference that the company and the officers were at least reckless in not knowing that the financial statements were false and in failing to disclose internal control weaknesses); *In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d 266, 292 (S.D.N.Y. 2006) (holding that plaintiffs must “specifically allege defendants’ knowledge of facts or access to information contradicting their public statements”).

¹⁰⁰ *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001) (describing “[i]nsufficient motives” as including “(1) the desire for the corporation to appear profitable and (2) the desire to keep stock prices high to increase officer compensation”) (quotation marks omitted).

¹⁰¹ *Id. Accord ECA*, 553 F.3d at 198.

corporation committed a culpable act with the requisite scienter, and that the act (and accompanying mental state) are attributable to the corporation.”¹⁰²

“Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.”¹⁰³ Under this theory of scienter, a plaintiff must show that the defendant’s conduct is “at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.”¹⁰⁴ “To state a claim based on recklessness, plaintiffs may either specifically allege defendants’ knowledge of facts or access to information contradicting defendants’ public statements, or allege that defendants failed to

¹⁰² *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008).

¹⁰³ *Kalnit*, 264 F.3d at 142. *Accord South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009); *In re Novagold Res. Inc. Sec. Litig.*, 629 F. Supp. 2d 272, 297 (S.D.N.Y. 2009) (quoting *ECA*, 553 F.3d at 198-99).

¹⁰⁴ *South Cherry St.*, 573 F.3d at 109. (quotation marks and emphasis omitted). *Accord ECA*, 553 F.3d at 203.

check information they had a duty to monitor.”¹⁰⁵

3. Loss Causation

To satisfy the fifth prong of a Section 10b-5 claim, a plaintiff must plead loss causation.¹⁰⁶ Loss causation is “the proximate causal link between the alleged misconduct and the plaintiff’s economic harm.”¹⁰⁷ “A misrepresentation is ‘the proximate cause of an investment loss if the risk that caused the loss was within the zone of risk *concealed* by the misrepresentations. . . .’”¹⁰⁸ “To plead loss causation,” therefore, “the complaint[] must allege facts that support an inference that [defendants’] misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud.”¹⁰⁹

¹⁰⁵ *Gildan Activewear*, 636 F. Supp. 2d at 272 (quotation marks and citation omitted).

¹⁰⁶ *See ATSI*, 493 F.3d at 106.

¹⁰⁷ *Id.* at 106-07 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005); *Lentell*, 396 F.3d at 172). *Accord Emergent Capital Inv. Mgmt. v. Stonepath Group, LLC*, 343 F.3d 189, 197 (2d Cir. 2003).

¹⁰⁸ *In re Omnicom Group, Inc. Secs. Litig.*, 597 F.3d 501, 513 (2d Cir. 2010) (quoting *Lentell*, 396 F.3d at 173) (emphasis in original).

¹⁰⁹ *Lentell*, 396 F.3d at 175.

C. Section 20(a)

“To establish a prima facie case of control person liability, a plaintiff 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.”¹¹⁰

“Allegations of control are not averments of fraud and therefore need not be pleaded with particularity.”¹¹¹ Thus, “[a]t the pleading stage, the extent to which the control must be alleged will be governed by Rule 8’s pleading standard.”¹¹²

D. Amendments to Pleadings

“Rule 15(a) provides that, other than amendments as a matter of course, a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”¹¹³ “[W]hether to permit a plaintiff to amend its pleadings is a matter

¹¹⁰ *ATSI*, 493 F.3d at 108 (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996)).

¹¹¹ *In re Parmalat Sec. Litig.*, 414 F. Supp. 2d 428, 440 (S.D.N.Y. 2006).

¹¹² *In re Scottish Re*, 524 F. Supp. 2d at 385. *Accord In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897, 2006 WL 3804619, at *14 (S.D.N.Y. Dec. 28, 2006) (quoting *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392, 415-16 (S.D.N.Y. 2003)).

¹¹³ *Slayton v. American Express Co. (“Slayton I”)*, 460 F.3d 215, 226 n.10 (2d Cir. 2006) (quotation marks omitted).

committed to the Court’s sound discretion.”¹¹⁴ However, the Supreme Court has explained that

[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be “freely given.”¹¹⁵

Accordingly, “[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead.”¹¹⁶

IV. DISCUSSION

A. Defendants Bilton and Snethun

The Complaint does not attribute any false or misleading statement to either Bilton or Snethun. Indeed, the Complaint fails to identify any connection

¹¹⁴ *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (quotation marks omitted).

¹¹⁵ *Foman v. Davis*, 371 U.S. 178, 182 (1962). *Accord Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002).

¹¹⁶ *Vacold LLC v. Cerami*, No. 00 Civ. 4024, 2002 WL 193157, at *6 (S.D.N.Y. Feb. 6, 2002) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991)). *Accord Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) (“When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint.”).

between either Bilton or Snethun – who both presided, apparently exclusively, over Canadian Superior’s operations in Western Canada¹¹⁷ – and the Joint Venture offshore Trinidad and Tobago. Although the Complaint is hardly clear on this point, Ströker apparently relies on Bilton and Snethun’s alleged status as “senior executive officers and/or directors” to allege that Bilton and Snethun are liable for misstatements made by others.¹¹⁸

The Second Circuit, in its recent decision in *Pacific Investment Management Co. LLC v. Mayer Brown LLP* (“*PIMCO*”),¹¹⁹ considered, but did not decide, whether a corporate insider may be held liable under Section 10(b) and Rule 10b-5 for statements not specifically attributed to that corporate insider.¹²⁰ *PIMCO* did not foreclose liability in such cases, nor did it provide much guidance as to the circumstances under which this indirect corporate insider liability might arise.¹²¹ However, *PIMCO*’s broader discussion of the attribution requirement in

¹¹⁷ See Compl. ¶ 24(b), (e).

¹¹⁸ See *id.* ¶ 25.

¹¹⁹ 603 F.3d 144 (2d Cir. 2010).

¹²⁰ See *id.* at 158 n.6 (“Because this appeal does not involve claims against corporate insiders, we intimate no view on whether attribution is required for such claims . . .”).

