UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GENWORTH FINANCIAL, INC. SECURITIES LITIGATION	Case No. 14-CV-02392 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendants Genworth Financial, Inc. ("Genworth"), Michael D. Fraizer, and Martin P. Klein respectfully submit this memorandum of law in support of their motion to dismiss the Amended Complaint for Violation of the Federal Securities Laws ("AC") filed on October 3, 2014 (ECF No. 26) under Fed. R. Civ. P. 9(b) and 12(b)(6) and the Private Securities Litigation Reform Act ("PSLRA").

PRELIMINARY STATEMENT

At the start of the class period in November 2011, Genworth announced a "planned initial public offering of Genworth Australia" "targeted for the second quarter of 2012" (April–June). From the outset, Genworth told investors that while it "expect[s] this transaction is achievable, there can be *no assurance* that this transaction can be executed within the targeted timeframe or on the desired terms," and "[a]dverse market or other conditions might delay or impede the planned IPO." On April 17, 2012, the final day of the purported class period, Genworth announced a postponement of the IPO based on Genworth Australia's recent performance—specifically, *during the first three months of 2012*, lenders had submitted more claims, for significantly higher claim amounts, than Genworth Australia had previously experienced or anticipated earlier in the class period, particularly in the Queensland region, which had experienced widespread flooding in early 2011. Shortly thereafter, in connection with its first quarter 2012 earnings announcement on May 1, Genworth reported an increase in Genworth Australia reserves of $82 million to account for the increased claim frequency and severity experienced during the first three months of 2012.

The basic premise of any securities fraud class action is that defendants *lied* to investors. Here, Plaintiffs accuse Defendants of concealing rising delinquencies and losses during the class period and lying about their plan to execute the IPO. But the documents Plaintiffs cite directly controvert this tale. Throughout 2011, Genworth disclosed the impact of the Queensland

flooding on Genworth Australia's performance each quarter, including increasing delinquency rates and loss ratios, reported increased reserves to account for these losses, and repeatedly cautioned that it "expect[ed] these pressures to continue through the remainder of 2011." Plaintiffs ask the Court to ignore Genworth's extensive, detailed disclosures about the impact of the Queensland flooding on Genworth Australia's performance each quarter—which Plaintiffs do not allege were false—and, based on the fact that Genworth Australia increased reserves in May 2012, hold that Plaintiffs have adequately pleaded that Defendants' earlier statements concerning reserves and the planned IPO were false when made. Under the PSLRA and long-settled Second Circuit law, Plaintiffs fail to state a Section 10(b) claim under the Securities Exchange Act of 1934 (the "Exchange Act").

First, Plaintiffs have not pleaded an actionable misstatement or omission. Plaintiffs challenge the accuracy of Defendants' opinions about Genworth Australia's reserves and the feasibility of the planned IPO based on their assertion that Defendants "should have" better predicted the spike in claim frequency and severity that Genworth Australia experienced in the first quarter of 2012. But Plaintiffs plead no facts demonstrating that Defendants did not genuinely believe their own opinions regarding Genworth Australia's reserves or the planned IPO or that those opinions were not reasonably held. These failures are fatal under *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011). Further, Plaintiffs plead no factual support for their assertion that Genworth Australia "should have" increased reserves earlier, relying instead on distortions of Genworth's exhaustive (and not alleged to be inaccurate) disclosures of its financial performance. *See* Point I, *infra*.

Second, Defendants' statements regarding the IPO "targeted for the second quarter of 2012" are also protected by the PSLRA's safe harbor for forward-looking statements. Genworth

plainly identified its statements about the "targeted" or "planned" IPO as forward-looking and accompanied them with meaningful cautionary language identifying factors that could cause actual results to change. Moreover, even without this cautionary language, Plaintiffs fail to plead that these statements were made with actual knowledge of their falsity, as required by the PSLRA. Defendants' forward-looking statements about the planned IPO are thus protected by the PSLRA's safe harbor under two independent grounds. *See* Point II, *infra*.

Third, Plaintiffs fail to plead scienter. The complaint alleges no motive, much less one that is plausible. Plaintiffs fail to plead that Defendants acted with conscious misbehavior or recklessness—they reference *no* internal sources and plead no facts demonstrating Defendants' conscious or reckless disregard of information contradicting their statements that was available at the time they made them. The complaint is also devoid of any allegation tying any purportedly contradictory information to either of the individual defendants (Messrs. Klein and Fraizer), at any point before, during or after the class period. Further, Plaintiffs' theory of fraud—which would entail Defendants' concealing Genworth Australia's supposed need for increased loss reserves and announcing an IPO they never planned to execute by the targeted second quarter of 2012 timeframe, with no alleged benefit to them or the company—fails to plead the requisite strong inference of scienter required by *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). *See* Point III, *infra*.

Finally, Plaintiffs' control-person claim under Section 20(a) of the Exchange Act should also be dismissed, as the complaint pleads no underlying securities fraud. *See* Point IV, *infra*.

STATEMENT OF FACTS

The alleged class period begins on November 3, 2011, when Genworth announced a plan to pursue an IPO of 40% of Genworth Australia, and ends on April 17, 2012, when Genworth announced that it expected to report elevated losses in Australia for the first three months of

2012 and that it was postponing the IPO until early 2013 due to "recent business performance in Australia." AC ¶¶ 1, 36, 56. The gravamen of Plaintiffs' complaint is that, throughout the class period, "Defendants told investors that Genworth was not being significantly impacted by the slowing economy in Australia, especially in Queensland" (*id.* ¶ 38), "concealed" the rise in delinquencies and claims (*id.* ¶ 5), was "under-reserved" for losses (*id.* ¶¶ 55, 74, 76, 84, 89), and "assured" investors that the IPO would occur in Q2 2012 (*id.* ¶¶ 6, 51, 88, 94-95). In fact, as demonstrated by the documents cited in the complaint and set forth below, Genworth (i) clearly and repeatedly discussed the economic problems impacting Queensland; (ii) clearly and repeatedly reported quarter-by-quarter increases and decreases in delinquencies and claims that Genworth Australia experienced (including in Queensland); and (iii) did not assure investors that the IPO would occur in Q2 2012 but rather that execution was "targeted" for Q2 2012 and that "*there can be no assurance*" that the Q2 2012 timeframe could be met. In brief, the crux of the complaint is demonstrably false.

A. Genworth Regularly Updates Investors Concerning Genworth Australia's Mortgage Insurance Business

Genworth is the largest overall provider of private mortgage insurance outside of the U.S., with a presence in over 25 countries, including Australia. Ex. A (FY 2010 Form 10-K) at 13.[1] Genworth Australia's principal product offering is lenders' mortgage insurance. *Id.* at 17.

Beginning before the start of the class period and continuing through it, Genworth provided investors with exhaustive disclosures concerning the composition, performance, and risk profile of Genworth Australia's mortgage insurance business. For example, every quarter,

[1] As used herein, "Ex." refers to the exhibits attached to the accompanying Declaration of Greg A. Danilow. On this motion, the Court may consider "(1) documents attached to or incorporated by reference in the complaint, (2) documents integral to and relied upon in the complaint, even if not attached or incorporated by reference, (3) public disclosure documents required by law to be, and that have been, filed with the SEC, and (4) facts of which judicial notice properly may be taken." *Bd. of Trs. of City of Ft. Lauderdale Gen. Emps.' Ret. Sys. v. Mechel OAO*, 811 F. Supp. 2d 853, 865 (S.D.N.Y. 2011), *aff'd sub nom. Frederick v. Mechel OAO*, 475 F. App'x 353 (2d Cir. 2012).

Genworth disclosed overall revenues, loss ratios (the ratio of incurred losses to earned premiums), delinquency rates, the total amount of actual paid claims, and the average paid claim amount for each quarter, and further detailed—for each major geographical region within Australia (including Queensland) and each insurance policy vintage (the year the insurance policy was issued)—delinquencies and the percentage of Genworth Australia's overall risk in-force (*i.e.*, the risk associated with the business's "in-force" (issued) policies) that each region and vintage represented. *See, e.g.*, Ex. B (Q2 2011 Quarterly Fin. Supp.) at 35, 37-41; Ex. C (Q3 2011 Quarterly Fin. Supp.) at 35, 37-41.

Genworth also disclosed its reserves for Genworth Australia—*i.e.*, "estimated future payments of claims"—each quarter. Ex. A (FY 2010 Form 10-K) at 57. Genworth told investors that "the reserves … reflect estimates and actuarial assumptions with regard to [Genworth's] future experience … [and] involve the exercise of significant judgment," that "[m]any factors can affect future experience, including economic and social conditions," and that Genworth "cannot determine with precision the ultimate amounts [it] will pay for actual claims or the timing of those payments." *Id.* at 58. Given this "inherent uncertainty," Genworth warned that "[t]he actual amount of the claim payments may vary significantly from the loss reserve estimates." *Id.* at 106.

B. Pre-Class Period: Genworth Discloses that Flooding in Queensland Has Impacted Genworth Australia's Performance and Will Continue to Impact Performance Through 2011

On May 3, 2011, Genworth announced its Q1 2011 operating results (January–March 2011),[2] reporting Genworth Australia net operating income of $52 million.[3] In its May 3 news release, Genworth explained that Genworth Australia's operating earnings results "includ[ed] a

[2] Genworth's fiscal year is based on the calendar year.

[3] All currency values are USD except where indicated otherwise.

$5 million impact from economic disruption in areas impacted by January's flooding, primarily in Queensland." Ex. D (5/3/2011 News Release) at 8. Genworth also disclosed that Genworth Australia's "loss ratio increased to 45 percent … reflecting reserve strengthening associated with the flooding." *Id.* In its Q1 2011 Form 10-Q filed on May 4, 2011, Genworth further disclosed that in Australia, "the combined impact of higher mortgage interest rates, increases in the cost of living and January flooding," and the "pressured" Queensland economy "could adversely impact [its] results of operations." Ex. E (Q1 2011 Form 10-Q) at 65. During the Q1 2011 earnings call on May 4, Mr. Fraizer, Genworth's then-CEO, told investors that Genworth Australia had "experienced initial economic impacts from the floods" and that the company was "monitoring these [impacts] closely to see whether they linger and if any combined effect emerges." Ex. F (5/4/2011 Tr.) at 4.

