UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PENN WEST PETROLEUM LTD. SECURITIES REGULATION

No. 14 Civ. 06046 (JGK)(GWG)

ECF CASE

REPLY MEMORANDUM OF LAW OF DEFENDANT MURRAY NUNNS IN SUPPORT OF HIS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Although Plaintiffs' Complaint is more than 100 pages long — and their opposition brief devotes an additional 72 pages to explaining and defending their claims — Plaintiffs are unable to point to a single, particularized factual allegation demonstrating that Murray Nunns, the former CEO of Penn West, was aware of any accounting impropriety or internal control deficiency at the Company. Instead, they ask the Court to draw the inference that Mr. Nunns must have known what was going on because of his status; the fact that he signed certifications attesting to his belief in the accuracy of the Company's financial statements and the adequacy of its internal controls; and the fact that the financial statements at issue were *later* corrected to remedy accounting errors that Plaintiffs are unable to demonstrate were ever brought to Mr. Nunns' attention. The PSLRA demands much more. Courts repeatedly have rejected the argument that allegations such as these are sufficient to "state with particularity facts giving rise to a strong inference that the defendant acted" with scienter. 15 U.S.C. § 78u-4(b)(2)(A). For these and other reasons set forth below, Plaintiffs' claims against Mr. Nunns must be dismissed.

ARGUMENT

I. PLAINTIFFS' SCIENTER ALLEGATIONS FAIL AS TO MR. NUNNS.

Plaintiffs' opposition brief confirms that their theory of scienter rests principally on allegations about the actions of "senior accounting management." For reasons set forth in detail in the Company's motion to dismiss, these allegations cannot withstand scrutiny. (*See* Company Br. 19-21; Company Reply Br. Pt. I.B.1.) They are also utterly irrelevant to Mr. Nunns, a geologist who served as the Company's CEO, was never a member of the accounting department, and is not alleged to have played any role in the accounting practices at issue. Unable to link Mr. Nunns to the Company's purported admissions about "senior accounting management," Plaintiffs rely instead on a variety of other theories. All are defective.

A. Plaintiffs Cannot Raise A Strong Inference of Scienter Based on Mr. Nunns' Status as CEO or His Supposed Knowledge of "Core Operations."

Plaintiffs repeatedly attempt to draw a "strong" inference of scienter by arguing that Mr. Nunns was a "high level executive[] with unlimited access to Company information" (Opp. 21) and therefore must have known about the alleged accounting improprieties. But it is well established that "accusations founded on nothing more than a defendant's corporate position are entitled to no weight." *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) *aff'd sub nom. Frederick v. Mechel OAO*, 475 F. App'x 353 (2d Cir. 2012). Broad allegations of access to information are similarly insufficient. *See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 196 (2d Cir. 2008). Instead, when plaintiffs attempt to plead scienter by demonstrating that the defendant had "'access to contrary facts, they must specifically identify the reports or statements containing this information.'" *Id.* (quoting *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000)). Here, such allegations are utterly lacking. Nowhere in the 326 paragraphs of the Complaint do Plaintiffs plead that Mr. Nunns had any information that contradicted the Company's accounting or called into question the adequacy of its internal controls.

Plaintiffs attempt to buttress their inadequate, status-based allegations of scienter by asserting that, as a CEO, Mr. Nunns must be presumed to have knowledge of Penn West's "core operations." (Opp. 21-22, 27-28.) Their reliance on the "core operations" doctrine is dubious at best, because it is doubtful that the doctrine remains viable following the enactment of the PSLRA. *See Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron Inc.*, 741 F. Supp. 2d 474, 490 (S.D.N.Y. 2010) (Koeltl, J.) (most circuits have found core operations doctrine "no longer viable in most situations"); *see also In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 353 (S.D.N.Y. 2011). Even assuming the doctrine continues to

apply in some contexts, it would not apply here. As this Court held in *Arbitron*, while the doctrine may permit a court to infer "general knowledge" of significant corporate facts, it is not a basis to infer knowledge of "small bore details." *Arbitron Inc.*, 741 F. Supp. 2d at 490. Rather, "courts have required that the operation in question constitute nearly all of a company's business before finding scienter based on the 'core operations doctrine.'" *Tyler v. Liz Claiborne, Inc.*, 814 F. Supp. 2d 323, 343 (S.D.N.Y. 2011). The doctrine thus provides no basis to conclude that Mr. Nunns was aware of the accounting practices at issue, none of which meet this high threshold.[1]