¹²¹ See *id.*

securities fraud cases establishes that reliance is of central importance in considering whether to extend liability to defendants who did not make the statements at issue.¹²² The Second Circuit suggested that a plaintiff might be able to show that she relied on a corporate insider’s known role in issuing public statements – thus providing a basis for liability absent direct attribution.¹²³ The Second Circuit ultimately declined to guarantee that such a showing is possible, and *PIMCO* certainly does not suggest that the requisite reliance would be presumed in every case.¹²⁴

Based on the Second Circuit’s analysis in *PIMCO*, I conclude that Ströker has failed to plausibly allege that Bilton and Snethun are liable for any misstatements issued by Canadian Superior, McKenzie, Noval, or Coolen. Ströker provides no facts to show that Bilton or Snethun had a discernible role in issuing Canadian Superior’s public statements, let alone facts to show that he or any other investor relied on Bilton or Snethun’s role in issuing those public statements. As

¹²² See *id.* at 156 (“More generally, [*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008)] stands for the proposition that reliance is the critical element in private actions under Rule 10b-5.”).

¹²³ See *id.* at 158 n.6 (“There may be a justifiable basis for holding that investors *rely* on the role corporate executives play in issuing public statements even in the absence of explicit attribution.”).

¹²⁴ See *id.*

such, the Section 10(b) and Rule 10b-5 claims against Bilton and Snethun are dismissed.

B. Defendants McKenzie, Noval, and Coolen: Section 10(b) and Rule 10b-5¹²⁵

1. Misstatements or Omissions of Material Fact

The Officers argue that many statements regarding the wells are non-actionable because (1) “allegations of falsity are speculative and do not adequately specify how the statement was false when made,”¹²⁶ and (2) because the statements are forward-looking and “accompanied by meaningful cautionary language”¹²⁷ and were not “made or approved by [an executive] officer with actual knowledge . . . that the statement was false or misleading.”¹²⁸ The Officers further contend that their failure to disclose Canadian Superior’s violations of the JOA’s accounting

¹²⁵ Although Ströker identifies statements directly attributable to McKenzie, Noval, and Coolen, the Complaint alleges no facts that would render any of these defendants liable for the misstatements of the others or for the statements attributed to Canadian Superior generally (i.e., all statements regarding the extent of Canadian Superior’s liability under the JOA, which appear in Canadian Superior press releases, but which are not attributed to any particular individual). As such, McKenzie, Noval, and Coolen may only be held liable for the misstatements attributed directly to them as individuals.

¹²⁶ Officers’ Memorandum of Law in Support of Officers’ Motion to Dismiss (“Officers’ Mem.”) at 27.

¹²⁷ *Slayton II*, 604 F.3d at 766.

¹²⁸ 15 U.S.C. § 78u-5(c)(1)(B)(ii)(II).

procedures is shielded by the “truth-on-the-market” doctrine due to prior disclosures of Canadian Superior’s accounting control problems.¹²⁹ The Officers also invoke the truth-on-the-market doctrine to argue that Canadian Superior’s tenuous financial state had been sufficiently revealed to the market in late 2008.¹³⁰ Finally, The Officers claim that Canadian Superior’s representations of its financial obligations under the JOA were accurate.¹³¹

Ströker counters that statements regarding the wells are indeed actionable because (1) the Complaint’s allegations of falsity specify how the statements were false or misleading by pointing to specific documents that contradicted The Officers public statements,¹³² (2) many of The Officers’ statements were not forward-looking because they either stated existing facts or incorporated forward-looking aspects with existing facts,¹³³ and (3) any forward-

¹²⁹ See Officers’ Mem. at 22.

¹³⁰ See *id.* at 23.

¹³¹ See *id.* The Officers primarily frame these arguments in terms of scienter. See *id.* at 21-26. However, since many of The Officers’ scienter arguments boil down to a claim that their statements were not misstatements to begin with, it is appropriate to first consider whether the statements are actionable before turning to scienter.

¹³² See Ströker’s Memorandum of Law in Opposition to Officers’ Motion to Dismiss (“Ströker Mem.”) at 9.

¹³³ See *id.* at 13.

looking statements were accompanied solely by boilerplate disclaimers and were made with actual knowledge that they were false or misleading.¹³⁴ Ströker next argues that The Officers could not have publicly disclosed Canadian Superior's breach of the JOA's accounting procedures because the terms of the JOA were not public during the Class Period.¹³⁵ Ströker also asserts that disclosures of Canadian Superior's financial difficulties failed to reveal the extent of Canadian Superior's troubles, and that this was the case precisely because The Officers failed to disclose the problems Canadian Superior faced vis-à-vis the Joint Venture.¹³⁶ Finally, Ströker contends that characterizations of the extent of Canadian Superior's liability under the JOA were inaccurate and misleading because Canadian Superior did not reveal that it was ultimately responsible for Challenger's share of the costs under the JOA.¹³⁷ For the reasons discussed below, I find that all of the alleged misstatements are adequately pled, with the exception of misstatements of Canadian Superior's liability under the JOA, which are not attributed to any Officer.

¹³⁴ *See id.*

¹³⁵ *See id.* at 3.

¹³⁶ *See id.* at 15 n.9, 21 n.14.

¹³⁷ *See id.* at 21.

a. Statements Regarding the Wells

Ströker identifies actionable misstatements and omissions regarding the wells. The Complaint adequately specifies how the statements regarding the Victory and Bounty wells were false or misleading when made. The Complaint alleges, relying on the Denning Affidavit,¹³⁸ that the statements regarding the Victory well were false and misleading when made because unreported test results would have “indicated that there were only limited reserves connected to the well and that the well would likely be a sub-economic discovery.”¹³⁹

The Officers argue that this statement is impermissibly vague because it fails to identify how low the reserves needed to be in order to render the well uneconomic.¹⁴⁰ However, the level of reserves needed to render a well economic varies from well to well and depends on company-specific information, such as “capital development and operating costs.”¹⁴¹ Because such information is known only to Canadian Superior and The Officers, Ströker cannot be expected to allege this information prior to discovery. At this early stage, the Denning Affidavit

¹³⁸ See *infra* Part IV.B.2.c for a discussion of timing and the Denning Affidavit.

¹³⁹ Compl. ¶ 58(a).

¹⁴⁰ See Officers’ Mem. at 27.

¹⁴¹ Ströker Mem. at 10.

provides an adequate factual basis for Ströker's allegations that The Officers' statements regarding the Victory well were false and misleading when made.

