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

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

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

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**Table of Contents**

Page

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**OTHER AUTHORITIES**

Defendant William E. Andrew respectfully moves this Court to dismiss all claims asserted against him in Plaintiffs' Consolidated Amended Class Action Complaint (the "CAC").

## Preliminary Statement

This case is not about Mr. Andrew, who was the CEO of Penn West Petroleum Ltd. ("Penn West") for only the first 18 months of the 53-month proposed Class Period and was never part of Penn West's accounting or finance departments. Mr. Andrew was not named in the original complaints, and although Plaintiffs added Mr. Andrew as a defendant and sprinkled his name here and there in the CAC, there is no sufficient allegation that he had any role in or awareness of the alleged fraud. Because Plaintiffs' allegations do not come close to meeting their burden to plead with particularity that Mr. Andrew made material misstatements and did so with scienter, the claims against Mr. Andrew should be dismissed with prejudice.

## Background[1]

Mr. Andrew's "role" in the purported fraud—defined entirely by his position as CEO—is alleged to have occurred from February 18, 2010 through May 5, 2011. (CAC ¶ 22) None of the financial statements during that period have been restated. Only 24 of the 324 paragraphs in the CAC even mention Mr. Andrew.[2] The CAC's 93-paragraph "Summary of the Fraud" mentions Mr. Andrew just *three times*—each related to non-actionable comments Mr. Andrew made well before the start of the proposed Class Period. (CAC ¶¶ 34 n.2, 56, 60)

The basis for Plaintiffs' claims is statements Penn West made in 2014 allegedly

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[1] Mr. Andrew adopts the additional background set forth in Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Consolidated Amended Class Action Complaint (the "Joint Memorandum"). *See* Joint Mem. at 4–16.

[2] CAC ¶¶ 21–22, 27, 34 n.2, 56, 60, 133, 137, 141, 145–50, 155, 305, 309–12, 316, 322–23.

"admitt[ing]" to the fraud.[3] Although the review conducted by Penn West's audit committee analyzed all periods "going back to and including 2007,"[4] it did not result in the restatement of results from any period before Q1 2012, which were initially disclosed almost a full year after Mr. Andrew was no longer CEO. (CAC ¶ 158) Contrary to Plaintiffs' allegation, Penn West's public disclosure regarding the restatement did not "acknowledge[] that the Company's practice of accounting for transactions so as 'to reduce operating expenses and increase the Company's reported capital expenditures and royalties' went back as far as 2007." (CAC ¶ 114) Because Penn West's restatement disclosure itself establishes that Penn West said no such thing, the Court need not accept Plaintiffs' allegation as true.[5]

Far from supporting any inference that Mr. Andrew participated in fraud while he was CEO, Penn West's review found that during parts of the 2007 to 2014 period, "attempts were made at the time of the entries to analyze supporting documentation to determine which items were properly reclassified as property, plant and equipment."[6] It was during "other periods, and more recently" (when Mr. Andrew was not CEO) that the review concluded "it appears that little if any analysis was performed at the time of the entries to determine which items ought to be capitalized."[7]

Plaintiffs allege that Mr. Andrew made nine misrepresentations:

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3 *Id.* ¶ 113; *see also id.* ¶¶ 2, 5, 10–11, 42–44, 46–47, 49–50, 52, 58, 98–103, 111–18, 122–23, 130, 134, 139, 142, 151, 154, 157, 159, 166, 170, 173, 175, 180, 186, 191, 199, 203, 209, 214, 218, 228–29, 234, 241, 246, 248, 258, 262, 271, 276.

4 Ex. 2, Penn West Petroleum Ltd. Form 6-K (Sept. 18, 2014) at Exhibit 99.2 at 2. All references to exhibits in this brief are to exhibits attached to the Declaration of Robert J. Giuffra, Jr. submitted in support of the Joint Memorandum.

5 *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 692 (S.D.N.Y. 2008); *see* Ex. 2, Penn West Petroleum Ltd. Form 6-K (Sept. 18, 2014) at Exhibit 99.2.