Similarly, there is no merit to Plaintiffs' argument that Mr. Nunns must have been aware of the alleged accounting violations because he purportedly "represent[ed]" to investors that he was "focused" on the "subject" matter at issue. (Opp. Br. 28-29 (citing Compl. ¶ 195).) Plaintiffs cite only one statement by Mr. Nunns in support of this argument — a remark on an investor conference call that Penn West would prioritize "[c]apital efficiency and production performance" in 2013. This statement proves nothing about what Mr. Nunns knew or should have known about Company accounting and internal controls. If knowledge of accounting practices could be inferred from statements about the desire to control costs or improve

[1] The case law Plaintiffs cite is in accord. (Opp. 22.) In *Atlas*, the court invoked the core operations doctrine where an accounting scandal not only physically manifested itself to corporate executives — the company's core assets (cargo planes) were idling unused — but also forced the company into bankruptcy. *In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F. Supp. 2d 474, 491, 498 (S.D.N.Y. 2004). The court distinguished a case in which a court declined to apply the doctrine to a claim arising from an accounting scandal, by explaining that the scandal had not implicated the company's "survival." *Id.* at 490-91 (discussing *In re Federated Dep't Stores, Inc. Sec. Litig.*, 2004 WL 444559 (S.D.N.Y. Mar. 11, 2004)).

performance, then virtually every CEO would be deemed to have full knowledge of every aspect of a company's accounting. Plaintiffs cite no authority for such an absurd proposition.[2]

B. Mr. Nunns' Certifications Do Not Give Rise to a Strong Inference of Scienter.

Plaintiffs argue that Mr. Nunns' certifications of financial statements support an inference of scienter (Opp. 33-35), but they fail to address or distinguish the many cases establishing the opposite. (*See* Nunns Br. 11-12 (collecting cases).) As these authorities make clear, the mere fact that a defendant certified financial statements that later proved inaccurate will not support an inference of scienter absent "specific allegations of reasonably available facts that should have put him on notice that the reported financial results were false." *Goplen v. 51job, Inc.,* 453 F. Supp. 2d 759, 775 (S.D.N.Y. 2006). Here, the Complaint contains no such allegations.

Instead, Plaintiffs speculate that Mr. Nunns either had sufficient information about Penn West's accounting practices to certify the filings — in which case he would have been aware of the alleged accounting violations — or lacked such information, in which case his certification was reckless. (Opp. 34.) The argument fails, because allegations that defendants "knew or were reckless in not knowing" about an alleged fraud are "so broad and conclusory as to be meaningless." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994). Moreover, Plaintiffs present a false dichotomy. There is no reason to assume that Mr. Nunns *either* knew *or* was reckless, when there is a more plausible alternative: that, even with the exercise of

[2] Plaintiffs' cases (Opp. 29-30 & n.8) are distinguishable, because they involve particularized allegations that the defendants actively monitored the subject matter at issue. *See In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 782-84 (S.D. Tex. 2012) (in case involving misrepresentations about safety, CEO "tout[ed]" his attention to inadequate safety efforts nearly twenty times; described his attention to issue as "laser[-like]"; and implemented safety training course); *Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 283 (S.D.N.Y. 2012) (laundry list of particular allegations that defendants "actively monitored" allegedly deceptive asset sales).

reasonable diligence, none of Penn West's accounting problems was so obvious as to be visible to Mr. Nunns — a geologist turned CEO with no training as an accountant.[3]

