UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PENN WEST PETROLEUM LTD. SECURITIES LITIGATION	**No. 14-cv-6046-JGK** **ECF Case**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF WILLIAM E. ANDREW'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT[1]

The Complaint was not about Mr. Andrew, and neither is the Opposition. The crux of the Opposition is that because Plaintiffs contend that *some*one at Penn West must have known of the alleged fraud, they have stated claims against *every*one. Under well-established law, including a decision by this Court issued shortly after the defendants' motions were filed, that does not meet Plaintiffs' burden for pleading claims against *Mr. Andrew*. Having declined the opportunity to amend, Plaintiffs' claims against Mr. Andrew should be dismissed with prejudice.

ARGUMENT

I. PLAINTIFFS DO NOT IDENTIFY ANY FALSE STATEMENT OR ACTIONABLE OMISSION ATTRIBUTABLE TO MR. ANDREW

The Opposition identifies nothing in the Complaint containing any particularized allegation that any statements by Mr. Andrew were false or misleading or omitted any particular facts. Plaintiffs thus fail to allege a Section 10(b) claim against Mr. Andrew.

A. Plaintiffs do not dispute that Mr. Andrew's statements on earnings calls were true and have not pleaded any omission by Mr. Andrew

Unable to cite any paragraph in the Complaint that "state[s] with particularity the specific facts in support of plaintiffs' belief that [Mr. Andrew's statements on any Penn West earnings calls] were false when made,"[2] Plaintiffs argue that although Mr. Andrew's statements may have been "technically true," he can still be held liable for "omit[ting] material information"

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[1] Capitalized terms not defined herein have the meaning set forth in William E. Andrew's Memorandum of Law in Support of Motion to Dismiss Consolidated Amended Class Action Complaint [Dkt. No. 89] (the "WA Br."). References to Lead Plaintiffs' Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss [Dkt. No. 94] (the "Opposition") are in the form "Opp. XX." References to the Reply Memorandum of Law of Defendant Murray Nunns in Support of His Motion to Dismiss are in the form "MN Reply Point YY."

[2] *Rombach v. Chang*, 355 F.3d 164, 172 (2d Cir. 2004); *see also* WA Br. at 7–8.

required to make those statements "not misleading." (Opp. 59–60 & n.24) But to plead an actionable omission, the Complaint must identify with particularity one or more *facts* left out of Mr. Andrew's statements to investors and explain why those allegedly omitted facts were material.[3] It does not, nor do Plaintiffs claim otherwise.

The *only* purported omission Plaintiffs suggest with respect to Mr. Andrew's statements on investor calls is his alleged "fail[ure] to disclose that a driver of [Penn West's] results [wa]s the use of improper or illegal business practices." (Opp. 60) But this argument identifies no particular omitted fact, and assumes what Plaintiffs are required to plead with particularity (but did not). Not surprisingly, this argument comes with no citation to the Complaint, confirming that Plaintiffs have not satisfied their burden to plead "with specificity why and how" Mr. Andrew's statements were misleading.[4] If this gambit worked, then insufficiently-pled misstatement claims would routinely survive as omission claims, which they do not.

B. Mr. Andrew is not liable for statements made by others on investor calls

Plaintiffs criticize the unambiguous post-*Janus* case law holding that a corporate officer cannot be liable for the statements of others on analyst calls because, Plaintiffs say, those opinions only contain "brief analyses" of the issue. (Opp. 66) That analysis is brief because the law is clear: Because Section 10(b) liability can only be assigned to the person "*making* any untrue statement" and "[o]ne 'makes' a statement by *stating* it, " Mr. Andrew "cannot be held

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[3] *See Omnicare, Inc. v. Laborers Dist. Council Constr. Ind. Pension Fund*, 135 S. Ct. 1318, 1332 (2015).

[4] *See Stratte-McClure v. Morgan Stanley*, 598 F. App'x 25, 28 (2d Cir. 2015); *see also* MN Reply Point II.

liable" for statements he "did not make."[5] Although Plaintiffs may not like it, it is that simple.