Two months later on July 28, 2011, Genworth announced its Q2 2011 results, reporting Genworth Australia net operating income of $54 million. Ex. G (7/28/2011 News Release) at 7, 9. Consistent with its regular practice, Genworth provided extensive disclosures concerning Genworth Australia's performance during the quarter, including that Genworth Australia's (i) Q2 2011 net income of $54 million represented a decrease of 22% from 2010 "due to higher taxes and *increased delinquencies*" (*id.* at 9) (emphasis added); (ii) Q2 2011 loss ratio was 48%, up 6 points sequentially from Q1 2011 (*id.* at 7, 9); and (iii) reserves had *increased* by AU$46 million (bringing the ending reserves balance to AU$232 million from AU$216 million after AU$30 million in paid claims), with an average reserve per delinquency of AU$28,200 (Ex. B (Q2 2011 Quarterly Fin. Supp.) at 41).

In its Q2 2011 earnings news release on July 28, 2011, Genworth explained that the 48% loss ratio "reflect[ed] continued economic impacts from flooding in Queensland earlier in 2011

together with the combined impacts of higher interest rates, increased living costs, and the strong Australian dollar pressuring certain consumers and small business owners." Ex. G (7/28/2011 News Release) at 9. During the Q2 2011 earnings call held the same day, the then-COO of Genworth's international division also discussed that Queensland was enduring a "slow recovery" and was "just going to take some time to come back." Ex. H (7/29/2011 Tr.) at 14. Genworth also expressly disclosed in its Q2 2011 Form 10-Q filed on August 2, 2011, that:

> In Australia, the economy has slowed, *particularly in Queensland*, given the economic impact of the flooding in January 2011, pressures from higher interest rates, higher costs of living, higher exchange rates and cautious consumer spending. As a result, increased levels of new delinquencies were reported by financial institutions in this market, which adversely impacted the results of our operations…. In the first quarter of 2011, [2010 improvement] trend[s] reversed driven by higher reserves for claims anticipated from the natural disasters during that quarter, particularly the flooding in Queensland. In the second quarter of 2011, there was an increase in delinquencies and reserves as the cumulative impact of the factors noted previously exerted pressure on elements of the portfolio. *We expect these pressures to continue through the remainder of 2011 resulting in an elevated loss ratio as was seen in the second quarter of 2011 which may begin to moderate in 2012.*

Ex. I (Q2 2011 Form 10-Q) at 73 (emphasis added).

Six weeks later on September 26, 2011, Genworth updated investors with a presentation about Genworth Australia's mortgage insurance business. In this presentation, Genworth explicitly identified the "2007/2008 Books" in the "Queensland Region" as "[p]ressured," (Ex. J (9/26/2011 Presentation) at 25), explaining that the Queensland book was "Clearly Impacted" by the January 2011 flooding and that the "Small Business/Self Employed Impact" was "More Pronounced" in Queensland. *Id.* at 28. Genworth also informed investors that it had established a $7.5 million "Flood Reserve" in Q1 2011 and that its 45% loss ratio for Q1 2011 reflected an 8% increase from the loss ratio reported in Q4 2010 (37%). *Id.* at 29. With respect to projected losses going forward, Genworth advised that there were a number of factors impacting Queensland and driving loss ratios higher, and expressly warned that it was projecting loss ratios for Genworth

Australia in the second half of 2011 in the "High 40's/Low 50's." *Id.* at 29.

C. The Start of the Class Period: Genworth Announces Q3 2011 Results and Continues to Update Investors About the Impact of the Queensland Flooding

On November 3, 2011, the first day of the class period, Genworth announced Genworth Australia's Q3 2011 results (July–September) in extensive detail:

- Q3 2011 earnings of $41 million represented a decrease of 4% from 2010 (Ex. K (11/3/2011 News Release) at 8, 9);
- Q3 2011 loss ratio was 48%, "flat sequentially" from Q2 2011 and "and up 10 points over the prior year" (*id.* at 7, 9);
- Paid AU$25 million in claims and the average paid claim was AU$62,400 (Ex. C (Q3 2011 Quarterly Fin. Supp.) at 41);
- Queensland represented 22% of Genworth Australia's overall risk in-force, and policies originated in 2007 and 2008 represented 13% and 12% of the overall risk in-force respectively (together, 25%) (*id.* at 40);
- The total primary delinquency rate for Genworth Australia was 0.59%, while the delinquency rate for Queensland was 0.84%, and for policies written in 2007 and 2008, the delinquency rates were 1.22% and 1.50% respectively (*id.* at 40);
- Reserves increased by AU$48 million (bringing the ending reserves balance to AU$255 million from AU$232 million after the payment of claims), and the average reserve per delinquency was AU$30,000 (*id.* at 41).

Plaintiffs do not allege that any of these publicly disclosed metrics were false. Nor can they deny that these disclosures made clear that Genworth was continuing to advise investors of lower earnings, increasing delinquencies (especially in Queensland), and increasing reserves—not concealing that information or failing to strengthen reserves.

In its November 3, 2011 earnings news release, Genworth explained that Genworth Australia's Q3 2011 earnings "decreased four percent from the prior year *due to increased delinquencies*." Ex. K (11/3/2011 News Release) at 9 (emphasis added). Genworth further disclosed that the 48% loss ratio for the quarter "reflect[ed] ongoing economic impacts from flooding in Queensland earlier in 2011 and continued pressure on certain consumers and small

business owners from the combined impacts of higher interest rates, increased living costs, currency valuation and lower consumer spending." *Id.* (emphasis added). Mr. Fraizer offered the view that Genworth Australia was "absorbing the loss pressures coming from the early 2011 Queensland flood events." Ex. L (11/4/2011 Tr.) at 3.

In Genworth's Q3 2011 Form 10-Q filed on November 7, 2011, Genworth explained that "the economy has slowed particularly in Queensland, given the economic impact of the flooding in January 2011, pressures from higher interest rates, higher costs of living, higher exchange rates and cautious consumer spending … [and] increased levels of new delinquencies were reported by financial institutions in this market, *which adversely impacted the results of our operations*." Ex. M (Q3 2011 Form 10-Q) at 74 (emphasis added). Genworth again disclosed that delinquencies and reserves had increased because of "the cumulative impact of the factors noted" for previous quarters, and that Genworth "*expect[ed] these pressures to continue through the remainder of 2011*" and "begin to moderate in 2012." *Id.* (emphasis added).

D. Genworth Announces Pursuit of Minority IPO of Genworth Australia

Contemporaneously with its detailed disclosure concerning increased delinquencies and the impact of flooding in Queensland, on November 3, 2011, Genworth announced its "plan" to pursue a minority IPO of up to 40% of Genworth Australia "in the second quarter of 2012, *subject to market conditions and regulatory review and approval*." Ex. K (11/3/2011 News Release) at 3 (emphasis added). Genworth explained: "This move is part of a broader strategy to rebalance the business portfolio, support future growth opportunities … and together with other actions, free material capital for redeployment." *Id.* at 3; AC ¶ 36. Without citation to any actual written or oral statements by Genworth, the complaint misleadingly characterizes Genworth's announcement of the IPO and subsequent related disclosures as "assuring" investors that the transaction "would" occur in Q2 2012. *See* AC ¶¶ 6, 51, 88, 94-95. There was no such assurance,

and the complaint refers to none. To the contrary, Genworth accurately and appropriately disclosed from the start of the class period that, while it "expect[s] this transaction is achievable, there can be *no assurance* that this transaction can be executed within the targeted timeframe or on the desired terms," and "[a]dverse market or other conditions might delay or impede the planned IPO." Ex. M (Q3 2011 Form 10-Q) at 148 (emphasis added); *see also* Ex. K (11/3/2011 News Release) at 19. Plaintiffs must build their case on the words Defendants wrote and said; not on misrepresentations of those words. "There can be no assurance" cannot be transmogrified into an assurance, and "[a]dverse market or other conditions might delay or impede" the IPO targeted for Q2 2012 cannot be reworked into the IPO "*would*" occur in Q2 2012.

Genworth continued to caution investors about the risks attendant to the IPO plan throughout the remainder of the class period, not only in its public filings (*see* Ex. N (FY 2011 Form 10-K) at 85; Ex. O (2/2/2012 News Release) at 20) but also during calls with investors. For example, in a February 3, 2012 investor call, Mr. Klein, Genworth's CFO, stated that the IPO was "on track right now" (Ex. P (2/3/2012 Tr.) at 12-13) but also that "we are managing holding company cash at the moment as if the Australia IPO is not going to occur so that we can do that from a position of strength as we have the opportunity and not to do it out of necessity" (*id.* at 18). Mr. Klein continued, "But again the priority is going to be risk buffers and seeing where we are, what the economies look like at that point in time." *Id.* And at a conference on March 29, 2012, Mr. Klein reiterated that "the [IPO] transaction will of course depend on … market conditions including valuation considerations" and that "we're pursuing a[n] [IPO] transaction from a position of strength and will do what's most beneficial for shareholders and bondholders based on the conditions at the time." Ex. Q (3/29/2012 Tr.) at 4-5; AC ¶ 51. Mr. Klein further disclosed during the same conference:

> We're working very actively to put ourselves in a position to execute this in the second quarter, as we've said. *That said, like any IPO there's a number of factors that impact timing* and I think we're watching those very closely as we're working through. One is obviously market conditions and the impact that has on valuation considerations. So it's not just looking at the equity markets, it's looking at the impact also in the Australian housing market and things of that nature.

Ex. Q (3/29/2012 Tr.) at 10 (emphasis added).

Plaintiffs identify no statements from Genworth guaranteeing or otherwise assuring that the IPO would occur by any particular deadline or at all.

