UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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Defendants Genworth,[1] Michael D. Fraizer, and Martin P. Klein respectfully submit this reply memorandum of law in further support of their motion to dismiss.

PRELIMINARY STATEMENT

In this action, Plaintiffs claim that Defendants misrepresented the adequacy of Genworth's reserves for its Australian mortgage insurance business and misled investors about Genworth's plans and ability to execute a minority IPO of Genworth Australia in Q2 2012 (April–July 2012).

A central theme of Plaintiffs' opposition is that all of Defendants' statements—whether about the adequacy of Genworth Australia's reserves, the plan for the IPO, or the strength of Genworth Australia's capital generation—were rendered false and misleading because Defendants "concealed a massive exposure to low-documentation … loans approved using 'projected' and manipulated sources of income." Plaintiffs argue that "[o]nly after the Class Period (November 3, 2011–April 17, 2012) did defendants admit that these low-documentation loans were defaulting at an 'increasing' rate before the Class Period, as factors in the Australian economy—and particularly in Queensland, where Genworth Australia concentrated its business—put greater pressure on these borrowers." Plaintiffs assert that "this very category of borrower caused the $82 million increase in reserves, the unheard of losses at Genworth Australia, and suspended the IPO." According to Plaintiffs, "[a]s a result of defendants' false and misleading statements, covering up a massive exposure to high-risk low-doc loans from 2007 and 2008, Genworth securities traded at artificially inflated prices," and "[t]he revelation of the true state of Genworth Australia's business stunned the market" and caused Genworth's stock price to decline. Every aspect of this tale is demonstrably false.

[1] Capitalized terms not defined in this reply brief retain their definitions from Defendants' opening brief.

While Plaintiffs repeatedly allege that Defendants "concealed" and "covered up" Genworth Australia's exposure to low-doc loans, their complaint and opposition draw extensively from *Genworth's own publication* from 2007 entitled "Low-Doc Lending in Australia," posted on Genworth's website. In this document, Genworth disclosed, among other things, that low-doc loans typically have "self-employed borrowers," that there is "greater risk associated with offering loans to this group" because of "the style of product and borrower," and that Genworth had insured "over 200,000 prime low-doc loans" since 1999. Thus, contrary to Plaintiffs' allegations and their opposition, the existence, magnitude, and risks of low-doc loans were disclosed and explained by Genworth before the class period even began. Further, at the end of every quarter during the class period, Genworth provided investors with extensive disclosures concerning the composition and performance of Genworth Australia's overall mortgage insurance portfolio as well as granular details concerning the performance of the 2007 and 2008 vintages and the Queensland region. These disclosures plainly reflected that, relative to the first half of 2011, delinquencies were increasing in the second half of 2011 for the mortgage insurance portfolio overall, and specifically for the 2007/2008 vintages and for the Queensland region. In short, Plaintiffs' assertion that Defendants covered up the fact that Genworth Australia insured low-doc loans, misled investors about the higher risk associated with these loans, and concealed the delinquencies associated with these loans, particularly in Queensland, is directly contradicted by the face of Plaintiffs' pleading and the disclosures that they cite.

For the reasons Defendants previously demonstrated, the remainder of the arguments in Plaintiffs' opposition are similarly without merit.

First, Plaintiffs' opposition does not respond to Defendants' showing that the complaint fails to plead an actionable false statement or omission. Plaintiffs continue to insist that

Genworth Australia's reserves were understated by some unspecified amount "up to" $82 million (and that, as a result, the IPO would never occur in Q2 2012) because (i) Australia, particularly Queensland, was experiencing an economic downturn; (ii) Genworth Australia's portfolio included 2007- and 2008-vintage policies insuring risky "low-doc" mortgages; and (iii) delinquencies were increasing in the second half of 2011. Plaintiffs completely miss the point: they cannot plead securities fraud simply by alleging their opinion that, because of the above conditions, Genworth "should have" reserved more, earlier, or "should have known" that the IPO was not achievable within the planned timeframe. Such an assertion merely (and impermissibly) substitutes Plaintiffs' opinions for Defendants'.