Plaintiffs cite only one case, *Dobina v. Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228 (S.D.N.Y. 2012), in their effort to draw an inference of scienter based on Mr. Nunns' certifications, but their reliance on *Dobina* is entirely misplaced. While the court in *Dobina* found that scienter had been pleaded as to the CFO, it did so based on particularized allegations that the CFO had been "*expressly*" advised of weaknesses in the internal controls prior to certifying their adequacy. *Id.* at 247-48. By contrast, the court held that scienter was not pleaded as to the CEO, because there were no allegations demonstrating that the CEO was aware of any such deficiencies at the time of his own certifications. *Id.* at 248. Here, there are no particularized allegations that any individual defendant was "expressly" advised of any accounting errors during the relevant period, and there are certainly no such allegations with respect to the Company's former CEOs, including Mr. Nunns. *See id.; see also Plumbers & Pipefitters Nat. Pension Fund v. Orthofix Int'l N.V.*, No. 13 Civ. 5696 (JGK), 2015 WL 981518, at *9 (S.D.N.Y. Mar. 6, 2015) (Koeltl, J.) (plaintiff cannot demonstrate scienter based on CEO's "signing of a certification without alleging any facts" demonstrating "concomitant awareness" of or "reckless" disregard of the inaccuracy of the certification).

[3] Notably, even if Mr. Nunns had been negligent, that would not be sufficient to conclude that he acted with scienter, which requires, at a minimum, "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." *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001).

C. Plaintiffs' Allegations About the Nature, Timing, and Magnitude of the Alleged Accounting Irregularities Are Equally Insufficient to Demonstrate Scienter.

Unable to point to a single, factual allegation demonstrating that Mr. Nunns was aware of any accounting impropriety, Plaintiffs ask the Court to assume such knowledge based on arguments about the nature, timing, and magnitude of the alleged violations. The arguments fail.

There is no merit to Plaintiffs' assertion that the accounting violations were so "clear-cut" or "flagrant" (Opp. 23-25, 55) as to support an inference of scienter. The argument that the accounting errors were obvious is implausible, given that Penn West's auditors consistently gave the Company clean audit opinions.[4] And even if the accounting practices *were* "clear-cut violations of GAAP mandates," as Plaintiffs contend (Opp. 23), it would make no difference as to Mr. Nunns, because Plaintiffs have failed to allege that he was even aware of any of the particular practices at issue — a fatal defect. *See City of Brockton Ret. Sys. v. Shaw Grp. Inc.*, 540 F. Supp. 2d 464, 473 (S.D.N.Y. 2008); *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 568 (S.D.N.Y. 2004))); *see also Orthofix*, 2015 WL 981518, at *9, 13 (dismissing Section 10(b) claim against CEO, despite company's violation of "basic accounting principles," because complaint did not demonstrate his knowledge of violations).

Plaintiffs attempt to salvage their argument by citing *SEC v. Espuelas*, 579 F. Supp. 2d 461 (S.D.N.Y. 2008), for the proposition that "even where defendants 'are not accounting professionals,'" scienter may be inferred where "'the accounting rules are straightforward and the company's accounting treatment was obviously wrong.'" (Opp. 55 (quoting *Espuelas*, 579 F.

[4] While Plaintiffs are correct that an auditor's endorsement of a company's filings does not render the company's executives "immune from liability" under the securities laws (Opp. 46), courts in this district repeatedly have held that an auditor's independent certification cuts against an inference of scienter, *see, e.g.*, *In re IMAX Sec. Litig.*, 587 F. Supp. 2d 471, 482 (S.D.N.Y. 2008); *In re Bausch & Lomb, Inc. Sec. Litig.*, 592 F. Supp. 2d 323, 341 (W.D.N.Y. 2008).