E. Genworth Discloses Q4 2011 Results and Continues to Update Investors About the Impact of the Queensland Flooding

Continuing its practice of providing detailed disclosures of Genworth Australia's performance each quarter, on February 2, 2012, Genworth disclosed Genworth Australia's Q4 2011 results:

- Q4 2011 earnings of $53 million represented a decrease of 9% from Q4 2010 (Ex. O (2/2/2012 News Release) at 8, 9);
- Q4 2011 loss ratio was 46%, up nine points from Q4 2010, but down two points from Q3 2011 (*id.* at 9; Ex. R (Q4 2011 Quarterly Fin. Supp.) at 40);
- Paid AU$31 million in claims and the average paid claim was AU$64,600 (*id.* at 44);
- Queensland represented 22% of Genworth Australia's primary risk in-force, and policies originated in 2007 and 2008 represented 12% and 12% of the primary risk in-force respectively (together, 24%) (*id.* at 43);
- Genworth Australia's total primary delinquency rate was 0.55%, the delinquency rate in Queensland was 0.81%, and for policies written in 2007 and 2008, the delinquency rates were 1.18% and 1.40% respectively (*id.* at 43);
- Reserves increased by AU$42 million (bringing the ending reserves balance to AU$266 million from AU$255 million after the payment of claims) and the average reserve per delinquency was AU$33,700 (*id.* at 44).

Again, Plaintiffs do not allege that any of these publicly disclosed metrics were false. Thus, Genworth truthfully disclosed that Genworth Australia's earnings were decreasing, reserves were

increasing, delinquency rates in Queensland were substantially higher than delinquency rates in the rest of Australia, and delinquency rates for older 2007 and 2008 policies were substantially higher than in the overall portfolio.

In its February 2, 2012 earnings news release, Genworth explained that the decrease in Genworth Australia's Q4 2011 operating earnings "reflect[ed] reserve additions for prior delinquencies where lenders accelerated actions to move these loans through to claim and higher severity experience in the New Zealand run-off portfolio partially offset by a decrease in new delinquencies, including reductions in Queensland." Ex. O (2/2/2012 News Release) at 9.

In its Fiscal Year 2011 Form 10-K filed on February 27, 2012, Genworth explained that Genworth Australia had experienced "higher delinquencies [year-over-year] as a result of the seasoning of our in-force blocks of business and regional economic pressures." Ex. N (FY 2011 Form 10-K) at 163. Specifically with respect to delinquency rates, Genworth disclosed:

> *During the second and third quarters of 2011, there was an increase in the number of outstanding delinquencies and reserves* as the cumulative impact of the factors noted previously exerted pressure on elements of the portfolio. *During the fourth quarter of 2011, total delinquencies decreased but remained above 2010 levels* and the rate of new delinquencies slowed.

Id. at 104 (emphasis added). Additionally, Genworth discussed that another reason Genworth Australia strengthened reserves in Q4 2011 was because "*lenders accelerated actions to transition delinquencies to claim*." *Id.* at 159 (emphasis added).

F. The End of the Class Period: Genworth Announces New Targeted Timeframe for the IPO

On April 17, 2012, Genworth announced a new timeframe for completing the IPO, stating that it would "now seek to complete the IPO in early 2013, subject to market conditions, valuation considerations including business performance, and regulatory approvals." Ex. S (4/17/2012 News Release) at 1. Genworth disclosed:

> This new timeframe primarily reflects recent business performance in Australia. For the 2012 first quarter, the company expects to report elevated loss experience in Australia as lenders accelerated the processing of later-stage delinquencies from prior years through to foreclosure and claim at a higher rate and severity than expected, particularly in coastal areas of Queensland that experienced natural catastrophes and regional economic slowdowns and among certain groups of small business owners and self-employed borrowers. First quarter experience is anticipated to result in a modest first quarter loss in the Australian [mortgage insurance] business.

Id.; AC ¶ 99 (emphasis removed). This announcement marks the close of the class period.

G. Post-Class Period: Genworth Discloses Q1 2012 Results and Reserve Strengthening

On May 1, 2012, Genworth announced Genworth Australia's Q1 2012 results (January–March 2012). Genworth disclosed that (i) Genworth Australia had experienced Q1 2012 losses of $21 million versus reported operating earnings of $52 million in 2010 (Ex. T (5/1/2012 News Release) at 7-8); (ii) Genworth Australia's Q1 2012 loss ratio was 154%, up 108 points from Q4 2011 and up 109 points from Q1 2010 (*id.* at 9); and (iii) Genworth Australia had increased reserves by AU$131 million, bringing the ending reserves balance to AU$331 million from AU$266 million after the payment of claims (Ex. U (Q1 2012 Quarterly Fin. Supp.) at 44). As discussed below, Genworth explained that sharp increases in claim frequency in Q1 2012 and in claim severity in March 2012—in other words, lenders submitting more claims in greater amounts[4]—drove these disappointing results.

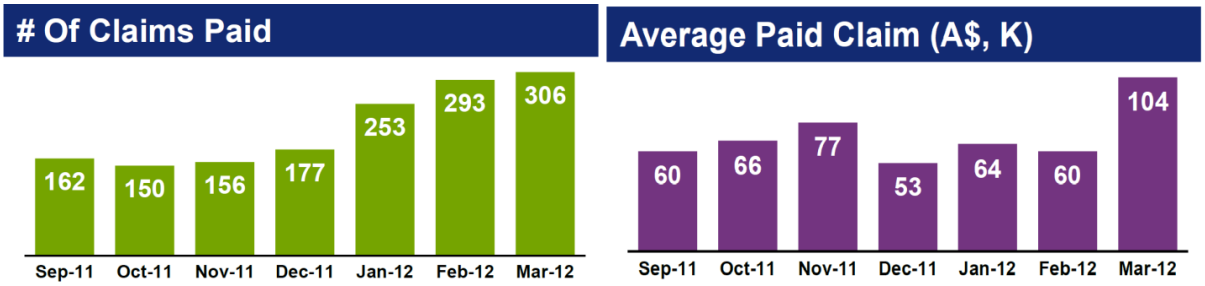
Claim Frequency (Number of Claims): With respect to claim frequency, Genworth

[4] When a borrower defaults on an insured loan—*i.e.*, fails to make a "scheduled monthly mortgage payment" to the lender—a "delinquency" on the underlying loan occurs. Ex. A (FY 2010 Form 10-K) at 141. Under Genworth Australia's typical lenders' mortgage insurance policies, the lender must notify Genworth of a delinquency "after the borrower has been in default by three monthly payments." *Id.* Not every reported delinquency results in the lenders' submission of a claim to Genworth Australia, as borrowers can "cure delinquencies by making all of the delinquent loan payments or by selling the property in full satisfaction of all amounts due under the mortgage," and thus the lenders do not submit a claim to Genworth that causes a loss. *Id.* at 141. As Genworth disclosed in the Q1 2012 Genworth Australia presentation on May 2, 2012 (Ex. V (5/2/2012 Presentation) at 17), while the actual delinquency rate in Q1 2012 decreased from the previous two quarters, the number of delinquencies that were cured decreased by 14.6% (from 3,207 cures in Q4 2011 to 2,740 cures in Q1 2012) and the paid claims increased by 76.4% (from 483 paid claims in Q4 2011 to 852 paid claims in Q1 2012).

disclosed—and Plaintiffs do not dispute (AC ¶ 52)—that the number of claims modestly increased in November and December 2011 (4.0% and 13.5% respectively), but then increased significantly at the start of Q1 2012: there was a *42.9% increase* in number of claims in January compared to December with claim numbers remaining at elevated levels through February and March. *See* Ex. V (5/2/2012 Presentation) at 9; Ex. W (5/2/2012 Tr.) at 12; AC ¶ 103.

Claim Severity (Claim Amount): Plaintiffs also do not dispute that on a quarterly basis, the amount of paid claims for Q1 2012 (AU$66 million) was more than twice the amount of paid claims for each of the preceding three quarters. *See* Ex. U (Q1 2012 Quarterly Fin. Supp.) at 44 (reflecting total paid claims amounts of AU$31 million, AU$25 million, and AU$30 million for the fourth, third, and second quarters of 2011 respectively). When analyzed on a monthly basis, although average paid claim amount increased in November 2011 (as Plaintiffs repeatedly emphasize (AC ¶¶ 5, 53, 54)), average paid claim amount then *decreased* in December 2011 and remained around December 2011 levels in January and February 2012. Ex. V (5/2/2012 Presentation) at 9. Indeed, the average paid claim for December 2011 through February 2012 (AU$59,000) was not only lower than that of each of the preceding three months, it was also *lower* than the reported average paid claim for the preceding three quarters. *See* Ex. R (Q4 2011 Quarterly Fin. Supp.) at 44 (AU$64,600); Ex. C (Q3 2011 Quarterly Fin. Supp.) at 41 (AU$62,400); Ex. B (Q2 2011 Quarterly Fin. Supp.) at 41 (AU$75,900). It was not until March 2012 that Genworth experienced a significant increase in claim severity, *with a 73.3% increase in average paid claim from February to March 2012* (Ex. V (5/2/2012 Presentation) at 9)—entirely consistent with Mr. Upton's statement that claim severity "*was more concentrated in March*, with a significant increase in the average claim paid as many of these claims also had higher loan balances." Ex. W (5/2/2012 Tr.) at 8 (emphasis added). *See also* Ex. V (5/2/2012

Presentation) at 9:



Mr. Upton explained that "[t]he observed increase in average claim size in *March* led us to conduct a comprehensive review of our delinquency inventory" (Ex. W (5/2/2012 Tr.) at 8 (emphasis added); *see also* Ex. V (5/2/2012 Presentation) at 9) and that this "extensive loan by loan analysis of our delinquency inventory … formed the basis of the reserve strengthening of $82 million" disclosed on May 2, 2012 (Ex. W (5/2/2012 Tr.) at 8).

Genworth also disclosed that the increase in claim frequency and severity for small business owning and self-employed borrowers increased dramatically from Q4 2011 to Q1 2012, particularly in Queensland. *See* Ex. V (5/2/2012 Presentation) at 6 (demonstrating that the number of paid claims increased from Q4 2011 to Q1 2012 across the portfolio for small business/self-employed borrowers as a whole (87%), for small business/self-employed borrowers with 2007 and 2008 vintage loans (113%), and for small business/self-employed borrowers in Queensland (165%)). The average claim amount for each group also increased from Q4 2011 to Q1 2012 by 30.7%, 20.2%, and 4.7% respectively. *Id.*

In the subsequent Q&A portion of the call, in response to an analyst's asking whether the need for reserve strengthening for Genworth Australia "should have been caught earlier or was … truly something that arose in March," Mr. Upton explained: "it was—the March loss emergence and the average claims size[] that really gave rise to our deep dive on the delinquency inventory and the extensive review that we undertook to strengthen loss reserves of $82 million."