With respect to the Bounty well, Ströker sufficiently alleges, based on the Denning Affidavit, that The Officers' statements were false and misleading because "the Bounty discovery on its own would not be economic to develop,"¹⁴² an important fact given the sub-economic status of the Victory well.¹⁴³ The Officers claim that this allegation is flatly contradicted by the fact that BG later purchased forty-five percent of Canadian Superior's interest in the Joint Venture. According to The Officers, this purchase demonstrates that BG had greater faith in the economic viability of the Joint Venture than expressed in the Denning Affidavit.¹⁴⁴ However, any apparent contradiction between Denning's sworn statement, which was authorized by and made on behalf of BG,¹⁴⁵ and BG's later conduct at most raises an issue of fact that cannot be decided at the motion to dismiss stage.¹⁴⁶ Accordingly, Ströker has adequately alleged that the statements

¹⁴² Compl. ¶ 75.

¹⁴³ See Ströker Mem. at 1.

¹⁴⁴ See Officers' Mem. at 11, 27.

¹⁴⁵ See Denning Aff. ¶¶ 1-2.

¹⁴⁶ Nor is the motion to dismiss stage the proper juncture to assail the credibility of Denning's sworn statement, though The Officers do so repeatedly in their moving papers. See, e.g., Officers' Mem. at 1 ("Plaintiff's claim is based on

regarding the Bounty well were false and misleading when made.

Nor does the PSLRA safe harbor provision for forward-looking statements render these alleged misstatements non-actionable. Many of the alleged misstatements are not forward-looking because they either state a present or historical fact alone or incorporate forward-looking aspects into statements of present or historical fact.¹⁴⁷ For instance, all statements in which The Officers report being “encouraged by” or “pleased with” some aspect of the Joint Venture’s progress¹⁴⁸ are statements of The Officers’ present views. And many of the statements regarding well testing are simply statements of present or historical

the untested and unsupported statement of Ewen Denning”); *id.* at 10 n.5 (“Denning’s testimony was never tested under cross-examination and contains numerous unsupported and unsubstantiated statements of opinion that Denning was in no position to make.”).

¹⁴⁷ See *In re Nortel Networks*, 238 F. Supp. 2d at 629 (“[I]t is well recognized that even when an allegedly false statement ‘has both a forward-looking aspect and an aspect that encompasses a representation of present fact,’ the safe harbor provision of the PSLRA does not apply.” (quoting *In re APAC Teleservice, Inc. Sec. Litig.*, No. 97 Civ. 9145, 1999 WL 1052004, at *7 (S.D.N.Y. Nov. 19, 1999))).

¹⁴⁸ See Compl. ¶ 55 (Noval: “We are encouraged by the initial test results in the first zone [of the Victory well]”); *id.* ¶ 70 (McKenzie: “We are very pleased with what we see on the logs that indicate encouraging hydrocarbons”); *id.* ¶ 74 (Noval: “We are very pleased with the results of the ‘Bounty’ well”).

fact.¹⁴⁹ Statements reporting test results from the wells and predicting future well performance based on those results incorporate forward-looking aspects into statements of present fact.¹⁵⁰

Moreover, none of the statements identified in the Complaint were accompanied by meaningful cautionary language. The cautionary language The Officers identify amounts to an identical blanket, boilerplate disclaimer appended to every Canadian Superior statement issued during the Class Period.¹⁵¹ Though this disclaimer mentioned myriad, general factors – such as natural gas prices or environmental hazards – that might cause actual results to differ from Canadian Superior’s projections,¹⁵² the disclaimer provided no company-specific information, failed to link any specific projections to specific risks,¹⁵³ and

¹⁴⁹ See, e.g., *id.* ¶¶ 56, 57, 61, 63, 66, 70-72, 78-79, 81, 83, 86, 88.

¹⁵⁰ See *id.* ¶ 55 (McKenzie: “The ‘Victory’ well has an estimated flowing rate of over 100 mmscf/d of natural gas and is condensate rich. We have just completed the extended flow testing of the first zone to be tested in the well which was flowed on a restricted flow basis with high pressures and flowed with measured flow rates averaging between 40 and 45 mmscf/d.”); *id.* ¶ 59 (linking estimates of well size to test results); *id.* ¶ 65 (linking estimates of well production to test results); *id.* ¶¶ 65, 74, 76 (same).

¹⁵¹ See, e.g., 1/28/08 Press Release, Ex. 1, Row 5 to Stodola Decl.; 1/23/09 Press Release, Ex. 1, Row 27 to Stodola Decl.

¹⁵² See 1/28/08 Press Release.

¹⁵³ The Second Circuit in *Slayton II* noted with approval that both the Third and Fifth Circuits look to company-specific cautionary language and

remained constant throughout the Class Period, even as the risks confronting Canadian Superior changed.¹⁵⁴

Finally, as discussed below under scienter, Ströker adequately alleges that The Officers had no basis for optimistic statements regarding the wells and actually knew that the risks that the wells would contain limited reserves and/or be uneconomic to develop had already materialized when they made their optimistic statements.¹⁵⁵ As such, the PSLRA safe harbor does not apply to any of the forward-looking statements to the limited extent they may exist.¹⁵⁶

connections between specific projections and specific risks in distinguishing meaningful cautionary language from mere boilerplate. *See Slayton II*, 604 F.3d at 772 (citing *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 256 (3rd Cir. 2009); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004)).

¹⁵⁴ *See id.* at 772-73 (“Our conclusion [that defendants’ cautionary language was not meaningful] is bolstered by the fact that the defendants’ cautionary language remained the same even while the problem changed.”).

¹⁵⁵ *See infra* Part IV.B.2.c.