6 Ex. 2, Penn West Petroleum Ltd. Form 6-K (Sept. 18, 2014) at Exhibit 99.2 at 2.

7 *Id.*

- Plaintiffs allege that statements Mr. Andrew made during May 5, 2010 and February 17, 2011 conference calls (that Penn West was "looking for little bits of efficiencies" and "ha[d] enough buying power" to "balance" cost pressures) were false. (CAC ¶¶ 145–46, 147–48)

- Plaintiffs allege that statements by another defendant on February 18, 2010 and May 5, 2010 conference calls were false and that Mr. Andrew had a duty to correct them. (*Id*. ¶¶ 135–36, 143–44)

- Plaintiffs allege that Sarbanes-Oxley certifications Mr. Andrew signed as Penn West's CEO between March 22, 2010 and May 6, 2011 were false. In these certifications, Mr. Andrew represented that he believed based on "reasonable diligence" that the Penn West financial statements to which the certifications were attached were materially correct and that Penn West's internal controls provided "reasonable assurance" of the reliability of those financial statements. (*Id*. ¶¶ 137, 149, 150, 155)

- Plaintiffs allege that the financial results disclosed in Penn West's 2009 and 2010 Annual Reports were false and misleading. Mr. Andrew signed these Annual Reports as Penn West's then-CEO. (*Id*. ¶¶ 133, 141)

That is the entirety of Plaintiffs' allegations regarding Mr. Andrew. Plaintiffs do not plead with specificity that Mr. Andrew knew of or participated in the alleged fraud; knew of, directed, or played any role in the accounting decisions at issue (or any other accounting decisions); or had access to information contrary to anything he told investors.

## Argument[8]

### I. The Section 10(b) Claim Asserted Against Mr. Andrew Must Be Dismissed

Plaintiffs have not adequately pleaded that Mr. Andrew violated Section 10(b) of the Exchange Act and Rule 10b–5, under which a defendant may be held liable for any "untrue statements of material fact" that the defendant himself makes "in connection with the purchase or sale of securities."[9]

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[8] Mr. Andrew adopts the argument in Sections II and III of the Joint Memorandum.

[9] *Janus Capital Investors, Inc. v. First Derivative Traders*, 131 S.Ct. 2296, 2299 (2011).

### A. Standard of Review

A claim for violation of Section 10(b) and Rule 10b–5 must meet "[e]xacting pleading requirements" and "state with particularity ... the facts constituting the alleged violation."[10] Merely alleging that a defendant made a false statement is not enough. Plaintiffs must "specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading."[11] To do so, a complaint must "state *with particularity* the *specific facts* in support of plaintiff's belief that defendants' statements were false."[12] Those alleged facts must show that each statement was "false when made," not merely in hindsight.[13] A plaintiff must thus do more than conclude that a statement is false—it must "demonstrate with specificity why and how that is so."[14] And if an alleged misrepresentation was a statement of "belief or opinion," a plaintiff can only allege falsity "to the extent that the statement was *both* objectively false *and* disbelieved by the defendant at the time it was expressed."[15] Such a plaintiff must allege with particularity that the statement was false when made and that the speaker knew it was false when he or she made the statement.[16]

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10 *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Because Plaintiffs assert fraud claims, the CAC must meet the heightened pleading standards of both the PSLRA and Federal Rule of Civil Procedure 9(b) "by stating with particularity the circumstances constituting fraud." *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009).

11 *Id*. at 321 (quoting 15 U.S.C. § 78u–4(b)(1)).

12 *Rombach v. Chang*, 355 F.3d 164, 172 (2d Cir. 2004) (citations omitted) (emphasis added).

13 *Id*.

14 *Id*. at 174.

15 *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011) (emphasis added); *see also In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 578 (S.D.N.Y. 2014) (applying *Fait* to allegations of Section 10(b) violations).

16 *Fait*, 655 F.3d at 112.

Just as important, a plaintiff must "state *with particularity* facts giving rise to a *strong inference* that the defendant acted with the required state of mind."[17] The state of mind required for a Section 10(b) claim is "a mental state embracing intent to deceive, manipulate, or defraud" investors.[18] This may be established either (1) through facts showing that the defendant had the "motive and opportunity" to commit the alleged fraud or (2) through "strong circumstantial evidence of conscious misbehavior or recklessness."[19]

This requires a plaintiff to plead "particular facts demonstrating" the defendant's scienter.[20] Critically, "ambiguities count *against* inferring scienter."[21] As a result, "[s]cienter must be separately pled and individually supportable as to each defendant" and "is not amenable to group pleading."[22] Allegations of scienter attributed to "Defendants" or other terms referring to multiple persons violate "the PSLRA's requirement that a plaintiff state with particularity facts giving rise to a strong inference that *the defendant* acted with the requisite state of mind."[23]

To plead a *strong* inference of scienter, Plaintiffs' allegations must give rise to "more than merely [a] 'reasonable' or 'permissible'" inference that Mr. Andrew possessed the

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17 *Tellabs*, 551 U.S. at 314 (quoting 15 U.S.C. § 78u–4(b)(2)) (emphasis added).