Ex. W (5/2/2012 Tr.) at 12; AC ¶ 103 (emphasis removed); *see also* Ex. V (5/2/2012 Presentation) at 9 (showing increase in average claim size from February to March 2012 of AU$60,000 to AU$104,000). Mr. Upton also discussed that "[i]n the second half of 2011, we did see increasing delinquency levels and we did observe lender processing delays" (Ex. W (5/2/2012 Tr.) at 11-12) and went on to note that Genworth had begun "to work more closely with those lenders to improve the collection and default management techniques" and that this process "did accelerate some of the older delinquencies coming through and as those came through in the first quarter, the claim paid counts did increase in January and February" (*id.* at 12)—as Genworth had disclosed previously.[5]

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "'[L]abels and conclusions'" and "'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice. *Id.* (citation omitted). To state a claim for securities fraud under Section 10(b) of the Exchange Act, a plaintiff must adequately plead (i) a material misrepresentation; (ii) scienter; (iii) a connection with the purchase or sale of a security; (iv) reliance; (v) economic loss; and (vi) loss causation. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). Under Rule 9(b) and the PSLRA, a complaint asserting a Section 10(b) claim must "stat[e] with particularity the circumstances constituting fraud." *ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009). Plaintiffs' complaint does not even plausibly state a claim, much less satisfy the heightened

[5] *See* Ex. O (2/2/2012 News Release) at 9 (disclosing "reserve additions for prior delinquencies *where lenders accelerated actions to move these loans through to claim*") (emphasis added); Ex. N (FY 2011 Form 10-K) at 159 (disclosing "increased reserves … *as lenders accelerated actions to transition delinquencies to claim*") (emphasis added).

pleading requirements of Rule 9(b) and the PSLRA.

I. PLAINTIFFS FAIL TO PLEAD AN ACTIONABLE FALSE STATEMENT OR OMISSION

The complaint's "False and Misleading Statements" section quotes selective excerpts from Defendants' detailed disclosures about Genworth Australia's financial performance, emphasizing statements about earnings, delinquencies, and loss ratios. *See* AC ¶¶ 65-69, 78-82, 85-88, 92. But fatal to their complaint, Plaintiffs never specify how any of these numbers were false. Cover to cover, there is not a single allegation suggesting when, why, or by how much Genworth's contemporaneous disclosures concerning Genworth Australia's performance, and the impact of the Queensland flooding on that performance, were false. This defect is fatal. Plaintiffs instead point only to their own conclusory assertion that Defendants were under-reserved and contend, *ipse dixit*, that all of Defendants' statements regarding its plans to pursue the IPO were therefore false. *Id.* ¶¶ 77, 84, 91, 96. Plaintiffs' unsubstantiated, hindsight conclusion fails to plead (much less with particularity) that Defendants' statements were false when made.

A. Plaintiffs Fail to Plead that Genworth's Opinions Concerning Genworth Australia's Loss Reserves Were False

"[D]etermining the adequacy of loan loss reserves is not a matter of objective fact. Instead, loan loss reserves reflect management's opinion or judgment about what, if any, portion of amounts due on the loans ultimately might not be collectible …. Such a determination is inherently subjective, and like goodwill, estimates will vary depending on a variety of predictable and unpredictable circumstances." *Fait*, 655 F.3d at 113. Thus, for Plaintiffs to base liability on this "inherently subjective" process, they "must allege that defendant's opinions were both false and not honestly believed when they were made." *Id.*; *see also City of Omaha, Neb. Civilian Emps.' Ret. Sys. v. CBS Corp.*, 679 F.3d 64, 67-68 (2d Cir. 2012) (applying *Fait* to

Section 10(b) claims). Plaintiffs do not remotely approach satisfying their burden of pleading particularized facts demonstrating either element of falsity.

1. Plaintiffs Do Not Plead Objective Falsity

Plaintiffs do not dispute that Genworth disclosed delinquencies and loss ratios for Genworth Australia, and increased reserves from AU$216 million in Q1 2011 to AU$232 million in Q2 2011, to AU$255 million in Q3 2011, and to AU$266 million in Q4 2011 for Genworth Australia throughout the class period. *See infra* p. 20-21 (table). And Plaintiffs do not plead that Genworth Australia's delinquencies or losses were, in fact, higher than the percentages Genworth contemporaneously disclosed. Unable to allege that any of this public information was false, Plaintiffs substitute their own opinion for Defendants' and assert that Genworth should have reserved more, earlier, because Defendants should have predicted, better, that there would be more claims for higher amounts in Q1 2012. *See* AC ¶¶ 52-54. This assertion fails under well-established Second Circuit case law.

Simply put, Plaintiffs' assertion that Genworth "should have" earlier recognized "a significant portion, if not all, of the $82 million reserve charge,"[6] does not "suffice to state a securities fraud claim after *Fait*." *CBS*, 679 F.3d at 68 (allegations that the "downward trajectory of [a company's] overall market capitalization, declining … revenues for some [of the company's] reporting units … and [the company's] own anticipation of an economic slowdown" suggest in hindsight that the company may have "expressed overly optimistic views regarding its overall business outlook," not committed securities fraud). The Second Circuit and courts in this District have repeatedly rejected such challenges to reserves adequacy:

- *In re Fannie Mae 2008 Sec. Litig.*, 525 F. App'x 16, 18-19 (2d Cir. 2013) (dismissing allegations that Fannie Mae should have "set aside these loss reserves

[6] AC ¶ 54; *see also id.* ¶¶ 59, 72, 74, 84, 90.

earlier" as "a classic example of pleading fraud by hindsight," finding that although "greater clairvoyance" might have led Fannie Mae to act sooner, "failure to make such perceptions does not constitute fraud") (citation omitted);

- *Okla. Firefighters Pension & Ret. Sys. v. Student Loan Corp.*, 951 F. Supp. 2d 479, 497-98 (S.D.N.Y. 2013) (finding that "a complaint must allege more than the mere existence of contradictory information to support a securities fraud claim" (citing *CBS*, 679 F.3d at 68) and dismissing "conclusory allegations … that defendants could not possibly have believed their own estimates [of reserves], since plaintiffs interpret those estimates to have proven inadequate");

- *NECA-IBEW Pension Trust Fund v. Bank of Am. Corp.*, 2012 WL 3191860, at *10-12 (S.D.N.Y. Feb. 9, 2012) (Pitman, Mag. J.) ("[T]he mere fact that BAC's predicted loss reserves turned out to be insufficient some time after they were made does not render those figures false at the time that they were publicly filed with the SEC."), *cited in Student Loan Corp.*, 951 F. Supp. 2d at 498 and *In re Fannie Mae 2008 Sec. Litig.*, 525 F. App'x at 19;

- *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 361-62 (S.D.N.Y. 2011) (dismissing allegations regarding the adequacy of loan loss reserves "[i]n the absence of particularized allegations that Wachovia was experiencing or internally predicting losses exceeding their set reserves," finding that "the subsequent disclosures [of reserve increases] provide no basis to conclude that Defendants recklessly misstated previous reserve levels");

- *In re CIT Grp., Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 689-91 (S.D.N.Y. 2004) (dismissing complaint because "plaintiffs' claim that loan loss reserves were inadequate is nothing more than an assertion that CIT was incorrect or unskillful in determining exactly what amount of reserves would be adequate").[7]

Moreover, even assuming, *arguendo*, that Plaintiffs' "should have" theory of liability could sustain a securities fraud claim, they allege no factual support for it. To adequately plead falsity, Plaintiffs must plead the date when additional reserves should have been added, what specific event or information required it, how Defendants knew it, and why it was fraud, not a difference in judgment, to have failed to increase the reserves earlier than Plaintiffs now suggest was necessary. *See Wachovia*, 753 F. Supp. 2d at 361-62 (rejecting "generalized allegations" that

[7] *See also Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004) ("It is not sufficient to allege … that it would have been possible to reach a different opinion than that reached by defendant based on information available to defendant at the time, or even that the defendant's opinion was unreasonable. A securities fraud action may not rest on allegations that amount to second-guesses of defendants' opinions about the future value of issuers' stock—second-guesses made all too easy with the benefit of hindsight.").

"Wachovia was well aware of, or recklessly indifferent to, the fact that their loan reserves were significantly understated in light of the deteriorating real estate market" and that "Defendants could not have reasonably concluded that loan loss reserves were set at adequate levels" because they "fail to specify what caused the Defendants to know that the loan loss reserves were insufficient"); *City of Sterling Heights Police & Fire Ret. Sys. v. Vodafone Grp. PLC*, 655 F. Supp. 2d 262, 269-70 (S.D.N.Y. 2009) (dismissing allegations that were "undermined by [plaintiff's] failure to allege at what point in time an impairment charge should have been taken and which specific losses known to the [c]ompany should have triggered an impairment charge."). Plaintiffs plead no such facts, with or without particularity. Instead, Plaintiffs allege a number of distortions of Genworth's unchallenged financial disclosures.

First, Plaintiffs assert that "Defendants' awareness that Genworth Australia was experiencing increasing delinquencies in the second half of 2011 … should have resulted in a significant portion, if not all" of the $82 million reserve charge occurring earlier than May 2012. AC ¶ 54; *see also id.* ¶¶ 72, 74, 90. But the disclosures that Plaintiffs cite for this contention (*id.* ¶¶ 52-53) in fact showed increasing delinquencies in Q2 and Q3 2011 followed by *decreases* in Q4 2011 and Q1 2012, as well as steadily increasing reserves during the class period:

Genworth Australia Metric[8]	*Q1 2011*	*Q2 2011*	*Q3 2011*	*Q4 2011*	*Q1 2012*
Delinquency Rate	0.52%	0.56%	0.59%	0.55%	0.54%
Queensland Delinquency Rate	0.64%	0.74%	0.84%	0.81%	0.80%

[8] *See* Ex. X (Q1 2011 Quarterly Fin. Supp.) at 35, 38, 39; Ex. B (Q2 2011 Quarterly Fin. Supp.) at 37, 40, 41; Ex. C (Q3 2011 Quarterly Fin. Supp.) at 37, 40, 41; Ex. R (Q4 2011 Quarterly Fin. Supp.) at 40, 43, 44; Ex. U (Q1 2012 Quarterly Fin. Supp.) at 40, 43, 44.