All the cases Plaintiffs cite are inapposite for two reasons. *First*, many are pre-*Janus* opinions that are no longer good law.[6] *Second*, others involved statements that were on their face attributable to multiple persons.[7] None of the latter cases help Plaintiffs because the Complaint's allegations do not support attribution of statements by other corporate officers on earnings calls to Mr. Andrew. (CAC ¶¶ 135, 143, 311)

C. Plaintiffs are required to allege subjective falsity with respect to Mr. Andrew's Sarbanes-Oxley certifications

The alleged false statements in the certifications Mr. Andrew signed were statements of opinion. They were preceded by explicit caveats that they were "[b]ased on [Mr. Andrew's] knowledge" and "based on [his] most recent evaluation of internal control over financial reporting."[8] Thus, to plead that statements in those certifications were false, Plaintiffs must sufficiently plead that the statements were contrary to Mr. Andrew's knowledge.[9]

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5 *Janus Cap. Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2299, 2302 (2011).

6 *See Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 572 n.13 (S.D.N.Y. 2012) (rejecting reliance on *SmarTalk* and *Barrie* because "[i]n *Janus* ... the Supreme Court ruled that only the person who 'makes' the misstatement is ultimately liable for a section 10(b) violation").

7 *See City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) ("no dispute that [various defendants] signed the Registration Statements" and thus "'made' the statements" therein); *In re Puda Coal Sec. Litig.*, 30 F. Supp. 3d 261, 267 (S.D.N.Y. 2014) (court held that underwriters were "makers" of statements within prospectus because of various specific allegations for which Plaintiffs have no analogs with respect to Mr. Andrew); *see also* MN Reply Point II.

8 *See* WA Br. at 10–11; MN Br. at 15–16; MN Reply Point II; Ex. 7 to Dkt. No. 87, Penn West Energy Trust Form 40-F (Mar. 22, 2010) at 3.

9 *See Omnicare*, 135 S. Ct. at 1325–26 ("[A] statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not ... . [A]lthough a plaintiff could later prove that opinion erroneous, the words 'I believe' [or 'I think'] themselves admitted that possibility, thus precluding liability for an untrue statement of fact.").

Plaintiffs appear to be confused by the term "subjective disbelief" and the Supreme Court's recent *Omnicare* opinion. As the Second Circuit has explained, alleging subjective falsity requires that a statement was "disbelieved by the defendant at the time it was expressed."[10] Indeed, Plaintiffs appear to acknowledge that they must plead subjective falsity, repeatedly arguing that the certifications were materially false and misleading when made because Mr. Andrew knew of or recklessly disregarded the alleged accounting fraud and citing the *scienter* sections of their brief to support that argument. *See* Opp. 62–63, 65. Similarly, Plaintiffs' concession that "courts have analyzed the actionability of SOX certifications using the scienter analysis applicable to misstatements of fact" contradicts their argument that "SOX statements are not statements of opinion, and subjective falsity need not be alleged to plead their falsity." *See id*. at 63–64.

There is no question that subjective falsity is required. Although Plaintiffs assert that *Omnicare* held that "Plaintiffs need not allege [Mr. Andrew's] subjective disbelief" of such statements (Opp. 65), the Supreme Court in fact held that the plaintiffs there failed to sufficiently allege the falsity of statements of opinion because their allegations "d[id] not contest that Omnicare's opinion was honestly held."[11] That is subjective falsity. Thus, to plead falsity here, Plaintiffs must allege that Mr. Andrew did not believe the statements of opinion Plaintiffs challenge, which is a higher burden than pleading scienter.[12] And as demonstrated in Mr.

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10 *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011).

11 *Omnicare*, 135 S. Ct. at 1327.