The complaint pleads no contemporaneous facts, particularized or otherwise, showing that Genworth Australia's mortgage insurance reserves did not adequately account for the three factors that Plaintiffs identify, or specifically when and by how much Genworth Australia's reserves did not do so. In fact, the complaint is devoid of even one factual allegation about the reserve-setting process during the class period. Plaintiffs' fraud claim ultimately rests on the fact that Genworth strengthened reserves by $82 million at the end of the class period. That is the quintessential—and routinely rejected—"fraud-by-hindsight" argument. Moreover, because reserves are "best estimates" of losses and therefore opinions, Plaintiffs additionally must, but also fail to, plead that Defendants did not actually believe their stated opinions. Having failed to adequately allege that reserves were understated or that Defendants knew it, Plaintiffs are left with no basis for the allegation that Defendants *knew* that the IPO would not go forward as planned, and their complaint should be dismissed under *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011). *See* Section I below.

Second, Plaintiffs' opposition offers no serious rebuttal to Defendants' showing that

Defendants' statements about the IPO were protected by the PSLRA's safe harbor for forward-looking statements. Plaintiffs' unavailing attempt to recast Defendants' specific cautionary language as "boilerplate" does not withstand passing scrutiny. Genworth's tailored disclosures that the risks of "natural disasters, including … floods," "decline in home prices," and "economic downturns … where a large portion of [Genworth's] business is concentrated" "could adversely affect [Genworth's] financial condition and results of operations" are specific, focused, and directly on point. In fact, they warn of precisely the events that Plaintiffs identify as having caused the need to strengthen reserves. This cautionary language is an absolute bar to Plaintiffs' claims. And because Plaintiffs fail to adequately allege that Defendants had actual knowledge of the falsity of their forward-looking statements, the third prong of the PSLRA's safe harbor (no actual knowledge of falsity) independently insulates Defendants' IPO-related statements from attack, regardless of the adequacy of the cautionary language. *See* Section II below.

Third, Plaintiffs' opposition highlights the complaint's failure to plead facts giving rise to a cogent and compelling inference of scienter. Plaintiffs advance a handful of scienter theories, including a new theory that Defendants overstated Genworth Australia's financial position in order to execute the IPO at an inflated price. But Plaintiffs' complaint alleges that Defendants knew "that Genworth Australia was in no shape to complete the announced IPO" given the "known, but undisclosed high-risk low-doc loans in its Australian businesses." It is neither cogent nor logical to lie to investors to inflate the price of an offering that you know is never going to be executed. Even setting aside this fundamental inconsistency in Plaintiffs' new theory, Defendants' alleged desire to raise capital through the IPO is insufficient to plead motive under Second Circuit law, as it is a motive shared by virtually all companies and their executives. Having alleged no motive and no other logical reason why Defendants would commit securities

fraud, Plaintiffs have failed to plead a cogent inference of scienter that is at least as compelling as the logical, obvious, non-fraudulent inference set forth by Defendants: that during the class period Genworth was fully committed to executing an IPO in Q2 2012, then experienced emerging loss experience in Q1 2012 beyond that which it had anticipated, which led Defendants to strengthen reserves for this recent loss experience and postpone the IPO. Plaintiffs thus fail to satisfy the pleading requirements imposed by the Supreme Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). *See* Section III below.

ARGUMENT

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

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

Because Plaintiffs' complaint challenges Defendants' "'inherently subjective'" statements about loss reserves, *Fait v. Regions Financial Corp.* requires Plaintiffs to "'allege that defendant's opinions were both false and not honestly believed when they were made.'" Def. Br. at 17 (quoting *Fait*, 655 F.3d at 113, and citing *City of Omaha, Neb. Civilian Emps.' Ret. Sys. v. CBS Corp.*, 679 F.3d 64, 67-68 (2d Cir. 2012)).[2] Plaintiffs argue that Genworth "should have" reserved more, earlier, because Defendants were allegedly aware of—indeed, "concealed"—"a massive exposure to low-documentation (or 'low-doc') loans" that were, supposedly, "defaulting

[2] Plaintiffs appear to suggest that GAAP's requirement that accounting estimates be reasonable overrules *Fait*'s holding that a statement of opinion is only false if it was "disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110. Plaintiffs cite no support for this assertion. *See* Pl. Opp. at 17. And both *Fait* and *CBS* (extending *Fait*'s objective and subjective falsity requirements to 1934 Act claims) addressed the pleading standards for securities fraud claims predicated upon challenges to opinions related to GAAP accounting estimates. *See Fait*, 655 F.3d at 112 (assessing challenge to adequacy of loan loss reserves under an accounting rule providing that "[a] loan is impaired when, based on current information and events, it is probable that a creditor will be unable to collect all amounts due according to the contractual terms of the loan agreement"); *CBS*, 679 F.3d at 68 (assessing challenge to opinion regarding impairment testing under an accounting rule that "'requires that goodwill be tested for impairment annually, or 'more frequently if events or changed circumstances indicate that the asset might be impaired'") (citation omitted).

at an 'increasing' rate before the Class Period, as factors in Australian economy—and particularly in Queensland—put greater pressure on these borrowers." Pl. Opp. at 1, 19 n.9. Thus, Plaintiffs urge, Defendants allegedly "knew" that Genworth would experience more claims for higher amounts in Q1 2012 than Genworth estimated earlier during the class period. *Id.* at 22-23.