Total Claims Paid (in millions)	AU$26	AU$30	AU$25	AU$31	AU$66
Loss Ratio	45%	48%	48%	46%	154%
Ending Reserves (in millions)	AU$216	AU$232	AU$255	AU$266	AU$331

Moreover, the fact that the alleged contradictory information—here, Genworth's quarter-by-quarter disclosures regarding delinquencies and losses—"was publicly available when the allegedly misleading statements were made weakens any inference that defendants intended to defraud the market." *In re Pfizer, Inc. Sec. Litig.*, 538 F. Supp. 2d 621, 637 (S.D.N.Y. 2008); *see also In re GeoPharma, Inc. Sec. Litig.*, 399 F. Supp. 2d 432, 452-53 (S.D.N.Y. 2005) ("Cases in this Circuit assume that the contradictory information in question must be non-public.").

Second, Plaintiffs assert that "[t]he average paid claim had jumped considerably *beginning* as early as November 2011" and thus contend that "Defendants knew about an increase in claims' severity during the Class Period, but failed to properly account for the increase until after the Class Period." AC ¶ 53 (emphasis added). This assertion mischaracterizes the numbers cited in the complaint that were excerpted from the chart presented to investors on Genworth's May 2, 2012 call (*id.* ¶¶ 52-53)—all of which clearly shows sharp increases in claim numbers *in Q1 2012* and in claim severity *in March 2012*, not before. Plaintiffs cite these numbers in their complaint, which show that the average paid claim increased from AU$66,000 in October 2011 to AU$77,000 in November, but—as Plaintiffs ignore—decreased to well below that level for December (AU$53,000), January (AU$64,000), and February (AU$60,000), and then increased by more than 70% from February's AU$60,000 average paid claim amount to

AU$104,000 in March. *See id.* ¶ 53; *supra* Statement of Facts ("SOF") Section G.[9] These facts do not support Plaintiffs' allegation that "[t]he average paid claim had jumped considerably beginning as early as November 2011." AC ¶ 53; *see also id.* ¶¶ 5, 74, 76. To the contrary, if there was a trend, it was downward, not upward, with average claims paid in each of December, January and February below the averages of October and November. Plaintiffs cannot cite Genworth's financial disclosures, fail to dispute their accuracy, and then fabricate trends to bolster a fraud theory that supposes inaccurate loss reserves without ever alleging specifically *when* reserves should have been increased, by *how much*, and *why* the decision not to strengthen reserves earlier was fraud.

Third, Plaintiffs argue that Defendants concealed the risks of "the high-risk low-documentation loans that [Genworth Australia] promoted and insured in 2007 and 2008" and that Defendants should have increased reserves earlier during the class period because Genworth Australia "was experiencing increasing losses because of" these loans. AC ¶ 52; *see also id.* ¶¶ 39, 44, 45, 54, 71. Throughout their complaint, Plaintiffs describe these loans to small business owning and self-employed borrowers as "toxic" and "high-risk" because borrowers self-certified their income. *Id.* ¶¶ 4, 42, 59. Plaintiffs' colorful nomenclature does not plead that any of Defendants' statements were false. Plaintiffs do not allege that Genworth's extensive quarterly disclosures concerning the composition, performance, and risk profile of Genworth Australia's mortgage insurance portfolio, including disclosures about higher delinquencies for 2007 and 2008 loans, were wrong or that they failed to account for the risk associated with this category of loans. Nor do Plaintiffs allege with any degree of specificity how the existence of loans to small

[9] Plaintiffs' quotation of Mr. Upton's explanation of these numbers and that the March 2012 spike in claim severity was the primary cause of the review of Genworth Australia's reserves (which the complaint seems to suggest was false and misleading) (AC ¶ 103-04) fails for the same reasons. Plaintiffs mischaracterize the numbers they cite and imagine trends that are belied by the disclosures they cite.

business and self-employed borrowers from 2007 and 2008 in Genworth Australia's portfolio rendered *any* of Defendants' class period statements about Genworth Australia's performance, loss reserves, and other financial metrics false when made. And fatal to their assertion that Defendants should have increased reserves earlier for loans to small business/self-employed borrowers, Plaintiffs do not challenge Genworth's May 2012 disclosure showing that the number and severity of claims for policies insuring loans to such borrowers increased dramatically from Q4 2011 to Q1 2012 (*see* Ex. V (5/2/2012 Presentation) at 6)—not "starting in the second half of 2011," as Plaintiffs repeatedly contend without any factual support (AC ¶¶ 74, 76, 84). *See supra* SOF Section G.

2. Plaintiffs Do Not Plead Subjective Falsity

Even if Plaintiffs could allege objective falsity (which they have not), that would be insufficient as a matter of law. To satisfy *Fait*, Plaintiffs must also plead that Defendants subjectively "did not believe in their statements of opinion" when expressed. *CBS*, 679 F.3d at 68-69. The complaint "is devoid even of conclusory allegations" that Defendants did not genuinely hold their publicly stated opinions. *Id.*

Plaintiffs plead no details—such as information from internal reports or firsthand employee accounts—that come close to alleging subjective falsity. Plaintiffs instead rely on conclusory statements about housing trends premised on information that was public during the class period. AC ¶¶ 34-35, 67. Judge Sullivan rejected nearly identical allegations in *In re Wachovia Equity Securities Litigation*—dismissing a complaint that provided only "generalized allegations" relating to "the deteriorating real estate market" and "declining property values." 753 F. Supp. 2d at 361. The court held that the plaintiffs "fail[ed] to specify what caused the Defendants to know that the loan loss reserves were insufficient," "identify any contemporaneous internal document showing that the loan loss reserves were improperly

calculated," or provide allegations from confidential witnesses who had "access to aggregate loan loss data or knowledge of how Wachovia calculated reserve levels." *Id.* at 361-62 (citation omitted); *see also Student Loan Corp.*, 951 F. Supp. 2d at 497-98 (dismissing loss reserve claim for failure to meet the requirements of *Fait*).

Plaintiffs' heavy reliance on Genworth's post-class period reserve strengthening cannot save their claim. As the Second Circuit repeatedly has held, relying on the fact of "subsequent write-downs and loss reserve increases" to show that these write-downs and reserves should have been taken earlier is "a classic example of pleading fraud by hindsight," which is a "consistently rejected" form of pleading in this Circuit. *Fannie Mae*, 525 F. App'x at 19; *see also CBS*, 679 F.3d at 68 (dismissing Section 10(b) claims where fact that CBS conducted an interim impairment test revealing the need to incur a $14 billion impairment charge "d[id] not plausibly demonstrate that defendants knew, nor even had reason to know, at any specific time" that defendants' earlier statements were false).

In brief, Plaintiffs' allegations "provide[] absolutely no reasonable basis for concluding that defendants did not think reserves were [previously] adequate." *NECA-IBEW*, 2012 WL 3191860, at *10-12 (quoting *CIT*, 349 F. Supp. 2d at 690-91). Also unavailing is Plaintiffs' unsubstantiated assertion that Defendants' reasons for not predicting, and reserving for, higher losses before May 2012 were "simply not credible." AC ¶ 60; *see also id.* ¶ 74. *See Student Loan Corp.*, 951 F. Supp. 2d at 498 (rejecting similar theory as "one of underestimation in hindsight … rel[ying] on conclusory allegations to mask the legally insufficient contention at its core, which is that defendants could not possibly have believed their own estimates, since plaintiffs interpret those estimates to have proven inadequate").[10]

[10] Plaintiffs also allege that Defendants' Sarbanes-Oxley certifications of Genworth's financial reporting were false. AC ¶¶ 68, 75, 85, 91. Because these allegations "are essentially derivative of [Plaintiffs'] primary allegations

For the same reasons, Plaintiffs' challenges to Genworth's statements about Genworth Australia's financial performance (AC ¶¶ 2, 36-37, 47, 49-50, 65, 67, 71, 78, 80, 82, 92) fail to state a claim. As explained above, the complaint does not allege that Genworth misreported its financial performance. Nor do Plaintiffs allege that Defendants did not subjectively believe their opinions that Genworth Australia's performance was "strong" or "solid" or that it was "absorbing … loss pressures," as Plaintiffs must allege under *Fait*.[11]

B. Plaintiffs Fail to Plead that Defendants' Statements Regarding Genworth's Planned IPO Were False

Plaintiffs characterize Defendants' announcement of the planned IPO and subsequent disclosures about the IPO as "assuring" investors that the transaction "would" occur in Q2 2012. *See* AC ¶¶ 6, 51, 88, 94-95.[12] This is false. Genworth disclosed the exact opposite of what Plaintiffs describe, advising investors starting in November 2011, that "*there can be no assurance that this transaction can be executed within the targeted timeframe or on the desired terms.*" Ex. M (Q3 2011 Form 10-Q) at 148 (emphasis added); *see also* Ex. K (11/3/2011 News Release) at 19. Indeed, far from "assuring" or "reassuring" investors that the IPO "would" occur by a certain date throughout the class period, Genworth merely disclosed in November 2011 that it was "planning" or "targeting" the IPO for Q2 2012 subject to market and other conditions (AC ¶¶ 36-37, 65, 67, 69), reiterated in February 2012 that Genworth was "continu[ing] to pursue" the IPO in Q4 2011 while repeating its warning that there was no assurance the transaction

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regarding … loan loss reserves" and merely "rely[] on the allegations that defendants failed to account for adverse market trends … in setting loan loss reserves," they also fail for the reasons above. *See Fait*, 655 F.3d at 113.