12 *See Nakkhumpkun v. Taylor*, 782 F.3d 1142, 1159 (10th Cir. Apr. 7, 2015) (upholding dismissal under *Omnicare* because plaintiff "has not alleged any facts that would cast doubt on the sincerity or reasonableness of [defendant's] statement of his opinion"); *see also In re Salomon Analyst AT&T Litig.*, 350 F. Supp. 2d 455, 466 (S.D.N.Y. 2004). Allegations of recklessness ("should have known") do not suffice where, as here, a plaintiff must plead that a defendant *did* know that a statement of opinion was false.

Andrew's Motion and below, there is no particularized allegation that any statement attributed to Mr. Andrew was contrary to his knowledge when made. *See* WA Br. at 11–14; *infra* Section II.

A plaintiff might also plead that a statement of opinion was misleading as a result of an omission of material facts about the speaker's inquiry into or knowledge concerning a statement of opinion, but cannot do so merely by making conclusory assertions:

> The investor must identify particular (and material) facts going to the basis for the [defendant's] opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.[13]

The Complaint alleges nothing like what the Supreme Court discussed in *Omnicare*.

Finally, Plaintiffs ignore the arguments in Mr. Andrew's Motion that the Complaint also does not allege the *objective* falsity of any statements in his certifications. (WA Br. at 9–11) The Opposition asserts that the certifications made certain factual representations (Opp. 63), but points to no allegation (particularized or conclusory) that any were false. Because the Complaint does not adequately allege that any statement in Mr. Andrew's certifications was objectively or subjectively false, Plaintiffs have not alleged claims against Mr. Andrew.

II. PLAINTIFFS DO NOT PLEAD SCIENTER AS TO MR. ANDREW

Unable to identify allegations in the Complaint satisfying their burden, Plaintiffs rely on innuendo and conjecture about what Mr. Andrew and other Defendants "must have known." Much of this argument is comprised of generalized references to the "Defendants" or "Individual Defendants"—compounding the Complaint's improper group pleading through what is essentially "group briefing" not tied to particularized allegations concerning Mr. Andrew.

The Opposition identifies a total of *five* paragraphs in the Complaint that

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[13] *Omnicare*, 135 S. Ct. at 1332; *see also id*. at 1329.

purportedly support scienter as to Mr. Andrew himself (Opp. 29, 33, 53, 54 (citing CAC ¶¶ 53, 114, 134, 145, and 311)) and an additional 92 that purportedly support scienter as to the "Individual Defendants."[14] Only *five* of those 97 paragraphs even mention Mr. Andrew, and none alleges that he knew anything contradicting any of his public statements:

- Paragraph 22 provides the start and end dates of Mr. Andrew's tenures as Penn West's President and CEO.
- Paragraph 60 provides the following quotation from Mr. Andrew in a pre-Class Period earnings call: "We are caught in a funny period right now, because commodity prices have come off sharply, and the capital costs, the operating structure hasn't reacted yet." Plaintiffs do not allege that statement was false.
- Paragraph 137 states that Mr. Andrew "signed certifications filed with the Company's Form 40-F," and describes the contents of those certifications.
- Paragraph 145 alleges that "[i]t was materially misleading for Defendant Andrew to represent that Defendants Takeyasu and Curran were controlling and improving the Company's costs through legitimate means ... ."
- Paragraph 311 provides a summary list of statements for which Plaintiffs allege Mr. Andrew is liable under Section 10(b).

As demonstrated below, the Opposition does not cure Plaintiffs' deficient scienter allegations.[15]

A. Plaintiffs must "specifically identify" what information contrary to his public statements Mr. Andrew was or should have been aware of

Corporate officials are only responsible for revealing material facts reasonably available to them—and if plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing the alleged contrary information. Conceding that the Complaint does not satisfy that standard, Plaintiffs make the remarkable

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[14] *Id*. at 17–55 (citing CAC ¶¶ 3–4, 7, 9–11, 22–26, 32, 38, 40–52, 57, 59–60, 62, 66–75, 77, 80, 82–83, 91, 96, 98, 100–02, 104, 109, 111–14, 116–19, 123–28, 137, 145, 169, 171, 187, 195, 203, 219, 233, 254, 259, 279–89, 309–14).