This argument offers nothing more than Plaintiffs' own opinion (informed exclusively by hindsight) as a counterbalance to Defendants' opinion of a "best estimate of ultimate paid claims for reported delinquencies." Ex. W (5/2/2012 Tr.) at 8. In the Second Circuit, claiming that a company "should have" reserved more states a difference of opinion, not a "'securities fraud claim after *Fait*.'" Def. Br. at 18-19 (quoting *CBS*, 679 F.3d at 68, and collecting cases). To adequately allege that reserves were false, a plaintiff must plead what specific information warranted additional reserves, when the defendants obtained this information, and that the defendants not only failed to account for this information in the company's reserves, but knowingly failed to do so, such that the defendants did not believe in the accuracy of their own estimates. *Id.* at 19-20 (citing *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 361-62 (S.D.N.Y. 2011), and *City of Sterling Heights Police & Fire Ret. Sys. v. Vodafone Grp. PLC*, 655 F. Supp. 2d 262, 269-70 (S.D.N.Y. 2009)).[3] As set forth in Sections I.A.1-3 below, Plaintiffs plead none of the required facts.

[3] Plaintiffs' contention that *Vodafone* and *Wachovia* "actually support" their position is without merit. Pl. Opp. at 19. These cases require plaintiffs to "allege at what point in time [the] charge [to reserves] should have been taken and which specific losses known to the Company should have triggered [the] charge." *Vodafone*, 655 F. Supp. 2d at 269-70; *see also Wachovia*, 753 F. Supp. 2d at 361-62 (rejecting allegations as "generalized" where Plaintiffs "fail to specify what caused the Defendants to know that the loan loss reserves were insufficient"). Plaintiffs' opinion that "existing defaults in a segment of Genworth Australia's portfolio [were] highly likely to present for claim" (*see* Pl. Opp. at 20) provides none of the required specificity.

1. Plaintiffs' Assertions About How Genworth Australia "Should Have" Calculated Reserves Are Unsupported by Pleaded Facts or Accounting Principles

Throughout their opposition, Plaintiffs repeatedly assert that "the conditions that drove the ultimate $82 million reserve charge"—purportedly delinquencies in loans "from small business and self-employed borrowers in the 2007 and 2008 vintage years" for which "Genworth Australia was promoting low-doc loans"—"existed before the Class Period." Pl. Opp. at 18. Plaintiffs argue that "Defendants had *no reasonable basis* to believe that these borrowers would suddenly become current on their loans" based on "the way [the loans] were underwritten using manipulated sources of income" and thus had no "*no reasonable basis* to believe" that Genworth Australia's reserves were adequate during the class period. Pl. Opp. at 19-20 (emphasis added); *see also id.* at 2, 29, 41-42. This argument is not only unsupported by a single pleaded fact, it runs directly contrary to GAAP and actuarial principles governing how mortgage insurance reserves are calculated.

Loss reserves are "management's best estimate of ultimate paid claims for reported delinquencies." Ex. W (5/2/2012 Tr.) at 8.[4] The process of setting reserves is "inherently uncertain" and "require[s] significant judgment" using past experience and prediction about the future. Ex. Z (2010 Form 10-K) at 105.[5] Genworth generally "consider[s] a loan to be delinquent and establish[es] reserves if a borrower has failed to make a required mortgage payment." *Id*. at 141.[6] Having determined to establish a reserve for an insured loan, Genworth must then

[4] *See also* Fin. Acct'g Stds. Bd., Accounting Standards Codification (ASC) 450-20-25 ("An estimated loss from a loss contingency shall be accrued by a charge to income if … [i]nformation available before the financial statements are issued or are available to be issued … indicates that it is *probable* that an asset had been impaired or a liability had been incurred at the date of the financial statements…. [and] [t]he amount of loss can be reasonably estimated.") (emphasis added) (Ex. Y), *cited in* AC ¶ 72 *and* Pl. Opp. at 17.

[5] Exhibits Y through DD are attached to the Reply Declaration of Greg A. Danilow, filed with this reply brief.