18 *Id*. at 319 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)).

19 *ECA*, 553 F.3d at 198 (citations omitted).

20 *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1248 (2d Cir. 1987).

21 *Tellabs*, 551 U.S. at 326 (emphasis added).

22 *C.D.T.S. v. UBS AG*, No. 12-CV-4924-KBF, 2013 WL 6576031, at *6 (S.D.N.Y. Dec. 13, 2013); *see also Ross v. Lloyds Banking Grp., PLC*, No. 11-CV-8530-PKC, 2012 WL 4891759, at *10 (S.D.N.Y. Oct. 16, 2012) ("generalized averments that draw no distinction between and among defendants" cannot be credited); *In re CRM Holdings, Ltd. Sec. Litig.*, No. 10-CV-975-RPP, 2012 WL 1646888, at *30 (S.D.N.Y. May 10, 2012) ("the scienter element ... cannot be satisfied through group pleading"); *Teamsters Allied Benefit Funds v. McGraw*, No. 09-CV-140-PGG, 2010 WL 882883, at *11 n.6 (S.D.N.Y. Mar. 11, 2010) (group pleading "cannot be relied on to establish scienter").

23 *The Penn. Ave. Funds v. Inyx Inc.*, No. 08-Civ-6857-PKC, 2010 WL 743562, at *12 (S.D.N.Y. Mar. 1, 2010) (citations omitted) (emphasis in original).

required state of mind.[24] The inference of scienter "must be cogent ... and at least as compelling as any opposing inference one could draw from the facts alleged."[25] In determining whether the CAC meets this standard, the Court must look at "*all* of the facts alleged, taken collectively" and "must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff."[26] If the inference that Mr. Andrew had the requisite scienter is not "*at least as likely* as any plausible opposing inference," the claims against Mr. Andrew must be dismissed.[27]

To plead scienter by alleging "motive and opportunity," Plaintiffs "must allege that [Mr. Andrew] 'benefitted in some concrete and personal way from the purported fraud.'"[28] Motives that are common to corporate executives—for example, "the desire for the corporation to appear profitable"—cannot constitute "motive" for the purpose of this inquiry.[29]

If a plaintiff is unable to plead scienter by alleging motive and opportunity, it must adequately plead "conscious misbehavior or recklessness," and the strength of its allegations must be greater if no motive is pleaded.[30] To meet their burden under this prong, Plaintiffs must plead with particularity facts supporting a strong inference that Mr. Andrew was at least "consciously reckless."[31] The Second Circuit describes this as "a state of mind

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24 *Tellabs*, 551 U.S. at 324.

25 *Id*.

26 *Id*. at 323, 324 (emphasis in original).

27 *Id*. at 329 (emphasis in original).

28 *ECA*, 553 F.3d at 198 (quoting *Novak v. Kasaks*, 216 F.3d 300, 307–08 (2d Cir. 2000)).

29 *Id*.

30 *Id*.

31 *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 186 (2d Cir. 2014).

*approximating actual intent*," and "*not merely a heightened form of negligence*."[32] Plaintiffs must thus plead particularized facts showing that Mr. Andrew's conduct in making an alleged misrepresentation was "an extreme departure from the standards of ordinary care to the extent *the danger was either known to [Mr. Andrew] or so obvious that [Mr. Andrew] must have been aware of it*," or that Mr. Andrew "failed to check or review *information [he] had a duty to monitor*, or ignored *obvious* signs of fraud."[33] If Plaintiffs contend that Mr. Andrew had access to facts contrary to those he represented to investors, they "must specifically identify the reports or statements containing this information."[34]

Plaintiffs do not meet any of these standards with respect to Mr. Andrew.

**B. Plaintiffs Make No Particularized Allegation That Any Statement Attributable to Mr. Andrew Was False**

The CAC fails at the outset because Plaintiffs do not allege with particularity that any statements attributed to Mr. Andrew were false.