[15] *See also* MN Reply Point I.

argument that "the law does not require Plaintiffs to allege such evidence at the pleading stage." (Opp. 47) That is just wrong. Where, as here, the allegation is that the defendant knew or was reckless in not knowing that a public statement was false or misleading, the law requires Plaintiffs to do *exactly* what they have disclaimed the ability to do.[16]

As this Court recently held, a "plaintiff cannot raise an inference of fraudulent intent ... without alleging any facts to show a concomitant awareness of or recklessness to the materially misleading nature of the statements."[17] In determining whether a plaintiff has done so, "Second Circuit cases uniformly rely on allegations that (1) *specific* contradictory information was available to defendants (2) *at the same time* they made their misleading statements."[18] The Complaint must therefore include allegations of facts that raise an inference that Mr. Andrew "either knew or had access to information ... contrary to h[is] public statements."[19] The complaint must "contain allegations of specific contemporaneous statements or conditions that demonstrate the intentional or the deliberately reckless false or misleading nature of the statements when made."[20] Indeed, this is the holding of the *Dobina* opinion that Plaintiffs rely on. (Opp. 64) There, the plaintiffs adequately pled scienter as to the CFO through specific allegations that he had been expressly told of the company's internal control deficiencies, but failed to plead scienter against the CEO because they—like Plaintiffs here—did

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16 *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000).

17 *Plumbers & Pipefitters Nat'l Pension Fund v. Orthofix Int'l N.V.*, No. 13 CV. 5696 JGK, 2015 WL 981518, at *9 (S.D.N.Y. Mar. 6, 2015).

18 *In re PXRE Grp., Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 536 (S.D.N.Y.), *aff'd sub nom. Condra v. PXRE Grp. Ltd.*, 357 F. App'x 393 (2d Cir. 2009) (emphasis in original) (internal quotations omitted).

19 *Orthofix*, 2015 WL 981518, at *12.

20 *In re Am. Int'l Grp., Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 532–33 (S.D.N.Y. 2010).

not plead his awareness "of any issues with internal controls at all."[21]

Much of Plaintiffs' response to Mr. Andrew's scienter arguments is dedicated to speculating how Mr. Andrew might have had access to unspecified information that could have made him aware of the purported fraud, but without alleging any specific facts. For example, Plaintiffs suggest that some unidentified "information that contradicted Defendants' public statements was contained in Penn West's own books and records ... to which all Defendants had access."[22] Not only is this allegation not in the Complaint, it is insufficient as a matter of law. Where a plaintiff "alleg[es] that the defendants failed to review or check information they had a duty to monitor," the plaintiff must "specifically identif[y] any reports or statements that would have come to light in a reasonable investigation and that would have demonstrated the falsity of the alleged misleading statements."[23] Speculating that some*one* could have found some*thing* had they looked some*where* is fact-free group pleading that does not suffice to state a fraud claim.[24]

There is likewise no factual allegation supporting Plaintiffs' argument (Opp. 26) that "internal knowledge of improper accounting practices [wa]s widespread" at any point during the Class Period. Thus, even if Plaintiffs could shirk their pleading burden under the PSLRA by arguing that whether anyone "within Penn West reported the fraud internally" before Mr. Dyck arrived was a "highly-fact intensive" question (*id*.) (they cannot), that argument would not help Plaintiffs because there is no allegation that anyone reported anything *to Mr. Andrew*. It is

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21 *Dobina v. Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228, 247–48 (S.D.N.Y. 2012).

22 Opp. 48; *see also* Opp. 21 ("All of the Individual Defendants were high level executives with unlimited access to Company information.").

23 *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Cap.*, 531 F.3d 190, 196 (2d Cir. 2008).