¹⁵⁶ The Court can only identify two truly forward-looking statements. *See* Compl. ¶ 68 (McKenzie: “We expect[] the remainder of this year will be very exciting for Canadian Superior shareholders.”); *id.* ¶ 76 (McKenzie: “[W]e believe the best is still to come for our shareholders.”).

b. Statements Regarding Compliance with and Liability Under the JOA¹⁵⁷

Ströker has adequately alleged that The Officers failed to disclose that Canadian Superior was violating the JOA by failing to adhere to the JOA's accounting procedures, thereby jeopardizing Canadian Superior's role in the Joint Venture.¹⁵⁸ In opposition, The Officers point to Canadian Superior's 2007 Management's Discussion and Analysis ("MD&A") as conclusive proof that Canadian Superior had disclosed its ongoing accounting control problems to the market. This disclosure makes no mention of the Joint Venture or the JOA.¹⁵⁹

¹⁵⁷ I note that given The Officers' persistently positive public statements about the Joint Venture, The Officers had a duty to disclose that Canadian Superior was in breach of the JOA. The disclosure of this breach would have "significantly altered the 'total mix' of information available" to investors regarding the Joint Venture. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). As such, the breach of the JOA was a material fact, the disclosure of which was necessary to render The Officers' other public statements about the Joint Venture not misleading. *See In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993).

¹⁵⁸ *See, e.g.*, Compl. ¶ 58(c)-(d).

¹⁵⁹ *See* 2007 Management's Discussion and Analysis ("2007 MD&A"), Ex. 1, Row 10 to Stodola Decl. at 11 ("There are no effective controls or procedures related to all significant accounts and processes to provide reasonable assurance that transactions are recorded accurately, are recorded timely and are complete."). Interestingly, the 2007 MD&A filed with the SEC stated that "[t]here are no effective controls or procedures related to significant accounts." The word "all" did not appear. *See* SEC 2007 Management's Discussion and Analysis ("SEC 2007 MD&A") at 11, available at <http://www.sec.gov/Archives/edgar/data/1177470/000110465908021398/a08-931>

Thus, The Officers had not previously disclosed that their accounting problems left Canadian Superior in violation of the JOA, and the truth-on-the-market defense is consequently unavailing.¹⁶⁰

Ströker also sufficiently alleges that Canadian Superior¹⁶¹ misrepresented its obligations under the JOA by failing to disclose the true extent of its liability.¹⁶² The Officers argue that Canadian Superior was never financially liable for Challenger's portion of the Joint Venture's costs, because Canadian Superior could pursue remedies against Challenger to recover Challenger's share

0_1ex99d3.htm. Additionally, neither the SEDAR – the Canadian securities document database – nor the SEC MD&A represented that remediation efforts would continue “through ‘2008 year-end,’” as The Officers state in their opening brief. *See* Officers’ Mem. at 22. Rather, the two MD&As each state that Canadian Superior “has implemented an aggressive plan that by the end of 2008 all noted material weaknesses at December 31, 2007 will be substantially eliminated.” *See* 2007 MD&A at 11; SEC 2007 MD&A at 11.

¹⁶⁰ I note further that “[t]he truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a § 10(b) complaint for failure to plead materiality.” *Ganino*, 228 F.3d at 159.

¹⁶¹ Statements regarding the Joint Venture division of participating interests are not attributed to any of The Officers. At this point then, The Officers cannot be liable for these statements under Section 10(b) and Rule 10b-5. *See* discussion *supra* note 125. Nevertheless, as discussed below, *see infra* note 203, The Officers may be liable for this misstatement under Section 20(a). *See In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 285-86 (3d Cir. 2006).

¹⁶² *See* Compl. ¶ 58(b).

of the costs in the event Challenger defaulted under the JOA.¹⁶³ But this does not obviate the fact that the express terms of the JOA hold Canadian Superior solely responsible for a seventy percent interest in the Joint Venture pending assignment of a twenty-five percent interest to Challenger that never occurred.¹⁶⁴ In fact, Coolen stated that BG considered Canadian Superior to be “directly liable” for the seventy percent interest, which suggests that this interpretation of the JOA is a plausible one.¹⁶⁵ Again, The Officers’ argument at most raises a question of fact to be decided at a later stage in this litigation.

c. Statements Regarding Canadian Superior’s Inability to Meet Its Financial Obligations to the Joint Venture in Late 2008

Finally, The Officers cannot, at this stage, invoke the truth-on-the-market doctrine to avoid liability for their failure to disclose Canadian Superior’s inability to meet its obligations to the Joint Venture between November 2008 (when the problems arose) and January 2009. Though Canadian Superior did disclose that it was experiencing liquidity problems in its Third Quarter 2008

¹⁶³ See Officers’ Mem. at 24. Challenger was in default beginning November 2008. See Coolen Aff. ¶ 24.

¹⁶⁴ See JOA § 3.2(c); Denning Aff. ¶ 27.

¹⁶⁵ Coolen Aff. ¶ 28.

MD&A, filed November 2008,¹⁶⁶ these disclosures made no mention of potential problems with the Joint Venture, and certainly did not disclose that Canadian Superior lacked sufficient funds to meet its obligations to the Joint Venture.¹⁶⁷ Moreover, Canadian Superior issued a distinctly upbeat press release on January 23, 2009, in which Coolen discussed plans to begin developing the three “successful” wells.¹⁶⁸ The January 23 press release does not so much as hint that the Joint Venture faced any financial shortfalls, even though the unpaid twelve million dollar Maersk invoice was by that point twenty-one days past due.¹⁶⁹ Although The Officers may eventually establish that the market was fully aware of Canadian Superior’s financial state by November 2008, the Complaint’s allegations of misstatements or material omissions regarding Canadian Superior’s inability to meet its financial obligations to the Joint Venture are sufficient to survive a motion to dismiss.

¹⁶⁶ See Third Quarter 2008 Management’s Discussion and Analysis (“3d Q 2008 MD&A”), Ex. 1, Row 21 at 6.

¹⁶⁷ See Coolen Aff. ¶ 24.

¹⁶⁸ See Compl. ¶ 88.

¹⁶⁹ See 1/26/09 Letter from Maersk to Canadian Superior, Ex. 7 to Stodola Decl. at 1-2.