[6] "'Delinquency' is defined in [Genworth's] master policies as the borrower's failure to pay when due an amount equal to the scheduled monthly mortgage payment under the terms of the mortgage." Ex. Z (2010 Form 10-K) at

determine the amount of the reserve. Because delinquencies occur "for a variety of reasons" and "[b]orrowers may 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" (*id.*), this process is complex.

Genworth calculates its mortgage insurance reserves "using assumptions developed based on past experience and [its] expectation of future developments. These assumptions include claim rates for loans in default, the average amount paid for loans that result in a claim and an estimate of the number of loans in [its] delinquency inventory that will be rescinded or modified (collectively referred to as 'loss mitigation actions') based on the effects that such loss mitigation actions have had on [its] historical claim frequency rates, including an estimate for reinstatement of previously rescinded coverage." *Id.* at 105. Of course, "[t]he frequency of delinquencies may not correlate directly with the number of claims received because the rate at which delinquencies are cured is influenced by borrowers' financial resources and circumstances and regional economic differences." *Id.* at 150. Genworth "reviews . . . the loss reserves for adequacy" on a quarterly basis, "and if indicated, updates the assumptions . . . based on actual experience." *Id.* at 105.

Plaintiffs do not assert that Genworth's methodologies for calculating mortgage insurance reserves or its assumptions as to claim frequency and severity were flawed, much less fraudulently derived or applied. In fact, Plaintiffs discuss neither the reserving process nor the factors that are required to be analyzed when establishing a reserve. The complaint and the opposition are both silent on this subject. Instead, Plaintiffs assert, without explanation or support, that Genworth nonetheless committed securities fraud because—*in Plaintiffs' view,*

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untethered to any accounting standard or well-pleaded factual allegation—there was "no reasonable basis" to believe that small business and self-employed borrowers whose loans were delinquent would ever become current on their loans. Pl. Opp. at 19. Plaintiffs plead no facts as to external industry information (which, in any event, is insufficient)[7] or internal Genworth information, and cite no accounting principle or actuarial standard, in support of their assertion that it was fraud for Genworth not to conclude that it was "probable" that virtually all borrowers who became delinquent would remain forever delinquent and ultimately result in the lender submitting a claim to Genworth. Pl. Opp. at 20-21. Plaintiffs acknowledge that ASC 450 governs this determination and only requires companies to estimate reserves for "probable" losses that "can be reasonably estimated." AC ¶ 72; *see also id.* ¶ 54; Pl. Opp. at 17; p. 7 n.4 above.

Unable to make these allegations—which are required to survive this motion—Plaintiffs offer labels such as "toxic" (Pl. Opp. at 3, 6) and "high-risk" (*id.* at 6, 7, 9, 23, 33, 35) in the apparent belief that the Court will conclude that the failure to reserve more for a delinquency on a "high risk" mortgage—that has already been in force between 3-5 years before the class period delinquency (Plaintiffs focus on 2007-2008 policies)—is fraud. Such labels are not a substitute for particularized allegations supporting their claims of securities fraud. Def. Br. at 22; *see also Stratte-McClure v. Ap-Fonden*, — F. App'x —, 2015 WL 136314, at *2-3 (2d Cir. Jan. 12, 2015) (dismissing challenge to statements regarding defendants' "subprime" exposure where the "complaint fails to 'demonstrate with specificity why and how' the statements are misleading") (quoting *Rombach v. Chang*, 355 F.3d 164, 170-74 (2d Cir. 2004)); *In re Downey Sec. Litig.*, 2009 WL 2767670, at *6 (C.D. Cal. Aug. 21, 2009) (dismissing 1934 Act claims when

[7] *See In re Keryx Biopharms., Inc., Sec. Litig.*, 2014 WL 585658, at *12 (S.D.N.Y. Feb. 14, 2014) (the "[f]ailure to follow industry standards – without more – is not itself sufficient to support scienter") (citing *Stevelman v. Alias Research, Inc.*, 174 F.3d 79, 84 (2d Cir. 1999)); *In re JP Morgan Auction Rate Sec. (ARS) Mktg. Litig.*, 867 F. Supp. 2d 407, 424-25 (S.D.N.Y. 2012) ("[V]iolation of industry standards does not in itself" demonstrate scienter) (citing *Stevelman* and *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 270 (2d Cir. 1996)).

"Plaintiff's allegations … that [defendants] misrepresented the quality of [their] loans … continue to be based on nothing more than Plaintiff's own characterization of [defendants' subprime] loans as 'toxic' and 'horrible' because such loans were inherently bad and uncollectible …. Plaintiff fails to plead any particularized facts supporting these claims, such as why [such] loans are inherently bad.").