***1. Mr. Andrew's Statements During Penn West Earnings Calls***

Plaintiffs do not properly allege that Mr. Andrew made misstatements during Penn West earnings calls. The first statement Plaintiffs take issue with is Mr. Andrew's statement during the May 5, 2010 call that

> Todd [Takeyasu] and Jeff Curran and his guys look around to where there's some cost savings and they really help Mark and the people in the field that make the Company run, and we're looking at little bits of efficiencies. You get to the point where CAD 0.10 or CAD 0.15 in operating costs, that's starting to throw a little more cash back in the Company and the things we can use to repay debt.

(CAC ¶ 145) Plaintiffs do not "demonstrate with specificity why and how" anything in that

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32 *Id*. (citations omitted) (emphasis in original).

33 *Id*. (citations omitted) (emphasis in original).

34 *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 196 (2d Cir. 2008) (quoting *Novak*, 216 F.3d at 309).

statement was false when it was made (or even that it was false in hindsight).[35] Instead, they merely make the conclusory allegation that, given (i.e., *assuming*) the fraud they try to allege, "[i]t was materially misleading" for Mr. Andrew to make the statement (CAC ¶ 146) without explaining why any part of the statement was (supposedly) not true. But that is pleading by assumption, which the PSLRA forbids. There is, for example, no allegation that Messrs. Takeyasu and Curran were not "look[ing] around" for "little bits of efficiencies" or that reducing operating costs by ten-to-fifteen cents would not give "more cash back in the Company" that could be used to repay debt.

Plaintiffs also take issue with Mr. Andrew's statement during the February 17, 2011 earnings call that

> We're not seeing massive cost pressure in the industry. We're seeing selective attempts. But we have enough buying power that we have been able to balance this across the Company in terms of activity levels. So we're not seeing anything on that side of the equation driving the overall cost structure.

(CAC ¶ 147) Again, there is no particularized allegation of "why and how" that statement was false.[36] Plaintiffs conclusorily allege that it was misleading for Mr. Andrew to state that Penn West was controlling costs legitimately given (again, *assuming*) the fraud they try to allege. (CAC ¶ 148) But that is not even the topic of Mr. Andrew's statement, which was directed at industry trends. Yet again, Plaintiffs allege no specific facts in support of their assertion that Mr. Andrew's statement was false. For example, there is no allegation that Penn West lacked buying power or that its buying power did not help it balance its costs.

***2. Mr. Nunns' Statements During Penn West Earnings Calls***

Plaintiffs allege that Mr. Andrew is liable for failing to correct alleged

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35 *Rombach*, 355 F.3d at 174.

36 *Id.*

misstatements by Mr. Nunns during Penn West's February 18, 2010 and May 5, 2010 earnings calls. For the reasons explained by Mr. Nunns, Plaintiffs have not adequately alleged that those statements were false.[37]

Even if Plaintiffs had adequately alleged that Mr. Nunns' statements were false, Mr. Andrew could not be held liable for them. Section 10(b) prohibits "*making* any untrue statement of material fact."[38] Mr. Andrew cannot be held liable for Mr. Nunns' statements because Mr. Andrew did not make those statements.[39] Plaintiffs cannot get around this by alleging that Mr. Andrew "failed to correct" Mr. Nunns' statements; the plain language of Section 10(b) and Rule 10b–5 "do not contemplate the general failure to rectify misstatements of others."[40] Absent a specific duty to disclose, "silence ... is not misleading under Rule 10b–5."[41] Because there is no "duty to rectify [another person's] allegedly material misstatements on analyst calls,"[42] Mr. Nunns' statements cannot form the basis for a claim against Mr. Andrew.

***3. Mr. Andrew's Statements Related to Penn West's Public Filings***

Plaintiffs have not pleaded that the statements they attribute to Mr. Andrew in Penn West's public filings were false. The Sarbanes-Oxley certifications he signed in conjunction with the annual reports and quarterly filings Penn West issued when he was CEO provide no basis for Plaintiffs' claims. Plaintiffs contend that certain statements in those certifications were false because:

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37 *See* Mem. of Law in Supp. of Mot. to Dismiss of Def. Murray Nunns Section I.B.2.

38 *Janus*, 131 S. Ct. at 2299 (citations omitted, emphasis added).

39 *Id*.

40 *Compare* CAC ¶ 311(b) *with United States v. Schiff*, 602 F.3d 152, 167 (3d Cir. 2010).