2. **Scienter**¹⁷⁰

The Officers argue that Ströker fails to adequately plead scienter based on conscious misbehavior or recklessness because the Complaint does not identify specific reports or documents to support its allegation that The Officers either “knew facts or had access to information suggesting that their public statements were not accurate.”¹⁷¹ The Officers further contend that the Complaint fails to allege a factual basis for allegations of conscious misbehavior or recklessness as to each defendant.¹⁷² The Officers finally claim that the Denning

¹⁷⁰ Ströker cannot establish motive and opportunity scienter, as the Complaint fails to allege a coherent theory of motive. Ströker alleges that The Officers made false and misleading statements “to allow Canadian Superior to benefit from the closing of two private placements.” *See* Compl. ¶ 99. However, The Officers correctly point out that the officers and directors of every company seek to raise capital for their companies, and that “motives generally possessed by officers and directors are insufficiently concrete and personal to qualify as a motive supporting the inference of scienter.” Officers’ Mem. at 14 (citing *ECA*, 553 F.3d at 198). Nor can Ströker establish motive through insider sales of stock, as neither Coolen nor Noval are alleged to have sold any stock during the Class Period, while McKenzie actually purchased stock on several occasions in 2008. *See* Insider Transaction Detail; *see also San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 814 (2d Cir. 1996) (“[T]he fact that other defendants did not sell their shares during the relevant class period sufficiently undermines plaintiffs’ claim regarding motive.”); *In re Regeneron Pharm., Inc. Sec. Litig.*, No. 03 Civ. 3111, 2005 WL 225288, at *22 (S.D.N.Y. Feb. 1, 2005) (“[T]he purchase of additional company shares during the class period [] is inconsistent with an intent to commit fraud.”).

¹⁷¹ Officers’ Mem. at 16 (quoting *ECA*, 553 F.3d at 199).

¹⁷² *See id.* at 17.

Affidavit does not support an inference that The Officers knew their statements regarding the wells were false at the time the statements were issued.¹⁷³

Ströker argues that (1) the Complaint alleges with adequate specificity that The Officers knew facts suggesting their public statements were not accurate, (2) the Complaint sufficiently alleges a factual basis for scienter as to each defendant, and (3) the Denning Affidavit supports a strong inference that The Officers knew of or had access to negative results from the wells at the time of the testing.¹⁷⁴ Ströker additionally argues that The Officers' positions at Canadian Superior and the importance of the Joint Venture to Canadian Superior's core operations further support a strong inference of scienter.¹⁷⁵ As discussed below, I find that Ströker adequately alleges scienter as to all The Officers for all statements attributed to them, with the exception of the failure to disclose that Canadian Superior's accounting problems left the company in breach of the JOA.¹⁷⁶

¹⁷³ See *id.* at 20. The Officers' related argument that Ströker fails to allege facts suggesting that the statements regarding the wells were false at all was addressed *supra* at Part IV.B.1.a.

¹⁷⁴ See Ströker Mem. at 16-23.

¹⁷⁵ See *id.* at 23-24.

¹⁷⁶ As misstatements regarding the extent of Canadian Superior's liability under the JOA are not actionable as to The Officers, I will not discuss

a. Knowledge of or Access to Contrary Facts

The Complaint satisfactorily identifies specific reports or documents that would have indicated that The Officers' public statements regarding the wells and Canadian Superior's inability to meet its financial obligations beginning late 2008 were inaccurate. Regarding the wells, the Complaint does considerably more than allege that a set of unspecified contrary facts must have been available to someone, somewhere inside Canadian Superior. Rather, the Complaint claims that these allegedly negative test results accompanied the results that were reported.¹⁷⁷ The Officers surely relied on some sort of document or report – as opposed to raw, unanalyzed data – in reporting the test results contained in their public

scienter with respect to those misstatements except as it relates to Section 20(a) liability. *See infra* Part IV.C.1.

¹⁷⁷ This fact distinguishes Ströker's allegations from those in the cases The Officers cite to support their position that plaintiffs must identify specific reports containing allegedly contrary facts. *See* Officers' Mem. at 16 (citing *Teamsters*, 531 F.3d at 196 (“[Plaintiffs’] broad reference to raw data lacks even an allegation that these data had been collected into reports that demonstrated that loan origination practices were undermining the collateral’s performance.”); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) (“[W]e held that an ‘unsupported general claim of the existence of confidential company sales reports that revealed [a] larger decline in sales is insufficient to survive a motion to dismiss.’” (quoting *San Leandro*, 75 F.3d at 812-13))). Ströker's allegations are not unsubstantiated; they are supported by the existence of the test results that were reported by The Officers.

statements.¹⁷⁸ And it is probable that these documents or reports contained the allegedly negative tests results that The Officers allegedly withheld, as well as the positive tests results that The Officers reported.¹⁷⁹ Moreover, Ströker notes that The Officers, by virtue of their experience as senior officers of an oil and gas exploration company,¹⁸⁰ may be reasonably assumed to have been competent to interpret any test results presented to them.¹⁸¹

Ströker also adequately identifies specific reports or documents suggesting that The Officers' statements regarding Canadian Superior's financial

¹⁷⁸ See Compl. ¶ 59 (McKenzie: "I am pleased to report that we have now *analyzed* and *evaluated* much of the initial data from the 'Victory' well") (emphasis added).

¹⁷⁹ See *id.* ¶¶ 55, 58(a).

¹⁸⁰ See Ströker Mem. at 17.

¹⁸¹ See *id.* at 18. Ströker does not, as The Officers claim, rely solely on The Officers' positions at Canadian Superior to allege access to and awareness of contrary facts regarding the wells. See *In re Sec. Capital Assur. Sec. Litig.*, No. 07 Civ. 11086, 2010 WL 1372688, at *25 (S.D.N.Y. Mar. 31, 2010) ("[B]road allegations that [d]efendants received and were aware of information contradicting their public statements because they held management roles is not enough to allege scienter.") (citation omitted); *In re Sotheby's Holdings, Inc.*, No. 00 Civ. 1041, 2000 WL 1234601, at *7 (S.D.N.Y. Aug. 31, 2000) ("[B]oilerplate allegations that defendants knew or should have known of fraudulent conduct based solely on their board membership or executive positions are insufficient to plead scienter."). Ströker actually alleges, quite plausibly, that The Officers' positions suggest that they have some expertise in oil and gas exploration such that test results from the wells were meaningful to them. See Ströker Mem. at 17-18.

condition vis-à-vis the Joint Venture in late 2008 were inaccurate. The Complaint specifically identifies the Maersk invoice presented to Canadian Superior in November 2008 and Coolen's admission that Canadian Superior lacked sufficient funds to meet its obligations in November 2008.¹⁸² It is plausible that The Officers knew, but failed to disclose, that Canadian Superior could not pay its vendors beginning November 2008.