24 Plaintiffs' oft-repeated assertion that every "Individual Defendant" had access to the same information that Mr. Dyck did (Opp. 4, 22, 27, 34, 39, 40–41, 42, 49, 55) fails for the same reasons.

Plaintiffs' burden to plead specific *facts* supporting a strong inference that *Mr. Andrew* possessed scienter. No allegation in the Complaint does so.

B. The Court must weigh the competing inferences, and the most compelling inference is that Mr. Andrew did not possess scienter

Contrary to Plaintiffs' assertions (Opp. 54–55), weighing inferences to determine whether scienter has been pleaded is *not* a question to be left to the jury. That question must be answered now. In determining whether pleaded facts support the strong inference of scienter necessary for the claim to survive dismissal, courts must take into account plausible opposing inferences, *including* plausible, nonculpable explanations for the defendant's conduct.[25] Among its many flaws, Plaintiffs' argument cannot be squared with the PSLRA's express direction that courts determine whether scienter has been pleaded before allowing a case to proceed.

No allegation supports the inference that Mr. Andrew was involved in, knew of, or was reckless in not knowing of the purported fraud that Plaintiffs allege "was designed and implemented by the Company's 'senior finance and accounting personnel.'"[26] Although Plaintiffs concede that Mr. Andrew was an engineer who was never involved with Penn West's finance or accounting (Opp. 55), they argue that the Court cannot at this stage decide that Mr. Andrew does not fall within that group, and complain that "Defendants fail to identify who *is* included in that group" (Opp. 39), again forgetting that it is *their* burden to allege particularized facts supporting scienter for each defendant. Plaintiffs do not allege that Mr. Andrew was a member of the Company's "senior accounting and finance personnel" or "senior accounting management," but *do* allege that "the fraud was perpetrated by 'senior accounting management'

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25 *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007); *see also W. Va. Inv. Mgmt. Bd. v. Doral Fin. Corp.*, 344 F. App'x 717, 721 (2d Cir. 2009).

26 CAC ¶¶ 11, 43, 44, 49, 100, 122, 277; Opp. 18; *see also* WA Br. at 11–14.

who left the Company in 2014" (Opp. 40), a group which does not include Mr. Andrew.

The unsupported and legally deficient arguments in the Opposition also weigh against any inference that Mr. Andrew possessed scienter. If Plaintiffs believe the "size and duration" of the purported fraud support a *greater* likelihood that Defendants knew or should have known of it, then Mr. Andrew's exit early in the Class Period, before the size of the fraud allegedly "increased" in 2012 (Opp. 30–32; CAC ¶¶ 22, 66–75) indicates a correspondingly *lesser* likelihood he acted with scienter. Similarly, even if the "suspicious circumstances and timing of high-level employee departures" could contribute to a strong inference of scienter (Opp. 32), the unremarkable timing of Mr. Andrew's departure does not.

Nor does the fact that "the [purported] fraud involved violations of internal Penn West policy" (Opp. 25) support any inference of scienter against Mr. Andrew. Mr. Andrew "need not be clairvoyant" and could reasonably rely on the Company's employees to follow the policies Plaintiffs concede existed.[27] There is no allegation that Mr. Andrew "focused on" Penn West's accounting in this area; only an excerpt from an earnings call in which Mr. Andrew told investors that *others* were "look[ing] around to see where there's some cost savings," (Opp. 29), a statement Plaintiffs do not even claim was false. The argument that (i) because Mr. Andrew signed certifications Plaintiffs allege turned out to be false (ii) he must have known of the alleged fraud assumes what Plaintiffs had the burden to plead with particularity (but did not).[28] Plaintiffs admit they cannot plead scienter solely based on corporate position,[29] but in the end Mr.

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27 *See Novak*, 216 F.3d at 309.