Supp. 2d at 475)). But *Espuelas* plainly states that, where defendants lack accounting expertise, the plaintiffs must plead either that the defendants "had access to information contradicting the substance of reported accounting" or "ignore[d] obvious warning signs" that imposed a duty to investigate. *Espuelas*, 579 F. Supp. 2d at 475. Because Plaintiffs have not alleged that Mr. Nunns was privy to such information or disregarded such "red flags," Plaintiffs' argument fails.

Plaintiffs also argue that the alleged accounting improprieties were obvious, because a new CFO — David Dyck — supposedly "discovered the fraud within weeks" of joining the Company in May of 2014. (Opp. 2, 15.) The argument fails for multiple reasons. First, the Complaint does not suggest that the accounting violations were immediately "obvious" to Mr. Dyck; instead, it alleges that potential issues were brought to his attention when "members of his team express[ed] concerns" about the Company's accounting practices. (Compl. ¶ 98.) Even then, Mr. Dyck did not "quickly" uncover an accounting "fraud," as Plaintiffs opposition brief asserts. Rather, the need for a restatement was not announced until months later, after an intensive Audit Committee investigation conducted with the assistance of "independent legal counsel and an independent forensic accounting firm." (*Id.*) None of these facts establishes that the alleged accounting violations were so obvious as to have been visible to Mr. Nunns, a former CEO who is not alleged to have had any responsibility for the challenged accounting practices. Mr. Nunns left Penn West almost a year before Mr. Dyck was appointed as the Company's CFO; Plaintiffs do not allege that anyone ever expressed concerns about the Company's accounting to Mr. Nunns;[5] and there is no dispute that the Audit Committee investigation and the expression of concerns that prompted it did not take place until a year after Mr. Nunns' departure.

[5] Citing *In re OSG Sec. Litig.*, 12 F. Supp. 3d 622 (S.D.N.Y. 2014), Plaintiffs argue in a footnote that Mr. Nunns must have had the same knowledge as Todd Takeyasu, the CFO who served (continued…)

Plaintiffs also argue that the magnitude, duration, and timing of the alleged accounting errors support an inference of scienter as to Mr. Nunns. While magnitude and duration may help strengthen an inference of scienter, they cannot create one in the absence of additional supporting allegations, which are utterly lacking here. *See, e.g.*, *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 304-05 (S.D.N.Y. 2008) (rejecting Plaintiff's allegations about the "magnitude of the fraud" and its "extended duration" of six years as insufficient); *Espuelas*, 579 F. Supp. 2d at 465, 474 (declining to infer scienter from restatement of income by over ninety percent in the absence of "additional supporting allegations"). Moreover, Plaintiffs' arguments about the purported magnitude of the accounting errors are overblown. Plaintiffs concede in the Complaint that the two key metrics which they claim the Company's accounting was designed to inflate — netbacks and funds flow[6] — were never misstated by more than 8% and 12%, respectively. Errors of even greater magnitude have been held insufficient to establish scienter. *See In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 448 (S.D.N.Y. 2005) (declining to infer scienter from restatement of "little more than twenty percent"). Plaintiffs' arguments about the supposed

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under him. (Opp. 21 n.5.) The argument fails not only because Plaintiffs have failed to adequately plead scienter as to Mr. Takeyasu (*see* Company Br. 16-32), but because it misreads *OSG*. The court in *OSG* did not find that scienter was pleaded solely by imputing knowledge of a corporate officer to his superior. It relied on other allegations, including that the defendant was aware of the rules governing the allegedly concealed tax liability; statements by a corporate officer that "anyone in a position of financial decisionmaking authority would have possessed the same knowledge"; and the fact that the defendant had been sued for fraud for related misconduct. *OSG*, 12 F. Supp. 3d at 631-32 & n.74.

[6] The supposed importance of these metrics is also insufficient, standing alone, to establish scienter. While the court in *New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 F. App'x 10, 14 (2d Cir. 2011) posited that misstating key metrics may "*reinforce*[] the inference of scienter," it sustained Plaintiffs' scienter allegations because the defendants "*received information*" contradicting the company's statements as to the metrics in question, *id.* (emphasis added).