With respect to the JOA accounting procedures, however, Ströker fails to allege facts indicating that The Officers knew, or ought to have known, that Canadian Superior's accounting controls were not in compliance with the JOA. Although The Officers were undoubtedly aware of the JOA's accounting requirements, there are no factual allegations to support the inference that they were aware that Canadian Superior's actual accounting procedures were defective. Thus, the Complaint fails to allege that any of The Officers had knowledge that Canadian Superior was in breach of the JOA.

b. Scier as to Each Defendant

Ströker adequately alleges a factual basis for scier as to each defendant. McKenzie, Noval, and Coolen each made direct statements regarding

¹⁸² See Ströker Mem. at 22.

test results from the wells throughout the Class Period.¹⁸³ It is highly plausible that each Officer had knowledge of and access to the test results on which their own public statements were based. Thus, there is a factual basis for the allegation that each Officer knew of the negative test results accompanying the positive results contained in his public statements. As for allegations regarding Canadian Superior's inability to meet its financial obligations to the Joint Venture beginning November 2008, the Coolen Affidavit supports a strong inference that Coolen – the only defendant who made public statements regarding the Joint Venture from November 2008 on¹⁸⁴ – was aware of Canadian Superior's financial difficulties vis-à-vis the Joint Venture.¹⁸⁵

However, because Ströker bases his Rule 10b-5 claim on omissions and selective disclosures, Ströker must do more than allege that The Officers were aware of negative test results and looming financial shortfalls. Rather, Ströker's allegations must give rise to an inference that The Officers were reckless (or consciously misbehaving) in failing to disclose or only partially disclosing these

¹⁸³ See Compl. ¶¶ 55, 74, 88.

¹⁸⁴ See *id.* ¶¶ 86, 88.

¹⁸⁵ See Coolen Aff. ¶ 24 (stating that Canadian Superior was unable to meet its financial obligations from November 2008 through January 2009).

facts.¹⁸⁶ I find that the Complaint successfully raises such an inference.

Regarding the wells, the Complaint alleges that The Officers suppressed negative facts and highlighted positive ones to create the distorted and misleading impression that Canadian Superior was well on its way to developing one of the most successful natural gas production sites offshore Trinidad and Tobago.¹⁸⁷ The Complaint further alleges that had test results from the well been reported in full, the resulting impression of the Joint Venture's prospects would have been considerably bleaker.¹⁸⁸ These allegations give rise to a strong inference that The Officers were reckless, and not merely negligent, in touting positive results from the wells, while simultaneously failing to disclose the negative results that would have undermined The Officers' confident statements regarding the Joint Venture's prospects.

Regarding The Officers' – or more specifically, Coolen's – failure to disclose Canadian Superior's inability to meet its obligations to the Joint Venture beginning November 2008, Ströker alleges that Coolen made several highly optimistic statements about the Joint Venture's progress and plans from November

¹⁸⁶ See *Kalnit*, 264 F.3d at 143.

¹⁸⁷ See Compl. ¶ 74.

¹⁸⁸ See *id.* ¶ 58(a).

2008 through January 2009.¹⁸⁹ Coolen made these statements even though the following risks to the Joint Venture had become a reality: (1) Canadian Superior did not have sufficient funds to meet its financial obligations to the Joint Venture, (2) Challenger was in default under the JOA, and (3) Maersk was not going to be paid on time and had not been paid by the end of January 2009. These realities manifestly threatened the viability of the Joint Venture. For Coolen to have issued unguardedly optimistic statements about the Joint Venture's future in the face of these threats raises a strong inference of his recklessness or conscious misbehavior.

c. The Denning Affidavit

The Officers finally argue that Denning's February 2009 statements regarding the wells and the economic viability of the Joint Venture do not support a strong inference of The Officers' scienter for "an entire year *prior* to [February 2009]."¹⁹⁰ The Officers correctly note that the Denning Affidavit is not precise as to when exactly test results indicated that the Victory well was likely to be sub-economic and that the Bounty well was not worth developing on its own.¹⁹¹

¹⁸⁹ See *id.* ¶¶ 86, 88.

¹⁹⁰ Officers' Mem. at 20 (emphasis added).

¹⁹¹ See Denning Aff. ¶¶ 44-45.

Nevertheless, the Denning Affidavit may be reasonably read to indicate that The Officers would have known of negative test results and their import for the Joint Venture at the time of testing.¹⁹² Thus, The Officers' timing argument is insufficient to defeat a strong inference of scienter throughout the Class Period.¹⁹³ Overall, the inference that The Officers were actually aware of contrary facts that made their public statements inaccurate and misleading and were reckless in failing to disclose these negative facts is at least as compelling as any other inference and is sufficient to raise a strong inference of scienter at the motion to dismiss stage.

¹⁹² See *id.* ¶ 44 (“[T]ests indicated that there are only limited reserves connected to the [Victory] well . . .”).

¹⁹³ The Officers posit an alternative inference – that neither Denning nor BG nor anyone else involved with the Joint Venture had reached any conclusions about any of the wells during the Class Period. See Officers' Mem. at 20. The Officers suggest that this inference is more compelling than an inference of scienter because BG continued to invest in the Joint Venture through 2008, thus indicating that BG itself believed that the wells were viable through at least the end of 2008. See Officers' Reply Memorandum in Further Support of Officers' Motion to Dismiss (“Reply Mem.”) at 6 n.4. Though this inference is certainly possible, I do not find it *more* compelling than an inference of scienter, as there are a range of plausible explanations for BG's behavior that do not undermine an inference of The Officers' scienter. BG might, for instance, have been quite pessimistic regarding both the Victory and Bounty wells, but chose to remain with the project and gamble on the success of the Endeavour well because its finances were sufficiently secure to withstand the costs of a failed exploration.

3. Loss Causation

To allege loss causation, Ströker must allege that The Officers’ “misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud.”¹⁹⁴ Ströker alleges that The Officers misrepresentations concealed significant risks that materially jeopardized the success of the Joint Venture and Canadian Superior’s role in it – namely, that the Victory and Bounty wells were not economically viable, that Canadian Superior was in breach of the JOA, that Canadian Superior was exposed to liability for a seventy percent interest in the Joint Venture because Challenger’s twenty-five percent interest had never been assigned, and that Canadian Superior was unable to meet its financial obligations to the Joint Venture.¹⁹⁵ Ströker claims that these concealed risks significantly increased the risk that the Joint Venture would fail,¹⁹⁶ and indeed the Joint Venture did fail as far as Canadian Superior and its shareholders were concerned when Canadian Superior’s interest in the Intrepid

¹⁹⁴ *Lentell*, 396 F.3d at 175.

