UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re GENWORTH FINANCIAL, INC. SECURITIES LITIGATION	:	Master File No. 1:14-cv-02392-AKH CLASS ACTION
This Document Relates To: ALL ACTIONS.	:	MOTION TO STRIKE AND MOTION TO CONVERT DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT INTO A MOTION FOR SUMMARY JUDGMENT AND TO OPEN DISCOVERY

Lead Plaintiffs City of Hialeah Employees' Retirement System and New Bedford Contributory Retirement System (collectively, "plaintiffs") respectfully submit this motion to strike and motion to convert the motion of defendants Michael D. Fraizer, Martin P. Klein and Genworth Financial, Inc. ("Genworth" or the "Company") (collectively, "defendants") to dismiss plaintiffs' Amended Complaint for Violation of the Federal Securities Laws (Dkt. No. 26) (the "Complaint") into a motion for summary judgment and to open discovery.

I. DISCUSSION

"In adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration 'to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.'" *Leonard F. v. Isr. Disc. Bank*, 199 F.3d 99, 107 (2d Cir. 1999) (citation omitted); *see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (stating that courts adjudicating Fed. R. Civ. P. 12(b)(6) motions may consider documents attached to the complaint, "statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff upon which it relied in bringing the suit"). In the motion to dismiss context, however, the court should generally take judicial notice only "to determine what statements [the documents] contain[] . . .[,] not for the truth of the matters asserted." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). The Private Securities Litigation Reform Act of 1995 is consistent with this limitation, allowing consideration of statements referenced in a complaint only where the statements offered are "not subject to material dispute." 15 U.S.C. §78u-5(e). "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be . . .

readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

When material outside the complaint is presented to and not excluded by the court, "the motion must be treated as one for summary judgment under Rule 56 . . . [a]nd all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). For purposes of this rule, "'[t]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" *Int'l Audiotext Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)); *see* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint "relies heavily upon its terms and effect," which renders the document "'integral'" to the complaint. *Int'l Audiotext*, 62 F.3d at 72 (citation omitted).

Defendants have attached a number of documents to their motion to dismiss. Those documents mostly include documents filed with the SEC on Form 10-K (Exs. A, N), Form 10-Q (Exs. E, I, M), and Form 8-K (News Releases (Exs. D, G, K, O, S, T), and Quarterly Financial Supplements (Exs. B, C, R, U, X)).[1] Defendants have also attached conference call transcripts maintained by Thomson Reuters StreetEvents (Exs. F, H, L, P, Q, V, W). The Court may not accept these documents for their truth. *Kramer*, 937 F.2d at 774. To the extent that any of these documents are offered for this purpose, they should be stricken and disregarded for purposes of defendants' motion.

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[1] Exhibits referenced are attached to the Declaration of Greg A. Danilow in Support of the Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint (Dkt. No. 31) ("Danilow Decl.").

Defendants have, however, effectively converted their motion to dismiss into one for summary judgment under Fed. R. Civ. P. 12(d). They have attached Ex. J – which does not qualify as a document that the Court can consider on a motion to dismiss – and ask the Court to accept the truth of its contents. According to the Declaration of Greg A. Danilow, who is counsel for defendants, Ex. J is purported to be a "true and correct copy of Genworth's Presentation entitled 'Genworth Australia – Mortgage Insurance,' dated September 26, 2011." Danilow Decl., ¶11. This document does not fall within the category of documents that a court may properly consider on a motion to dismiss and it is not judicially noticeable. Indeed, it is not a "written instrument attached to the complaint," it was not incorporated into the complaint by reference, it is not a legally required public disclosure document filed with the SEC, and it is not a document possessed by or known to the plaintiff and upon which it relied in bringing the suit. *ATSI*, 493 F.3d at 98. And it certainly does not qualify as a fact that is not subject to reasonable dispute under Fed. R. Evid. 201.