41 *Oneida Sav. Bank v. Uni-Ter Underwriting Mgmt. Corp.*, No. 5:13-CV-746-MAD/ATB, 2014 WL 4678046, at *12 (S.D.N.Y. Sept. 18, 2014) (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)).

42 *Schiff*, 602 F.3d at 162.

- Contrary to the representations that Penn West's internal controls "were 'effective'" and "designed to provide 'reasonable assurance regarding the reliability of financial reporting,'" Penn West in fact "lacked adequate internal controls ... and its financial statements were materially misstated as a result of the fraud." (CAC ¶¶ 139, 151)

- Contrary to the representations that the filings "'fairly present[ed] ... the financial condition and results of operations of' Penn West, and disclosed '[a]ny fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting,' the Company's financial results were materially misstated through the undisclosed fraudulent accounting scheme." (*Id*.)

However, Plaintiffs do not plead with particularity that anything in those certifications was false. Mr. Andrew told investors that Penn West's controls could only provide "reasonable assurance" regarding the reliability of the financial statements. The certifications made clear to investors—in a portion Plaintiffs omitted from their quotation—that the controls were not a guarantee and that fraud was still possible:

> It should be noted that while the CEO and CFO believe that Penn West's disclosure controls and procedures provide a reasonable level of assurance that they are effective, they **do not expect that Penn West's disclosure controls and procedures or internal controls over financial reporting will prevent all errors and fraud**. A control system, no matter how well conceived or operated, can only provide reasonable, not absolute, assurance that the objectives of the control system are met.[43]

Because Mr. Andrew made no "affirmative guarantees regarding the company's compliance with ... controls" or regarding the effectiveness of those controls, Plaintiffs have not met their burden

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[43] Ex. 7, Penn West Energy Trust Form 40-F (Mar. 22, 2010) at 3 (emphasis added); Ex. 27, Penn West Energy Trust Form 40-F (Mar. 22, 2011) at 3 (emphasis added). Indeed, Penn West's annual audit opinions expressed the same cautions to Penn West investors, stating that "[b]ecause of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements." *See*, *e.g.*, Ex. 7, Penn West Energy Trust Form 40-F (Mar. 22, 2010) at Exhibit 99.3 at 3. And as explained in more detail in the Joint Memorandum, Penn West's auditors provided clean audit opinions (including regarding internal controls) at all relevant times. *See* Joint Mem. Background, Section D.

to allege that Mr. Andrew's statements about those controls were false.[44] There is no particularized allegation that any internal control was deficient, only the improper hindsight supposition that "the controls *must* have been weak *because* a fraud actually occurred."[45]

Mr. Andrew also gave no guarantee regarding Penn West's financial statements. The certifications' representations concerning the financial statements were explicitly "[b]ased on [Mr. Andrew's] knowledge" and "based on [his] most recent evaluation of internal controls."[46] Because these were statements of belief and opinion, Plaintiffs must allege with particularity both that the statements were objectively false and that Mr. Andrew disbelieved them when he signed them.[47] There are no such allegations. As is discussed more fully below with respect to scienter, there is no particularized allegation that Mr. Andrew knew of the alleged fraud or of any error in Penn West's financial statements. Nor is there any allegation that he failed to perform an evaluation of the Company's internal controls or that his evaluation did not result in the conclusions described in the certifications.

### C. Plaintiffs Do Not Allege Scienter

Plaintiffs also do not allege with particularity facts giving rise to a strong inference that Mr. Andrew acted with scienter in connection with any statement they attribute to

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44 *In re UBS AG Sec. Litig.*, No. 07-CV-11225-RJS, 2012 WL 4471265, at *36 (S.D.N.Y. Sept. 28, 2012); *see also In re China N. E. Petroleum Holdings Ltd. Sec. Litig.*, No. 10 CIV. 4577 MGC, 2015 WL 223779, at *3 (S.D.N.Y. Jan. 15, 2015) (allegations like Plaintiffs' were "meaningless" without particularized allegations that defendant "knew or should have known" of internal control problems prior to signing certifications).

45 *Pugh v. Tribune Co.*, 521 F.3d 686, 694 (7th Cir. 2008) (emphasis in original).