[11] In addition, qualitative statements that Genworth's international mortgage insurance results were "strong" (AC ¶¶ 2, 36, 47, 65, 71, 78, 80) or "solid" (*id.* ¶¶ 37, 39, 49, 52, 59, 92) are "too general to cause a reasonable investor to rely upon them," and thus constitute non-actionable corporate optimism or "puffery." *See ECA*, 553 F.3d at 205-06; *see also Johnson v. Sequans Commc'ns S.A.*, 2013 WL 214297, at *14 (S.D.N.Y. Jan. 17, 2013) (statements that defendants believed they had a "strong position in the … market" constituted non-actionable puffery); *Gissin v. Endres*, 739 F. Supp. 2d 488, 512 (S.D.N.Y. 2010) (statement that the balance sheet was "strong" was non-actionable).

[12] *See also* AC ¶¶ 2, 49, 52, 65, 67, 69, 78, 80-82, 93, 96, 113.

would be completed (Ex. N (FY 2011 Form 10-K) at 85; AC ¶¶ 48, 78, 80-82, 88, 91), and discussed in March 2012 that, consistent with its earlier disclosures, Genworth "will do what's most beneficial for shareholders and bondholders based on conditions at the time," including market headwinds, and "provide a further update on [the] first-quarter 2012 earnings call" (*id.* ¶¶ 51, 93).

Moreover, although Plaintiffs challenge each of Defendants' statements concerning the planned IPO—including statements that the IPO was "on track" for a Q2 2012 execution, that the IPO was important to Genworth, and that the company was "working very actively" to complete it—Plaintiffs do not allege even once that Defendants did not actually plan to do an IPO or, for that matter, that Defendants were not "devoting a lot of time" (*id.* ¶ 93) (emphasis removed) and "working really hard" (*id.* ¶ 94) (emphasis removed) to complete the IPO. The absence of such allegations is fatal. *See In re Sanofi-Aventis Sec. Litig.*, 774 F. Supp. 2d 549, 566 (S.D.N.Y. 2011) (dismissing claim because "Plaintiffs never allege[d] any facts that would demonstrate that, at the time the statement was made, Defendants were either not planning for a launch in the second half of 2006 or not planning to continue such efforts in the future" or "any facts that would demonstrate that a reasonable investor could have understood this statement to convey a guarantee about the timing or success of the … launch") (citing *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004)); *City of Roseville Emps.' Ret. Sys. v. Nokia Corp.*, 2011 WL 7158548, at *9 (S.D.N.Y. Sept. 6, 2011) (dismissing challenges to defendants' statements concerning planned product release schedule where "factual allegations [were] insufficient to conclude that, at the time various statements were made about release dates, Nokia had no reasonable basis to believe that it could meet those deadlines even in light of the alleged software problems, or that Nokia had no intention of meeting the announced release dates").

All that remains is Plaintiffs' challenge to Defendants' opinions that the IPO could be achieved by Q2 2012 and that the IPO was "on track" for Q2 2012 execution. AC ¶¶ 49, 51-52, 80-82, 84, 94. These are clearly statements of opinion. *See Faulkner v. Verizon Commc'ns, Inc.*, 156 F. Supp. 2d 384, 389, 395, 397-400 (S.D.N.Y. 2001) (statements that merger was "on schedule" and "on track" "were not actionable because they were mere predictions or statements of opinion").[13] But Plaintiffs again fail to satisfy *Fait*. Plaintiffs never explain—with any specificity or with any reference to internal Genworth information—*why* the IPO was not objectively achievable by Q2 2012, or when Defendants must have known this. Plaintiffs resort solely to the generalized assertion that because market conditions in Australia were declining and delinquencies were increasing, the IPO must not have been achievable by Q2 2012. *See* AC ¶¶ 52, 77, 84, 95-96. But dooming this attack, Plaintiffs do not even once endeavor to allege what specific declining market conditions and increasing delinquency rates made the IPO not objectively achievable, at what point during the class period it was not achievable, or why these unquantified increased delinquencies were so significant to Genworth Australia's bottom line that Defendants should have postponed the IPO earlier than they did—much less that Defendants had reached the same conclusion that Plaintiffs posit in their complaint.

Finally, Plaintiffs' allegation that Defendants "should have" reached a different conclusion about the feasibility of the IPO,[14] based on information squarely in the public realm, fails for the reasons explained *supra* Section I.A.1 (explaining that "should have" allegations fail as a matter of law under *Fait*), and does not plead that Defendants did not genuinely believe their opinions. As the Second Circuit recently put it, a plaintiff cannot state a claim for securities fraud

[13] *See also Elliott Assocs., L.P. v. Covance, Inc.*, 2000 WL 1752848, at *9 (S.D.N.Y. Nov. 28, 2000) ("Given the usual level of uncertainty as to whether any proposed merger will actually be completed, these statements [regarding the expected completion of the merger] could not possibly be understood as anything but opinions.").

[14] AC ¶¶ 77, 84, 95-96.

where they fail to "challenge the accuracy of any of [defendant company's] financial disclosures" and merely contend that "defendants arguably took a more optimistic view of [the company's] prospects" than others "viewing the same publicly available information" might have taken. *Jones v. Perez*, 550 F. App'x 24, 26 (2d Cir. 2013).

II. THE PSLRA'S SAFE HARBOR PROTECTS GENWORTH'S FORWARD-LOOKING STATEMENTS CONCERNING THE IPO

The Court may dismiss Plaintiffs' claims based on Genworth's statements concerning the IPO on an alternative, independent ground: these forward-looking statements are protected by the PSLRA safe harbor.

As discussed above, Plaintiffs attack statements regarding Genworth's "plan" or "intent" to pursue the IPO "in the second quarter of 2012, subject to market conditions and regulatory review and approval." AC ¶¶ 65, 67 (emphasis removed).[15] These statements fall under the PSLRA's definition of a "forward-looking statement," which includes "a statement of the plans and objectives of management for future operations." 15 U.S.C. § 78u–5(i)(1)(B). As such, they cannot form the basis for a securities fraud claim if they are either "identified and accompanied by meaningful cautionary language *or* [are] immaterial *or* the plaintiff fails to prove that [the statement] was made with actual knowledge that it was false or misleading." *Slayton v. Am. Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010).

First, Genworth plainly identified the statements concerning its plan for the IPO as forward-looking. *See* Ex. K (11/3/2011 News Release) at 17 (identifying statements "regarding the outlook for the company's future business" as forward-looking, indicating that such "statements may be identified by words such as … 'intends,' 'anticipates,' [or] 'plans'"). Genworth also accompanied these forward-looking statements about the IPO with "meaningful

[15] *See also id.* ¶¶ 69, 78, 80, 88, 93-94.

cautionary language." *Slayton*, 604 F.3d at 766. The PSLRA defines language as "meaningfully cautionary" where it "identif[ies] important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u–5(c).

Before and during the alleged class period, Genworth cautioned that adverse macro-economic conditions could result in higher delinquencies, defaults, and losses, which, of course, could adversely impact Genworth Australia performance. For instance, Genworth disclosed in its Fiscal Year 2010 Form 10-K filed on February 25, 2011, that factors impacting "borrowers' ability to pay their mortgage," such as "rising unemployment rates" or a "deterioration in economic conditions internationally," could increase Genworth's risk of loss, as could a "decline in home prices" and, in particular, "economic downturns or reversals of recent significant home price appreciation in areas where a large portion of [Genworth's] business is concentrated." Ex. A (FY 2010 Form 10-K) at 67; *see also* Exs. I (Q2 2011 Form 10-Q) at 139, and M (Q3 2011 Form 10-Q) at 146 (incorporating these risk disclosures by reference). Genworth further disclosed in the same document that "natural disasters, including … floods," could "trigger an economic downturn in the areas directly or indirectly affected by the disaster … [and] result in a decline in business and increased claims from those areas, as well as an adverse effect on home prices in those areas, which could result in increased loss experience in our mortgage insurance businesses." Ex. A (FY 2010 Form 10-K) at 61; *see also* Exs. I (Q2 2011 Form 10-Q) at 139, and M (Q3 2011 Form 10-Q) at 146 (incorporating these risk disclosures by reference).

Genworth also disclosed risks specific to the IPO. Genworth warned at every opportunity—in SEC filings, news releases, and earnings calls[16]—that the IPO was "subject to

[16] On investor calls, Genworth advised investors to "read the cautionary note regarding forward-looking statements and our earnings release and the Risk Factors section of our most recent annual report on Form 10-K filed with the SEC in February 2011." Ex. L (11/4/2011 Tr.) at 2; *see also* Ex. P (2/3/2012 Tr.) at 1-2; Ex. Q (3/29/2012 Tr.) at 1.

market conditions" and that "adverse market or other conditions might delay or impede the planned IPO." *See supra* SOF Section D. Indeed, as discussed above, Mr. Klein expressly cautioned during the class period that: "like any IPO there's a number of factors that impact timing …. One is obviously market conditions and the impact that has on valuation considerations. So it's not just looking at the equity markets, it's looking at the impact also in the Australian housing market and things of that nature." Ex. Q (3/29/2012 Tr.) at 10.

Each of these cautionary statements clearly "identif[ied] important factors that could cause actual results to differ materially from those in the forward-looking statement." *See* 15 U.S.C. § 78u–5(c). As such, no "'reasonable investor could have been misled into thinking that the risk that materialized and resulted in his loss did not actually exist.'" *In re WEBMD Health Corp. Sec. Litig.*, 2013 WL 64511, at *8 (S.D.N.Y. Jan. 2, 2013) (quoting *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 359 (2d Cir. 2002)); *see also In re Duane Reade Inc. Sec. Litig.*, 2003 WL 22801416, at *6 (S.D.N.Y. Nov. 25, 2003) (unlike "children" investors "know that … when a company's officer make predictions … they are not issuing guarantees") (citation omitted), *aff'd sub nom. Nadoff v. Duane Reade, Inc.*, 107 F. App'x 250 (2d Cir. 2004). On this basis alone, regardless of whether Plaintiffs have pleaded that Defendants' statements were knowingly false when made, Plaintiffs' challenge to Genworth's statements concerning the IPO plan fails. *Gissin*, 739 F. Supp. 2d at 511 n.144 (the court "need not consider whether [defendants] had 'actual knowledge' that their statements were false" because defendants "prevail on the 'meaningful cautionary language' prong of the safe harbor").