"timing" of the accounting errors are equally unconvincing. For reasons explained in the Company's motion papers, there is a disconnect between the timing of the "downward financial pressures" experienced by Penn West and the occasions when "the size of the fraud" (Opp. 31) supposedly increased — one which destroys Plaintiffs' allegations of suspicious timing. (*See* Company Br. 28-29; Company Reply Br. I.B.4.d.)

D. *Plaintiffs' Remaining Scienter Allegations Are Without Merit.*

Plaintiffs' remaining scienter allegations are equally unconvincing. Plaintiffs argue that Mr. Nunns had a motive to commit fraud to retain his position (Opp. 36) but no such motive is alleged in the Complaint. Moreover, both this supposed motive — and Plaintiffs' alternative theory that the defendants were motivated to improve the company's performance under financial metrics that were "critically important" to investors (Opp. 35-36) — are generalized motives possessed by all corporate executives. As such, they are wholly insufficient to plead scienter. *See Shields*, 25 F.3d at 1130 (defendants' alleged motive to "protect their executive positions" insufficient to establish scienter); *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996) (allegation of motive to "maintain the appearance of corporate" profitability insufficient).

II. THE ALLEGED MISSTATEMENTS ARE NOT ACTIONABLE.

While the failure to plead a strong inference of scienter is reason enough to dismiss Plaintiffs' claims against Mr. Nunns, Plaintiffs' opposition brief fails to rebut yet another flaw in Plaintiffs' Complaint — the fact that the alleged misstatements and omissions that Plaintiffs attribute to Mr. Nunns simply are not actionable, even without regard to scienter.

First, Plaintiffs fail to offer any convincing response to the point that Mr. Nunns' certifications about the accuracy of the Company's financial statements, and the adequacy of its internal controls, were subjective statements of opinion or belief that are not false absent evidence that the defendant knew they were inaccurate at the time they were made. (*See* Nunns

Br. 16.) Plaintiffs focus their opposition on the fact that Mr. Nunns signed a "publicly reported" 2012 financial statement that later proved false. (Opp. 58-59.) In making this argument, however, they ignore the fact that an accompanying certification made clear that Mr. Nunns was certifying the accuracy of the Company's financial statement only "[b]ased on my knowledge." Ex. 8.[7] Because Mr. Nunns representations about Penn West's financial statements were qualified and limited by the extent of his own knowledge, they are not false absent proof that he was aware that the financial statements were inaccurate at the time — an allegation absent from the Complaint. *See, e.g., Hall v. The Children's Place Retail Stores, Inc.*, 580 F. Supp. 2d 212, 231-32 (S.D.N.Y. 2008) (for "certifications to be materially false" defendant must "have had knowledge of that falsity" at the time).

Similarly, while Plaintiffs argue that Mr. Nunns' certifications of internal controls were statements of objective fact, they ignore the fact that the language is inherently subjective — it expresses the opinion that the controls were sufficient to provide "*reasonable* assurance" that material information would be made known to the Company's superior officers. *See Dobina*, 909 F. Supp. 2d at 245 (certifications of internal controls "involve a certain amount of subjectivity"). Despite Plaintiffs' argument to the contrary, the cases they cite neither examine whether this language represents a statement of fact or opinion nor hold "that SOX certifications are not statements of opinion, and subjective disbelief need not be alleged to plead their falsity." (*See* Opp. 63 (citing *Orthofix*, 2015 WL 981518, at *12-13; *Hall*, 580 F. Supp. 2d at 232).)[8]

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[7] Exhibits are attached to the Declaration of Mark P. Gimbel, dated March 6, 2015, Doc. No. 84.