¹⁹⁵ *See* Compl. ¶¶ 58, 75, 88.

¹⁹⁶ *See id.* ¶ 58(d).

Block project was placed in receivership on February 11, 2009.¹⁹⁷ The market reacted harshly to this news, and Canadian Superior’s stock dropped forty-four percent on the day the receivership was announced.¹⁹⁸ Ströker further alleges that the failed participation in the Joint Venture caused Western Canada to demand repayment of its credit facility, leading to an additional thirty percent stock decline on February 17, 2009.¹⁹⁹ Because failure of the Joint Venture was within the “zone of risk concealed by the misrepresentations,”²⁰⁰ and because Canadian Superior’s stock dropped precipitously in response to the corrective disclosure, Ströker’s loss causation claims are sufficient to survive a motion to dismiss.²⁰¹

¹⁹⁷ See *id.* ¶ 48.

¹⁹⁸ See *id.* ¶ 50.

¹⁹⁹ See Ströker Mem. at 28.

²⁰⁰ *In re Omnicom Group*, 597 F.3d at 513 (quoting *Lentell*, 396 F.3d at 173) (emphasis omitted).

²⁰¹ The Officers do not contest that news of the “receivership order over one of [Canadian Superior’s] most valuable assets” caused Canadian Superior’s stock to drop on February 17. Officers’ Mem. at 12. Rather, The Officers claim that the receivership and not the concealed problems with the Joint Venture caused the loss. See Reply Mem. at 15. This ignores that Ströker is actually alleging that the concealed problems with the Joint Venture substantially increased the risk that BG would seek to terminate Canadian Superior’s interest in the Joint Venture and that these concealed problems in fact caused BG to seek a receivership. Thus, Ströker adequately alleges that the risks concealed by The Officers’ non-disclosures and selective disclosures caused his loss.

C. Section 20(a)

1. Primary Violation

The Officers move to dismiss the control person liability claims on the ground that Ströker has failed to allege a primary violation by any controlled person.²⁰² However, Ströker successfully states a claim for primary violations of Section 10(b) and Rule 10b-5, with only three exceptions: *First*, Ströker's primary liability claims against Bilton and Snethun fail because the Complaint fails to attribute any actionable misstatements to either individual. *Second*, the Complaint fails to attribute misstatements regarding Canadian Superior's financial liability under the JOA to any named defendant, thus precluding any named defendant's primary liability for those misstatements. *Third*, the Complaint fails to allege scienter as to any named defendant regarding the failure to disclose that Canadian Superior's faulty accounting procedures left the company in breach of the JOA.

Because the Complaint does not allege any primary violation by either Bilton or Snethun, any section 20(a) claims against the remaining Officers regarding Bilton or Snethun's conduct must be dismissed. However, The Officers may still be liable as control persons for misstatements regarding Canadian Superior's liability under the JOA and the failure to disclose Canadian Superior's

²⁰² See Officers' Mem. at 32 n.17.

breach of the JOA’s accounting procedures if the Complaint successfully alleges that Canadian Superior would have been liable under Section 10(b) and Rule 10b-5.²⁰³

Earlier in this opinion I concluded that but for the failure of attribution, misstatements of Canadian Superior’s liability under the JOA were actionable.²⁰⁴ Because these misstatements, contained in Canadian Superior press releases, were manifestly attributable to the company, the misstatements are actionable as to Canadian Superior. Moreover, I find that the Complaint adequately alleges Canadian Superior’s scienter as to misstatements of liability under the JOA,²⁰⁵ as it is utterly implausible that senior corporate officers –

²⁰³ So long as the Complaint adequately alleges the elements of a Rule 10b-5 claim against Canadian Superior as a corporation, it is of no moment that Canadian Superior is not a named defendant due to bankruptcy. *See In re Suprema*, 438 F.3d at 285 (“[T]here is no requirement in the language of [Section 20(a)] that the controlled person be named as a defendant as a predicate to imposing liability upon the controlling individual defendants.”). As the Third Circuit has noted, “[I]t would be inconsistent with the broad remedial purposes of the securities laws to permit senior executives of a bankrupt corporation whose actions allegedly contributed to the bankruptcy – to avoid liability by relying on the corporation’s bankruptcy.” *Id.* at 285-86 (citation omitted). Courts in this and other districts have permitted this type of Section 20(a) liability. *See, e.g., id.*; *Payne v. DeLuca*, 433 F. Supp. 2d 547, 612 n.67 (W.D. Pa. 2006); *In re Surebeam Corp. Sec. Litig.*, No. 03 Civ. 1721JM, 2005 WL 5036360, at *5 n.3 (S.D. Cal. Jan. 3, 2005); *Marcus v. Frome*, 329 F. Supp. 2d 464, 476 (S.D.N.Y. 2004).

²⁰⁴ *See supra* Part IV.B.1.b.

²⁰⁵ The Second Circuit has noted that a complaint may adequately allege corporate scienter without alleging scienter as to any particular defendant. *See*

including McKenzie, Noval, and Coolen – would not have been aware of the true terms of the JOA, which suggested that public statements regarding the division of interest under the JOA were inaccurate. As the breach of the JOA was material in light of Canadian Superior’s other, consistently positive statements regarding the Joint Venture, the Complaint raises a strong inference that some senior officer within Canadian Superior was reckless in failing to disclose the fact of the breach. And Ströker adequately alleges that the company’s misstatements of the extent of Canadian Superior’s liability under the JOA caused at least part of his loss.²⁰⁶ Accordingly, the Complaint sufficiently alleges a primary violation by Canadian Superior based on misstatements of the company’s liability under the JOA.

The Complaint does not, however, adequately plead a primary violation by Canadian Superior as to the failure to disclose its breach of the JOA’s accounting procedures. Just as the Complaint makes no allegations to suggest whether or when The Officers knew that Canadian Superior’s accounting procedures were faulty and in violation of the JOA, the Complaint makes no such allegations as to any senior officer or anyone else inside the company. As such,

Teamsters, 531 F.3d at 195; *see also Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008) (“[I]t is possible to draw a strong inference of corporate scienter without being able to name the individuals who concocted and disseminated the fraud.”).