Second, even if Defendants' forward-looking statements were not accompanied by cautionary language, Plaintiffs do not state a Section 10(b) claim because Plaintiffs fail to plead that these statements were "made with actual knowledge that [they] w[ere] false or misleading."

Slayton, 604 F.3d at 766. "Actual knowledge" of falsity is "stricter than for statements of current fact" and requires "proof of knowing falsity." *Id.* at 773 (citation omitted). As discussed *supra* Section I.B, nowhere in the complaint do Plaintiffs plead that Defendants did not actually "plan" to execute or "target" the IPO for Q2 2012 if market and other conditions permitted. *See id.* (dismissing for failure to plead actual knowledge); *WEBMD*, 2013 WL 64511, at *15 (dismissing "[b]ecause Plaintiffs have failed to prove that Defendants made forward-looking statements with actual knowledge of their falsity").

III. PLAINTIFFS FAIL TO PLEAD SCIENTER

Plaintiffs also fail to plead scienter—a mental state embracing an "intent to deceive, manipulate, or defraud." *ECA*, 553 F.3d at 198 (citation omitted). To survive dismissal, a complaint must "state with particularity facts giving rise to a strong inference" of scienter for each defendant. 15 U.S.C. §§ 78u–4(b)(2) & (b)(3)(A). A plaintiff can plead the requisite strong inference of scienter by alleging with particularity facts showing either (i) "that defendants had the motive and opportunity to commit fraud" or (ii) "strong circumstantial evidence of conscious misbehavior or recklessness." *ECA*, 553 F.3d at 198; *see also Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001) (same). To qualify as "strong," the inference of scienter must be "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314. Plaintiffs' complaint does not plead *any* theory of scienter, much less a theory that satisfies *Tellabs*.

A. Plaintiffs Fail to Plead Any Discernible Motive for the Alleged Fraud

In order to raise a strong inference of scienter based on "motive and opportunity" to defraud, Plaintiffs must allege that Defendants "benefited in a concrete and personal way from the purported fraud." *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000). Plaintiffs do not allege a single motive Defendants had to commit fraud. Plaintiffs do not allege (nor could they) that

Defendants sold any Genworth stock during the class period or otherwise personally benefited in any way from the alleged fraud. *See In re Sec. Capital Assurance, Ltd. Sec. Litig.*, 729 F. Supp. 2d 569, 594 (S.D.N.Y. 2010) ("That Defendants … did not sell their stock prior to a price drop 'suggest[s] the absence of any nefarious motives.'") (citation omitted).

B. Plaintiffs Fail to Plead Conscious Misbehavior or Recklessness

Because Plaintiffs "fail[] to demonstrate that defendants had a motive to defraud … [they] must produce a *stronger* inference" of conscious misbehavior or recklessness. *Kalnit*, 264 F.3d at 143 (emphasis added); *see also ECA*, 553 F.3d at 199 ("the strength of the circumstantial allegations must be correspondingly greater if there is no motive") (citation omitted). To plead conscious misbehavior, Plaintiffs must allege that Defendants engaged in "deliberate illegal behavior." *Novak*, 216 F.3d at 308. The bar for recklessness is equally high: it requires a state of mind "approximating actual intent" and not "merely a heightened form of negligence." *S. Cherry St. LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (quoting *Novak*, 216 F.3d at 312) (emphasis removed). Specifically, Plaintiffs must allege particularized facts showing that Defendants' conduct was "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." *ECA*, 553 F.3d at 198 (quoting *Novak*, 216 F.3d at 308).

As a threshold matter, none of Plaintiffs' "Additional Scienter Allegations" (AC ¶¶ 105-18) meet the minimum pleading requirements imposed by the PSLRA and the Second Circuit. In this section of their complaint, Plaintiffs purport to describe Genworth's internal up-the-chain reporting processes and reference a meeting "about the pending IPO" that allegedly took place in December 2011. For these "information and belief" allegations (which they must be because they do not regard "Lead Plaintiffs and Lead Plaintiffs' own acts" (*id.* at 1)), the PSLRA expressly requires the complaint to "state with particularity all facts on which that belief is formed." 15

U.S.C. § 78u–4(b)(1). This pleading requirement serves an important purpose because, as courts in this District have recognized, plaintiffs must "sufficiently identify the sources of their information and belief so as to allow each defendant and the Court to review the sources and determine, at the pleading stage, whether an inference of fraud may be fairly drawn from the information contained therein." *In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 589 (S.D.N.Y. 2007) (citations omitted). Plaintiffs disregard this requirement and plead *no* source for any of their information and belief allegations purportedly supporting an inference of scienter. On this basis alone, their "scienter allegations" should be rejected and their claims should be dismissed. *See Janbay v. Canadian Solar, Inc.*, 2012 WL 1080306, at *5 (S.D.N.Y. Mar. 30, 2012) (dismissing claims where "Plaintiffs quote[d] and characterize[d] … internal discussions without alleging any identifying information about their apparent source, rendering these allegations unreliable"); *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, 2010 WL 3790810, at *10 (S.D.N.Y. Sept. 28, 2010) (dismissing claims where "Plaintiffs d[id] not allege with particularity what [their] belief [wa]s based upon other than to say that 'real estate speculators' were the 'primary driver of the defaults'").

The closest Plaintiffs come to alleging an internal source is a boilerplate, conclusory statement at the beginning of their complaint that their counsel conducted "interviews with witnesses knowledgeable of relevant information, including former employees of the Company." AC at 1. This does not cut it. Employees (or any other individual source) must be described in the complaint "with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." *Bd. of Trs. of City of Ft. Lauderdale Gen. Emps.' Ret. Sys. v. Mechel OAO*, 811 F. Supp. 2d 853, 880 (S.D.N.Y. 2011) (rejecting employee witness allegations where plaintiffs failed to plead facts "needed to

substantiate the confidential witness's knowledge"), *aff'd sub nom. Frederick v. Mechel OAO*, 475 F. App'x 353 (2d Cir. 2012). And Plaintiffs must allege "facts indicating that [the employee] was in a position to have knowledge regarding communications with [the Company's] senior management or the conclusions reached by … management." *Local No. 38 Int'l Bhd. of Elec. Workers Pension Fund v. Am. Express Co.*, 724 F. Supp. 2d 447, 459, 460-61 (S.D.N.Y. 2010) (citations omitted), *aff'd*, 430 F. App'x 63 (2d Cir. 2011). Individuals who were "employed in rank-and-file positions" and who "had no contact with the Individual Defendants" and "no access to" relevant data will not suffice. *Id.* at 460; *see also Janbay v. Canadian Solar, Inc.*, 2013 WL 1287326, at *7 (S.D.N.Y. Mar. 28, 2013) (rejecting allegations where employee witness lacked "first-hand knowledge" because he was "cut out of the loop" on relevant deal), *aff'd sub nom. Tabak v. Canadian Solar Inc.*, 549 F. App'x 24 (2d Cir.); *Pfizer*, 538 F. Supp. 2d at 631 (rejecting allegations from employee witness not alleged to have "participat[ed] in relevant events"); *Steinberg v. Ericsson LM Tel. Co.*, 2008 WL 5170640, at *13 (S.D.N.Y. Dec 10, 2008) (rejecting allegations where sources were "mid-level managers … who claim no contacts or communications with Defendants"), *aff'd sub nom. Furher v. Ericsson LM Tel. Co.*, 363 F. App'x 763 (2d Cir. 2009).

In their complaint, Plaintiffs fail to name or even identify the alleged "witnesses knowledgeable of relevant information," specify how or why these individuals would have internal knowledge of Genworth, or identify which of these individuals held positions at Genworth (if any), what those positions were, and when they held those alleged positions during the class period (if at all). Nor do Plaintiffs connect any supposed source to any specific allegation regarding internal Genworth information so as to allow the Court to assess "the probability that a person in the position occupied by the source would possess the information

alleged," as the Second Circuit has long required. *Novak*, 216 F.3d at 314. Plaintiffs cannot circumvent the PSLRA and Second Circuit pleading requirements by tactically declining to describe the (presumably deficient) sources of their allegations.

In any event (and not surprisingly given the above), Plaintiffs' scienter allegations are largely predicated on information that Genworth disclosed to investors (not concealed), or merely plead the unremarkable fact that Genworth had a process for the upward reporting of financial information.[17] These "allegations do not establish what specific contradictory information the Individual Defendants received or when they received it." *See Local No. 38*, 724 F. Supp. 2d at 461 (dismissing complaint for this pleading failure). Indeed, as discussed above, Plaintiffs' complaint contains *no* accounts from confidential witnesses that reference internal meetings, documents, or other information that purportedly contradicts Defendants' public disclosures. Although "the PSLRA does not require internal information," the absence of such facts is "a significant flaw in the [complaint]" because "[w]ithout any insight into the internal operations of [Genworth], plaintiffs' interpretation is nothing more than an assumption." *City of Monroe Emps.' Ret. Sys. v. Hartford Fin. Servs. Grp., Inc.*, 2011 WL 4357368, at *18 (S.D.N.Y. Sept. 19, 2011).

Perhaps the most egregious example of failing to source supposed internal Genworth information alleged in the complaint is paragraph 111, in which Plaintiffs allege that at a mid-December 2011 "Leadership and Management" meeting, "a discussion was held about the pending IPO during which either Schneider or Upton" purportedly said that Genworth Australia

[17] For example, Plaintiffs allege that Genworth had a monthly reporting system covering Genworth Australia's financial performance (AC ¶ 107), the risks facing the market (*id.* ¶¶ 107, 110), default rates (*id.* ¶ 108), and "delinquency and loss ratio trends" (*id.* ¶ 110). Plaintiffs also allege that Genworth Australia "used a methodology for calculating reserves" (*id.* ¶ 108) and that Genworth's management reviewed "'quarterly the loss reserves for adequacy'" (*id.* ¶ 110 (quoting Ex. N (FY 2011 Form 10-K) at 116)). Plaintiffs allege that Mr. Fraizer and "corporate Genworth" received and reviewed these reports. *Id.* ¶ 106; *see also id.* ¶ 109.