[8] Plaintiffs argue that, even if they are opinions, Mr. Nunns' certifications run afoul of *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, —— U.S. ——, 135 S.Ct. 1318 (2015), because Mr. Nunns failed to disclose that he lacked a reasonable basis for the certifications. (Opp. 58, 64.) In order to state such a claim under *Omnicare*, however, the plaintiff must:

(continued…)

Second, Plaintiffs offer no convincing response to the point that Mr. Nunns' statements on investor conference calls were not rendered misleading by his supposed failure to disclose the Company's accounting practices. Plaintiffs argue that Mr. Nunns had a duty to disclose Penn West's accounting practices whenever he addressed "sources" of the Company's "financial success." (Opp. 57, 60-61 (quoting *In re Van der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 400-01 (S.D.N.Y. 2005)).) A plain reading of Mr. Nunns' cited statements demonstrates, however, that not one sufficiently concerns the "sources" of Penn West's success to impose such a duty of disclosure. For example, in the first statement, Mr. Nunns' simply notes that it is more efficient to bring the tenth oil well on line than the first — hardly a discussion that demands full disclosure of all of a company's accounting minutiae. (*See* CAC ¶ 135.) The remainder of the statements are likewise too disconnected from specific financial results to require the disclosure of the challenged accounting practices. (*See* CAC ¶ 143 (noting that "scal[ing] up" exploration produces efficiency gains); ¶ 162 (lamenting that operations costs were *higher* than anticipated); ¶ 195 (*forecasting* that the Company *would* prioritize capital and operational efficiency); ¶ 197 (noting that capital expenditures were "always in our plans")). *See In re ITT Educ. Servs., Inc. Sec. & S'holder Derivatives Litig.*, 859 F. Supp. 2d 572, 579 (S.D.N.Y. 2012) (no duty to disclose predatory business model as a "source" of success, because link between results and alleged predatory practices was too "tenuous").

Finally, Plaintiffs offer no credible response to the many cases holding that, under *Janus Capital Grp., Inc. v. First Deriv. Traders*, —— U.S. ——, 131 S.Ct. 2296 (2011), a defendant may

> identify particular (and material) facts going to the basis for the [defendant's] opinion — facts about the inquiry the [defendant] did or did not conduct or the knowledge [the defendant] 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.

Omnicare, 135 S. Ct. at 1332; *see also id*. at 1329. The Complaint fails to meet this requirement.

not be held liable for failing to correct the misstatements of others. (*See* Nunns Br. 19-20 (citing, *inter alia*, *Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1051-52 (7th Cir. 2012); *Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 572 n.13 (S.D.N.Y. 2012)).) Unable to rebut or distinguish these cases, Plaintiffs instead rely on two decisions that were issued prior to *Janus*. (Opp. 67 (citing *In re SmarTalk Teleserv. Sec. Litig.*, 124 F. Supp. 2d 527, 543 (S.D. Ohio 2000); *Barrie v. Intervoice Brite, Inc.*, 409 F.3d 653, 656 (5th Cir. 2005)).) The simple response to both is that they are no longer good law to the extent that they suggest that a defendant may be held responsible for a misstatement made by another party. *See Janus*, 131 S. Ct. at 2302. Likewise, the cases Plaintiffs cite involving "written statements" are not helpful to Plaintiffs, because the defendants in those cases either signed the statements in question or had "ultimate authority" over them, such as an express approval right. (*See* Opp. 66 (citing *City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 416-17 & n.9 (S.D.N.Y. 2011) (company owned and controlled subsidiary making statement); *In re Puda Coal Sec. Inc., Litig.*, 30 F. Supp. 3d 261, 267 (S.D.N.Y. 2014) (underwriter with approval right)).)

CONCLUSION

For the foregoing reasons, and those set forth in the motion papers filed by the Company and William Andrew, which are hereby incorporated by reference to the extent applicable, the Court should dismiss all claims against Mr. Nunns. [9]

[9] Plaintiffs' Section 20(a) Claim fails for reasons set forth in Mr. Nunns' initial brief and in Point III of the reply brief of Mr. Andrew, which Mr. Nunns incorporates by reference herein.

Dated: New York, New York
May 15, 2015

Respectfully submitted,

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