Nor do Plaintiffs satisfy the heightened pleading requirements of Rule 9(b) and the PSLRA with their argument that reserves increases during the class period were "minor" and inadequate "[g]iven the manner in which the loans were underwritten and defendants' experience with them in the United States." Pl. Opp. at 20. Plaintiffs plead no particularized facts supporting their assertion that the 2007 and 2008 loans that banks underwrote and Genworth insured were underwritten based on "fudged figures" and "manipulated income." Pl. Opp. at 19-20. Indeed, Plaintiffs reference a press article that does not even mention Genworth as their support for this assertion. *See* AC ¶ 44 (citing Ex. AA (Aus. Broad. Corp. Article) at 1).[8] And Plaintiffs plead no facts connecting Genworth's insurance practices in Australia with its practices in the United States, or explaining why Genworth's "experience" with unspecified U.S. mortgage insurance policies (Pl. Opp. at 20) should have led Defendants to reserve more than they did for Genworth Australia's mortgage insurance policies during Q3 and Q4 2011. Plaintiffs' conclusory assertions cannot sustain the weight of their securities fraud claims.

2. Plaintiffs' Repeated References to "Increased Delinquencies" "In the Second Half of 2011" and "Backlogs of Delinquencies" at Lenders Does Not Support Their Claim That Genworth Australia Was Under-Reserved

Plaintiffs repeatedly cite two excised statements made by Genworth's global mortgage

[8] Plaintiffs also reference testimony by Denise Brailey, President of the Banking and Finance Consumers Support Association to the Australian Parliament, that similarly is not alleged to have mentioned Genworth. AC ¶¶ 115-16.

insurance CFO, Jerome Upton, during the May 2012 first-quarter-end investor call, in support of their assertion that Defendants admitted or knew that Genworth was "dramatically" under-reserved during the class period. The first is Mr. Upton's comment in response to an analyst question 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, *referenced in* Pl. Opp. at 2, 6, 7, 9, 15, 22, 23, 33, 39, 42. The second is Mr. Upton's statement that, "[d]uring 2011, as delinquencies increased during the year, certain lender servicing routines fell behind which created processing delays and caused backlogs of delinquencies." *Id.* at 7, *referenced in* Pl. Opp. at 2, 7, 15, 19, 23, 33. Neither of Mr. Upton's comments remotely support Plaintiffs' characterization of them as "admissions" that Genworth had "dramatically understated" reserves to cover forthcoming "massive losses," and knew it throughout the class period. *See* AC ¶¶ 33, 39, 53, 55, 71, 74, 76, 84.

First, neither Mr. Upton nor anyone else at Genworth said what Plaintiffs claim. Mr. Upton did not "admit" that Genworth Australia was under-reserved during Q3 and Q4 2011. To the contrary, he explained that 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, *quoted in* AC ¶ 103; *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).[9] This is consistent with Genworth's disclosure that, as needed upon quarterly review, it "updates the assumptions used

[9] Plaintiffs similarly mischaracterize Mr. Upton's statements in reasserting their argument that Genworth's "average paid claim had jumped considerably beginning as early as November 2011." Pl. Opp. at 22 n.12. The numbers speak for themselves: the frequency and severity of claims significantly increased for the first time in Q1 2012, not before. *See* Def. Br. at 21-22. Plaintiffs' opposition tries to get around this fact by attributing their spin on the disclosed data to "an admission by Upton" that claim numbers and severity "jumped considerably beginning as early as November 2011." Pl. Opp. at 21-22 & n.12. Mr. Upton said nothing of the sort; Plaintiffs simply cite the disclosed numbers, which do not show the trend Plaintiffs urge. Plaintiffs continue to fabricate a trend where none exists.

for estimating and calculating … reserves based on actual experience and [its] historical frequency of claim and severity of loss rates." Ex. Z (2010 Form 10-K) at 105-06. Plaintiffs cannot square their "admission" argument with Mr. Upton's statement about the March 2012 loss emergence.