²⁰⁶ See discussion *supra* Part IV.B.3.

any Section 20(a) claims based on the failure to disclose Canadian's Superior violation of JOA accounting procedures must be dismissed.

2. Control Person²⁰⁷

Having adequately alleged primary violations – except as to Bilton and Snethun and the accounting failures – Ströker must also allege “control of the primary violator by the defendant.”²⁰⁸ The Officers challenge control solely as to Bilton and Snethun on the grounds that the Complaint fails to allege how either Bilton or Snethun – neither of whom appear to have been senior officers during the Class Period and who each presided over operations in Western Canada throughout the Class Period – were in a position to control Canadian Superior's statements regarding the Intrepid Block 5(c) Joint Venture.²⁰⁹ Indeed, the Complaint's sole mentions of Bilton and Snethun are a description of their titles and allegations that each sold Canadian Superior stock within the Class Period.²¹⁰ Because the Complaint contains literally no factual allegations that would support an inference that Bilton or Snethun were control persons under Section 20(a), all claims for

²⁰⁷ The Officers do not challenge the “culpable participation” prong of Ströker's Section 20(a) claims.

²⁰⁸ *ATSI*, 493 F.3d at 108.

²⁰⁹ *See* Officers' Mem. at 32 n.17.

²¹⁰ *See* Compl. ¶¶ 24(b), (e), 29, 99.

control person liability against Bilton and Snethun must be dismissed. Ströker nevertheless successfully states a claim for control person liability against McKenzie, Noval, and Coolen, as each was a senior officer and member of Canadian Superior’s Board of Directors during the Class Period,²¹¹ and as such “possessed ‘the power to direct or cause the direction of the management and policies of [Canadian Superior].’”²¹²

D. Plaintiffs Who Purchased on a Foreign Exchange

The parties concede that the Supreme Court’s recent decision in *Morrison v. National Australia Bank Ltd.*²¹³ forecloses any potential class members who purchased Canadian Superior common stock on a foreign exchange – in this case, the Toronto Stock Exchange (“TSX”)²¹⁴ – from recovering in this action.²¹⁵ The parties are correct that *Morrison* prevents such plaintiffs from recovering in this Court,²¹⁶ and the claims of any potential class members who purchased

²¹¹ See *id.* ¶ 24.

²¹² *First Jersey*, 101 F.3d at 1472-73 (citation omitted).

²¹³ — U.S. —, 130 S. Ct. 2869 (2010).

²¹⁴ See Officers’ Mem. at 32.

²¹⁵ See Ströker Mem. at 30 n.19; Reply Mem. at 15 n.10.

²¹⁶ See *Morrison*, 130 S. Ct. at 2888 (“Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”); see also *Cornwell v.*

Canadian Superior common stock on a foreign exchange are therefore dismissed.

E. Leave to Replead

Although leave to replead is typically granted, repleading should not be permitted when amendment would be futile. Thus, in light of *Morrison*, Ströker may not amend his complaint to seek to include plaintiffs who purchased Canadian Superior stock on a foreign exchange.

Amendment would not, however, be futile with respect to the other claims dismissed by this Order. Ströker might be able to allege new facts providing a factual basis for attributing misstatements to either Bilton or Snethun or facts supporting a finding that Bilton or Snethun were control persons under Section 20(a). Ströker could also allege facts that would attribute misstatements regarding Canadian Superior's liability under the JOA to one or more of the The Officers,²¹⁷ as well as facts supporting an inference of The Officers' scienter

Credit Suisse Group, No. 08 Civ. 3758, slip op. at 7 (S.D.N.Y. July 27, 2010) (holding that *Morrison* precluded recovery by United States residents who purchased shares on a foreign exchange).

²¹⁷ Such amendment should not be onerous as the documents submitted to the Court show that Canadian Superior's 2007 and 2008 SEC and SEDAR filings contain statements regarding Canadian Superior's interest in and liability to the Joint Venture that are substantively identical to the unattributed statements identified in the Complaint. See 2007 MD&A at 7 (attributed to management and the board of directors); 3d Q 2008 MD&A at 16 (signed "on behalf of the Board" by McKenzie).

regarding breaches of the JOA's accounting procedures.²¹⁸ Because amendment to these claims would not be futile, I grant Ströker leave to replead his claims as to (1) Bilton and Snethun's liability under Sections 10(b) and 20(a); (2) actionable misstatements by The Officers regarding the extent of Canadian Superior's liability under the JOA; (3) scienter as to failure to disclose accounting failures that violated the JOA; and (4) any corresponding Section 20(a) claims as to (1)-(3).

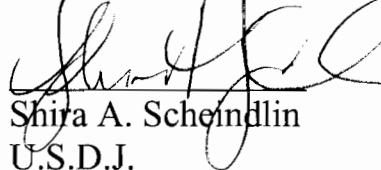
V. CONCLUSION

For the reasons discussed above, The Officers' motion is granted in part and denied in part. Any claims on behalf of potential class members who purchased Canadian Superior shares on a foreign exchange are dismissed with prejudice. All claims against Bilton and Snethun are dismissed without prejudice and with leave to amend. Finally, all claims derived from misstatements of Canadian Superior's liability under the JOA or relating to the failure to disclose accounting failures in breach of the JOA are dismissed without prejudice and with leave to amend. Any amended complaint must be filed within thirty (30) days of

²¹⁸ In this regard, I note that The Officers acknowledge that Canadian Superior disclosed accounting control problems in its 2007 MD&A. *See* 2007 MD&A at 11. The Officers may therefore have been expected to know that Canadian Superior suffered from accounting problems and that these accounting failures meant that Canadian Superior was in violation of the JOA, even though the market could not have been expected to make this inferential leap. *See supra* Part IV.B.1.b. However, I will not read scienter allegations into the Complaint that have not been pled.

the date of this Order. The Clerk of the Court is directed to close this motion (Docket No. 41). A conference is scheduled for Tuesday, August 24, 2010 at 4:30 p.m.

SO ORDERED:



Shira A. Scheindlin
U.S.D.J.

Dated: August 6, 2010
New York, New York

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