28 *See Orthofix*, 2015 WL 981518, at *9; *see also In re Turquoise Hill Res. Ltd. Sec. Litig.*, No. 13 CIV. 8846 LGS, 2014 WL 7176187, at *7 (S.D.N.Y. Dec. 16, 2014) (dismissing claims because complaint lacked "any particularized allegation of an inference that the ... certifications … were not honestly and reasonably believed to be true when made").

Andrew's role as CEO is all they offer. It is not enough.

C. Plaintiffs do not allege motive or opportunity

Plaintiffs' motive argument finds no support in the case law, is not tied to any particularized allegations in the Complaint, and is wholly reliant on assertions about "Defendants" generally as opposed to Mr. Andrew specifically. The Opposition does not specify Mr. Andrew's supposed motive to commit fraud, but waxes on about "the unique importance of operating costs to Penn West" and asserts that "[t]he Individual Defendants ... understood that their jobs were in danger unless they could show that Penn West was improving in this critical area." (Opp. 36) But there is no allegation in the Complaint that Mr. Andrew's job was in danger as a result of cost pressures. And "[m]otives that are common to most corporate officers, such as the desire to appear profitable ... do not constitute 'motive' for the purposes of this inquiry."[30] That generalized motive is all Plaintiffs rely on.

Moreover, Plaintiffs completely ignore their burden to show both that Mr. Andrew had the "opportunity" to commit fraud and receive some concrete, personal benefit from the purported fraud.[31] This is typically alleged by asserting that a defendant made a misrepresentation in order to benefit from sales of their own stock.[32] Plaintiffs allege neither

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29 Opp. 53; *see In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 649 (S.D.N.Y. 2007) ("[S]cienter cannot be inferred solely from the fact that, due to the defendants' board membership or executive managerial position, they had access to the company's internal documentation as well as any adverse information.") (internal quotations omitted); *In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 361 (S.D.N.Y. 2005) (it is improper to infer scienter "based merely on the corporate positions that [defendants] held").

30 *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009).

31 *See id.*; *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 297 (S.D.N.Y. 2008).

32 *In re Take-Two*, 551 F. Supp. 2d at 297*; In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 74 (2d Cir. 2001).

sales of stock by Mr. Andrew nor any other concrete, personal benefit. Their claims thus fail.

III. THE SECTION 20(A) CLAIM AGAINST MR. ANDREW FAILS

Plaintiffs try to allege "control" for Mr. Andrew by alleging that "each Defendant signed materially misstated financial statements, spoke about them on conference calls, and/or exercised direct control over the Company's accounting department." (Opp. 71) That is insufficient because control over the transaction in question is required to state a Section 20(a) claim: It "is not sufficient ... to allege that [Mr. Andrew] has control person status; instead Plaintiffs must assert that [Mr. Andrew] exercised *actual* control over the matters at issue."[33] And because Plaintiffs do not dispute that culpable participation requires "at least approximat[e] recklessness [like] in the Section 10(b) context,"[34] their failure to plead Mr. Andrew's scienter also dooms this claim.

CONCLUSION

For the reasons set forth above and in the opening and reply briefs filed by Penn West and Mr. Nunns (which are hereby incorporated by reference to the extent applicable), the Opposition wholly fails to address the multiple fatal deficiencies Mr. Andrew demonstrated with respect to the claims asserted against him. Because Plaintiffs, with full notice of those deficiencies, chose not to amend the Complaint, those claims must be dismissed with prejudice.[35]

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33 *In re Salomon Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 166 (S.D.N.Y. 2012) (italics in original, underlining added).

34 *Plumbers & Pipefitters Local Union No. 630 Pension–Annuity Trust Fund v. Arbitron Inc.*, 741 F. Supp. 2d 474, 492 (S.D.N.Y. 2010); *see* Opp. 71.

35 *See Fadem v. Ford Motor Co.*, 157 F. App'x 398, 399 (2d Cir. 2005).

Dated: May 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2015, I served the foregoing on all parties by filing this document with the Clerk of Court using the CM/ECF system, pursuant to Local Civil Rule 5.2.

s/ *Douglas W. Henkin*
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