"recently had a poor quarter due to increased claims related to unforeseen natural disasters, which led to miscalculating of reserves" and that a presentation used at the meeting allegedly showed an "increase in claims in Australia [that] equaled around $100 to $125 million." AC ¶ 111. The most striking aspect to this paragraph is what Plaintiffs do not allege: at this purported meeting in December 2011 concerning the IPO, no-one is alleged to have said, heard, or opined that the IPO was not on track, that Genworth was not actively working towards it, or that it could not be achieved by the targeted Q2 2012 timeframe.

Further, for being the complaint's lone reference to internal Genworth information purportedly contradicting Defendants' statements, paragraph 111 adds remarkably little to Plaintiffs' other allegations (which all rely on information that Genworth publicly disclosed throughout the class period), and certainly does not transform Plaintiffs' nonsensical theory of fraud into a cogent one, or otherwise support a claim that Defendants violated the federal securities laws.

To begin with, the ambiguities in paragraph 111 render it meaningless. Who heard "either Schneider or Upton" make the alleged statement? Which quarter was the referenced "poor quarter"? By how much did Genworth miscalculate reserves? For which quarter did those miscalculations occur? Over what period did the referenced "increase in claims" occur? For what region or category of borrower did claims increase? Was the $100-$125 million figure a historical fact or forward-looking projection? Devoid of any particularity, this allegation does nothing to demonstrate the falsity of Genworth's disclosures. Indeed, the most that can be gleaned from paragraph 111 is that "either Schneider or Upton" made statements regarding the most recent quarter (presumably Q3 2011) that were completely consistent with Genworth's Q3 2011 results disclosed in November 2011; *i.e.*, Genworth Australia had experienced increased

losses as a result of the Queensland flooding and posted higher reserves. *See supra* SOF Section C.

Further, Plaintiffs' failure to plead any source for these allegations concerning the December 2011 meeting is fatal to their claims. Judge Sweet's decision in *Janbay v. Canadian Solar, Inc.*, 2012 WL 1080306, is instructive. The *Janbay* plaintiffs alleged that specific executives attended meetings at specific times, detailed purportedly contradictory information that was discussed during those meetings, and recounted the alleged content of email communications between executives that elaborated on that information. *Id.* at *5, 11. The court rejected all of these allegations because plaintiffs "quote[d] and characterize[d] these internal discussions without alleging any identifying information about their apparent source, rendering these allegations unreliable." *Id.* at *5. The same ground warrants dismissal here. Similarly, the absence of any allegations tying either Mr. Fraizer or Mr. Klein to the alleged December meeting or the statements purportedly made there is fatal to Plaintiffs' claims against those individuals. *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, 2014 WL 4832321, at *22 (S.D.N.Y. Sept. 29, 2014) (dismissing claims where plaintiffs failed to plead that sources "were privy to the Individual Defendants' knowledge or had direct contact with the Individual Defendants, such that the Individual Defendants are alleged to have knowledge of or access to contemporaneous information that would show that their representations were false") (citation omitted); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 141 (D. Conn. 2007) (rejecting claims where there was no allegation that the purportedly contradictory information was "communicated … to any of the Individual Defendants or that the Individual Defendants otherwise knew about these issues"), *aff'd*, 312 F. App'x 400 (2d Cir. 2009).

Indeed, Plaintiffs make only minimal, conclusory assertions as to what Messrs. Fraizer

and Klein knew when they spoke. Plaintiffs' allegation that the individual "defendants oversaw and had actual knowledge of the [IPO] transaction's progress" (AC ¶ 113) is insufficient to establish scienter. Even assuming that Mr. Fraizer and other non-defendants "traveled to Australia more frequently in the year leading up to the IPO than in the past" (*id.* ¶ 113), Plaintiffs fail to allege what information, much less contradictory information, was learned on this trip. *See Avon Prods.*, 2014 WL 4832321, at *20 (rejecting allegations that the individual defendant was aware of bribery because he "traveled to China several times for meetings with Avon executives" because plaintiffs did "not allege[] facts demonstrating that these meetings would have made [individual defendant] aware [of contradictory information]"). Plaintiffs' only other scienter allegation with respect to Messrs. Fraizer and Klein is that they "were provided with copies of the [c]ompany's reports and press releases" and thus "knew" that negative information "w[as] being concealed from the public and that the positive representations being made were then materially false and misleading." AC ¶ 118. But the complaint fails to allege what negative information Defendants knew, and fails to identify "reports or data [suggesting] that the Defendants knew ... their reserves were inadequate or that their economic assumptions were improper." *In re Aegon N. V. Sec. Litig.*, 2004 WL 1415973, at *17 (S.D.N.Y. June 23, 2004).

Plaintiffs' conclusory allegations based on purported GAAP violations similarly fail.[18] "'Allegations of GAAP violations or accounting irregularities, standing alone, are insufficient to state a securities fraud claim …. Only where such allegations are coupled with evidence of corresponding fraudulent intent might they be sufficient.'" *ECA*, 553 F.3d at 200 (quoting *Novak,* 216 F.3d at 309); *see also One Commc'ns Corp. v. JP Morgan SBIC LLC*, 381 F. App'x 75, 79-80 (2d Cir. 2010) (dismissing complaint for failure to meet the standard set forth in *ECA*).

[18] AC ¶¶ 54, 71-74, 76, 84, 89-90.

For the same reasons Plaintiffs fail to plead the falsity of Genworth's loss reserves, Plaintiffs fail to plead when and how each Defendant knew of the alleged GAAP violations, how those alleged GAAP violations rendered a specific challenged statement false or misleading, or why the alleged failure to comply with GAAP was fraudulent rather than just the result of differences of opinion over how to apply GAAP. *See supra* Section I.A (discussing Plaintiffs' failure to plead falsity under *Fait*).[19]

C. Plaintiffs' Incoherent Theory of Fraud Is Far Less Compelling than Competing, Non-Fraudulent Inferences

A complaint alleging securities fraud must plead an inference of scienter that is "cogent and compelling, thus strong in light of other explanations," and the "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. *Tellabs*, 551 U.S. at 324. "An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct." *Id.* at 314, 319.

As explained above, there is *no* theory of scienter pleaded in the complaint. Nowhere do Plaintiffs explain *why* Defendants would promote the IPO as a boon to Genworth's capital plan despite allegedly knowing that the transaction was not achievable within the targeted timeframe (and that Genworth's stock price might drop when the company postponed the IPO). Nor do

[19] *See Caiafa v. Sea Containers Ltd.*, 525 F. Supp. 2d 398, 410 (S.D.N.Y. 2007) (dismissing where "Plaintiffs have failed to plead with particularity *how* [defendants'] $500 million write-down establishes '*why* [defendants'] statements were fraudulent'") (emphasis added); *see also Caiafa v. Sea Containers Ltd.*, 331 F. App'x 14, 16 (2d Cir. 2009) (affirming dismissal of GAAP allegations where "plaintiffs' cursory allegations that defendants failed to record accurately on the company's balance sheet the value of certain assets and other alleged departures from [GAAP] establish[ed] neither defendants' motive and opportunity nor strong circumstantial evidence of conscious behavior or recklessness"); *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1129-30 (2d Cir. 1994) (finding no scienter based on allegation of inadequate loan loss reserves because "misguided optimism is not a cause of action" and there was no particularized allegation that company's impairment disclosures conflicted with current data); *In re Loral Space & Commc'ns Sec. Litig.*, 2004 WL 376442, at *17 (S.D.N.Y. Feb. 27, 2004) (finding no scienter where Plaintiffs failed to allege "an incorrect application of [GAAP], much less an error so grievous that it exceeded differences over accounting principles and rose to the level of fraud").

Plaintiffs explain *why* Defendants would lie about the adequacy of the company's loss reserves, despite allegedly knowing that economic circumstances in Australia would require a significant strengthening of reserves, or why Defendants would accurately disclose and repeatedly discuss rising delinquencies and losses, and take meaningful reserve charges, but conceal the purported need to strengthen reserves even more. Plaintiffs' failure to rationalize these obvious questions dooms their complaint. The Second Circuit repeatedly rejects securities fraud claims predicated on nonsensical fraud. Courts in this District do the same.[20]

The far more compelling inference is that, as Genworth publicly disclosed, the company was fully committed to executing an IPO in Q2 2012, believed it was important, and believed it was on track during the class period, as the loss ratios in Australia in Q3 and Q4 2011 were in line with publicly-disclosed expectations. *Compare* Ex. J (9/26/2011 Presentation) at 29 (projecting loss ratios for Genworth Australia in the second half of 2011 in the "High 40's/Low 50's"), *with supra* pp. 20-21 (table showing Q3 and Q4 2011 loss ratios of 48% and 46%, respectively). Then, in March 2012, Genworth experienced unexpected losses that caused the postponement of the IPO and a strengthening of reserves. This theory, unlike Plaintiffs', is plausible and entirely consistent with Defendants' public disclosures.

IV. PLAINTIFFS FAIL TO PLEAD CONTROL PERSON LIABILITY UNDER SECTION 20(A) OF THE EXCHANGE ACT

Plaintiffs' Section 20(a) claim fails because Plaintiffs have not pleaded a primary violation of the federal securities laws. *See Rombach v. Chang*, 355 F.3d 164, 178 (2d Cir.

[20] *See Local No. 38*, 724 F. Supp. 2d at 462-63 (finding no "strong inference of scienter" where "common sense caution[ed] against" such an inference); *In re PXRE Grp., Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 533 (S.D.N.Y. 2009) (rejecting theory of fraud in part because of the "seeming futility of Defendants' alleged scheme"), *aff'd sub nom. Condra v. PXRE Grp. Ltd.*, 357 F. App'x 393 (2d Cir.); *Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 525 (S.D.N.Y. 2005) (rejecting scienter theory that "defie[d] economic reason," was "a recipe for economic disaster" and was "inconsistent with hopes for or expectations of increased bonuses") (citation omitted), *aff'd*, 157 F. App'x 398 (2d Cir.).

2004).

CONCLUSION

For the reasons above, the complaint should be dismissed with prejudice in its entirety.

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Respectfully submitted,

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