Defendants use Ex. J for two purposes. First, they claim in their brief that Ex. J was a public disclosure that put investors on notice of its contents, stating that "[s]ix weeks later on September 26, 2011, Genworth updated investors with a presentation about Genworth Australia's mortgage insurance business," and proceed to quote the documents' contents. Defs.' Mem. at 7.[2] But defendants have not laid the foundation necessary to demonstrate that this presentation was, in fact, given publicly. Indeed, Mr. Danilow does not attach a corresponding conference call transcript where the presentation was given publicly and defendants' motion does not cite to such a transcript. And while defendants' brief states that "Genworth updated investors" with the presentation, Mr. Danilow makes no such declaration, stating only that Ex. J is a true and correct copy of

[2] "Defs.' Mem." refers to the Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint (Dkt. No. 30).

"Genworth's Presentation entitled 'Genworth Australia – Mortgage Insurance,' dated September 26, 2011." Danilow Decl., ¶11. Defendants cannot rely on Ex. J for the purposes of their motion to argue that it disclosed information publicly.

Second, defendants ask the Court to accept Ex. J for its truth that "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." Defs.' Mem. at 40 ("*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') . . . ."). This argument is improper on a motion to dismiss. *Leonard F.*, 199 F.3d at 107. In fact, by offering the document as they have, defendants have effectively moved for summary judgment while denying plaintiffs the opportunity to conduct discovery. The Court should therefore convert defendants' motion to dismiss into a motion for summary judgment and permit discovery.

II. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court strike any document that defendants have offered for the truth, strike Ex. J as a document that may not be considered on a motion to dismiss, and convert defendants' motion to dismiss into a motion for summary judgment while giving plaintiffs an opportunity to conduct discovery to respond to defendants' argument about their "beliefs."

DATED: February 2, 2015

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
DOUGLAS R. BRITTON
ASHLEY M. PRICE

s/ DOUGLAS R. BRITTON
DOUGLAS R. BRITTON

655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)
dougb@rgrdlaw.com
aprice@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
srudman@rgrdlaw.com

LABATON SUCHAROW LLP
JONATHAN GARDNER
PAUL J. SCARLATO
ANGELINA NGUYEN
140 Broadway, 34th Floor
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)
jgardner@labaton.com
pscarlato@labaton.com
anguyen@labaton.com

Lead Counsel for Plaintiffs

CYPEN & CYPEN
STEPHEN H. CYPEN
777 Arthur Godfrey Road, Suite 320
Miami Beach, FL 33140
Telephone 305/532-3200
305/535-0050 (fax)

Additional Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 2, 2015.

s/ DOUGLAS R. BRITTON
DOUGLAS R. BRITTON

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: dougb@rgrdlaw.com

Mailing Information for a Case 1:14-cv-02392-AKH

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Mario Alba , Jr**
  malba@rgrdlaw.com,e_file_ny@rgrdlaw.com,e_file_sd@rgrdlaw.com,drosenfeld@rgrdlaw.com
- **Jeffrey R. Alexander**
  jalexander@bftalaw.com
- **Douglas R. Britton**
  dougb@rgrdlaw.com,kathyj@rgrdlaw.com
- **Greg A. Danilow**
  greg.danilow@weil.com,MCO.ECF@weil.com,robert.ruff@weil.com,Lauren.Engelmyer@weil.com,Larkin.Kittel@weil.com
- **Jonathan Gardner**
  jgardner@labaton.com,lmehringer@labaton.com,fmalonzo@labaton.com,acarpio@labaton.com,electroniccasefiling@labaton.com
- **Caroline Jane Hickey**
  caroline.hickeyzalka@weil.com,mco.ecf@weil.com,Layne.Behrens@weil.com
- **Angelina Nguyen**
  anguyen@labaton.com,electroniccasefiling@labaton.com
- **William Stephen Norton**
  bnorton@motleyrice.com,mkimpson@motleyrice.com,kweil@motleyrice.com
- **Ashley M. Price**
  APrice@rgrdlaw.com,susanw@rgrdlaw.com
- **David Avi Rosenfeld**
  drosenfeld@rgrdlaw.com,e_file_ny@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Samuel Howard Rudman**
  srudman@rgrdlaw.com,e_file_ny@rgrdlaw.com,mblasy@rgrdlaw.com,e_file_sd@rgrdlaw.com

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