46 Ex. 7, Penn West Energy Trust Form 40-F (Mar. 22, 2010) at 3, Exhibit 99.5; Ex. 18, Penn West Energy Trust Form 6-K (May 6, 2010) at Exhibit 99.3; Ex. 25, Penn West Energy Trust Form 6-K (Aug. 6, 2010) at Exhibit 99.3; Ex. 26, Penn West Energy Trust Form 6-K (Nov. 8, 2010) at Exhibit 99.3; Ex. 27, Penn West Energy Trust Form 40-F (Mar. 22, 2011) at 3, Exhibit 99.5.

47 *Fait*, 655 F.3d at 110.

him. As to the first prong of that analysis (motive), the CAC is devoid of any legally viable allegation of motive for Mr. Andrew to commit fraud. The only motive allegation is that "Penn West's senior management was ... highly motivated to show improving cost control." (CAC ¶ 42) Not only is that legally impermissible group pleading,[48] as a matter of law it cannot support an inference of scienter because it is precisely the sort of generic, common motive shared by most corporate officers, and the Second Circuit has "consistently rejected" such generic motives as "insufficient."[49] Just as important, Plaintiffs do not even try to allege that Mr. Andrew "benefitted in some concrete and personal way from the purported fraud."[50] Plaintiffs have thus failed to allege that Mr. Andrew had scienter by pleading motive.

The next inquiry is whether Plaintiffs have pleaded scienter by alleging particularized facts showing that Mr. Andrew acted with conscious misbehavior or recklessness. Because Plaintiffs do not plead motive, the strength of their allegations under this second prong "must be correspondingly greater."[51]

Plaintiffs wholly fail to plead conscious misbehavior or recklessness by Mr. Andrew. Not one paragraph in the CAC alleges that Mr. Andrew—an engineer, not a finance professional[52]—knew anything about any restatement-related subject, let alone that the alleged fraud was "known to [him] or so obvious that [he] must have been aware of it."[53] Nor is there any allegation that he had access to information contradicting any of his public statements, let

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48 Note 22, *supra*.

49 *Teamsters Local 445*, 531 F.3d at 196; *see ECA*, 553 F.3d at 198; *Kalnit v. Eichler*, 264 F.3d 131, 140 (2d Cir. 2001).

50 *Novak*, 216 F.3d at 307–08.

51 *ECA*, 553 F.3d at 199.

52 *See* Ex. 24, Penn West Energy Trust Form 6-K (May 14, 2010) at Exhibit 99.1 at 7 (describing Mr. Andrew's engineering background).

53 *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009).

alone an allegation "specifically identify[ing] the reports or statements containing this information."[54] Nor do Plaintiffs' allegations placing the blame for the alleged fraud on senior finance and accounting personnel (CAC ¶¶ 11, 44, 116, 118, 123, 96) apply to Mr. Andrew, who never worked in those departments and whose background was in engineering.

The only allegation in the CAC that even tries to address Mr. Andrew's scienter comes in paragraph 316, in which Plaintiffs conclusorily proclaim that "[t]he above allegations ... establish a strong inference that Defendants Takeyasu, Andrew, Nunns, Roberts, and Curran acted with scienter in making the materially false and misleading statements set forth above during the Class Period." (CAC ¶ 316) That conclusory group pleading fails as a matter of law.[55]

Looking past Plaintiffs' improper group pleading, the Court must dismiss the Complaint if the inference that Mr. Andrew acted with conscious disregard or recklessness is not at least as strong as the inference that he did not.[56] Here, the *only* inference supported by Plaintiffs' allegations is that he did not. The first question is what particularized allegations Plaintiffs have made tending to show that Mr. Andrew possessed the requisite scienter. That

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54 *Teamsters Local 445*, 531 F.3d at 196.

55 Plaintiffs also include Mr. Andrew in the defined term "Individual Defendants," but only use that term in Paragraph 125. The only allegation there that the "Individual Defendants" possessed scienter is that "[e]ither Roberts and the other Individual Defendants possessed the detailed personal knowledge of the Company's operating expenses that they claimed to have, in which case they knew about its massive fraud, or they lacked personal knowledge of the Company's operating expenses, in which case their repeated statements on the subject were severely reckless at a minimum." (CAC ¶ 125) This allegation fails not only as impermissible group pleading, but also as lacking in any particularity or specificity (or rational connection to any allegation) about Mr. Andrew's conduct. "A plaintiff cannot base securities fraud violations on speculation and conclusory allegations." *Kalnit*, 264 F.3d at 142 (citations omitted).

56 *Tellabs*, 551 U.S. at 324.

inquiry is simple, because there are no legally viable ones.[57] At the core, Plaintiffs rely on Mr. Andrew's position as CEO. But Mr. Andrew was not a finance or accounting executive, there is no allegation that he participated in those areas of Penn West's operations, and his position as CEO during a portion of the proposed Class Period cannot support an inference of scienter. As the Second Circuit has long held, "[c]orporate officials need not be clairvoyant"[58] and a defendant's "position in the corporate hierarchy" is entitled to no weight in pleading scienter.[59]

Although the Court need not even consider countervailing inferences because Plaintiffs' allegations do support any inference of scienter, the most compelling inference from Plaintiffs' allegations is that Mr. Andrew did not possess scienter. Plaintiffs' allegations place blame for the alleged fraud on senior finance and accounting personnel—which Mr. Andrew was not. (*See* CAC ¶¶ 11, 44, 116, 118, 123, 96) Indeed, the restatement press release upon which Plaintiffs base their entire case (*see* Note 3, *supra*) itself supports the inference that Mr. Andrew was not involved in or aware of any wrongdoing. And as the Joint Memorandum explains in more detail, there are a host of other facts pleaded in the CAC that support an inference that no individual defendants acted with scienter. (*See* Joint Mem., Section I.C) That requires the claims against Mr. Andrew to be dismissed with prejudice.

## II. Plaintiffs Do Not Plead A Section 20(a) Claim Against Mr. Andrew

Plaintiffs allege that Mr. Andrew is liable under Section 20(a) for controlling

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57 Allegations such as those in CAC ¶¶ 6 and 48 are entitled to no weight because they are both impermissible group pleading and not particularized with respect to Mr. Andrew. *See also* Joint Mem. Section I.B (additional discussions regarding why the CAC contains no allegations that support a strong inference of scienter).

58 *Novak*, 216 F.3d at 309.

59 *Teamsters Local 445*, 531 F.3d at 193; *see also Bd. of Trs. of City of Ft. Lauderdale Gen. Emps.' Ret. Sys. v. Mechel OAO*, 811 F. Supp. 2d 853, 873 (S.D.N.Y. 2011) ("courts in this District have long held that accusations founded on nothing more than a defendant's corporate position are entitled to no weight").

Penn West's primary violations. (CAC ¶ 321) To plead such a claim, Plaintiffs must show (1) a primary violation by Penn West, (2) control of Penn West by Mr. Andrew, and (3) that Mr. Andrew "was, in some meaningful sense, a culpable participant in the controlled person's fraud."[60] Plaintiffs do not allege a primary violation by Penn West. (*See* Joint Mem. Sections I–III) Although that alone requires dismissal of this claim, Plaintiffs also fail to plead the second and third requirements for a Section 20(a) claim.

Plaintiffs must allege that Mr. Andrew had "actual control" over "not only ... the primary violator, but [also] over the transaction in question."[61] It is not enough to allege Mr. Andrew's *status*—Plaintiffs must allege that Mr. Andrew exercised *actual* control over the matters at issue (*i.e.*, the items that were restated).[62] On that score the CAC is a complete failure: There is no specific allegation that Mr. Andrew had actual control over any of the accounting decisions at issue. Plaintiffs' conclusory allegation that "[i]n their capacities as senior corporate officers of the Company ..., Andrews, Nunns, Roberts, and Curran had direct involvement in the day-to-day operations of the Company ... and in its accounting and reporting functions" (CAC ¶ 322) does not come close to sufficing because "[c]onclusory allegations of control are insufficient as a matter of law" and "officer or director status alone does not constitute control."[63]

Plaintiffs also do not allege Mr. Andrew's culpable participation in the alleged fraud. A Section 20(a) plaintiff "must allege some level of culpable participation at least

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60 *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007).

61 *H&H Acquisition Corp. v. Fin. Intranet Holdings*, 669 F. Supp. 2d 351, 361 (S.D.N.Y. 2009) (citations omitted).

62 *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 166 (S.D.N.Y. 2012).

63 *Id.* at 166–67 (citations omitted).

approximating recklessness in the Section 10(b) context."[64] Because Plaintiffs failed to plead that Mr. Andrew acted recklessly, they also fail to allege culpable participation for the purposes of Section 20(a).

**Conclusion**

Because Plaintiffs have failed to plead any actionable claims against Mr. Andrew, the claims in the CAC against him must be dismissed with prejudice.

Dated: March 6, 2015

Respectfully submitted,

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

**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 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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