Second, Mr. Upton's comment that "[i]n the second half of 2011, we did see increasing delinquency levels" (Ex. W (5/5/2012 Tr.) at 11) does not support Plaintiffs' assertion that these increasing levels were "not disclosed to investors," despite Plaintiffs' insistence. Pl. Opp. 15; *see also id.* at 1, 6. Every quarter, Genworth disclosed, among numerous other performance metrics, delinquency rates for its Australia mortgage insurance portfolio as a whole, and the Queensland and 2007/2008 vintages specifically (*see* Def. Br. at 4-5, 8, 11, 20-21):

Genworth Australia Delinquency Rates by Period and Policy Type[10]

	All Policies	Queensland	2007 Vintage	2008 Vintage
Q1 2011	0.52%	0.64%	1.08%	1.24%
Q2 2011	0.56%	0.74%	1.16%	1.35%
1st half 2011	*0.54%*	*0.69%*	*1.12%*	*1.30%*
Q3 2011	0.59%	0.84%	1.22%	1.50%
Q4 2011	0.55%	0.81%	1.18%	1.40%
2nd half 2011	*0.57%*	*0.83%*	*1.20%*	*1.45%*

These disclosures reflect an increase in the average delinquency rate for the Australian portfolio from 0.54% in the first half of 2011 to 0.57% in the second half of 2011. Similarly, Genworth disclosed that the average delinquency rate increased from 0.69% to 0.83% in Queensland, from 1.12% to 1.20% for the 2007 portfolio, and from 1.30% to 1.45% for the 2008 portfolio, all of

[10] *See* Ex. X (Q1 2011 Quarterly Fin. Supp.) at 38; Ex. B (Q2 2011 Quarterly Fin. Supp.) at 40; Ex. C (Q3 2011 Quarterly Fin. Supp.) at 40; Ex. R (Q4 2011 Quarterly Fin. Supp.) at 43.

which Genworth disclosed quarterly.[11] That delinquency levels increased "[i]n the second half of 2011" for the overall portfolio, the 2007/2008 vintages, and the Queensland region (Pl. Opp. at 2, 6, 9, 15, 22-23, 33, 42) was not new information.[12]

Plaintiffs also allege no basis for characterizing Mr. Upton's comment about "increasing delinquency levels" as an "admission" that Genworth was under reserved during the class period. *See* Pl. Opp. at 2, 6, 22-23, 33, 39; AC ¶¶ 5, 43, 52, 59, 74. Plaintiffs plead no facts showing that an increase in delinquencies in the second half of 2011 was not covered by Genworth Australia's reserves (which also increased (Def. Br. at 20-21)) or why it was fraud for Genworth not to have reserved more than it did for those delinquent loans. The mere fact that delinquencies had increased in the second half of 2011 relative to earlier experience that year says nothing about whether Genworth had abruptly departed from GAAP requirements and failed to establish appropriate reserve amounts for the delinquencies.

Indeed, Plaintiffs' emphasis on this purported "admission" (which had actually been disclosed every quarter) fundamentally misconstrues how reserves are calculated. As discussed above at pages 7-8, consistent with GAAP and actuarial principles, Genworth calculates the amount of reserves for a delinquency using actuarial assumptions concerning claim severity and claim frequency. The $82 million reserve strengthening reflected "Recent Emergence Of Claims Frequency & Severity"—*i.e.*, more claims on delinquent loans were submitted in higher amounts in the first quarter of 2012 than Genworth had previously assumed. Ex. V (5/2/12 Presentation)

[11] As set forth in Defendants' opening brief (Def. Br. at 18, 20-21), Genworth also steadily increased reserves during 2011.

[12] Moreover, as Defendants noted in their opening brief (Def. Br. at 20-21), the disclosures that Plaintiffs cite for their contention 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 during the Class Period" (AC ¶ 54; *see also id.* ¶¶ 72, 74, 90), in fact showed increasing delinquencies in Q2 and Q3 2011 followed by *decreases* in Q4 2011 and Q1 2012. Def. Br. at 20-21.

at 10, 9; Ex. W (5/2/2012 Tr.) at 12. Based on this Q1 2012 *claims experience*, Genworth's updated *claims assumptions* resulted in higher estimated amounts reserved for delinquent loans, with "$20 million of the reserve strengthening … related to claims to be paid during the second quarter, with the residual applied to later stage delinquencies, the majority of which will be paid over the remainder of the year." Ex. W (5/2/2012 Tr.) at 8. In short, Plaintiffs' reliance on Mr. Upton's post-class period statement concerning previously disclosed "increasing delinquencies" "[i]n the second half of 2011" is entirely misplaced; this comment does nothing to support Plaintiffs' allegation that Genworth was under-reserved.

Third, with respect to Mr. Upton's comment about "backlogs of delinquencies," Plaintiffs mischaracterize what Mr. Upton said. Mr. Upton explained that, "[d]uring 2011, as delinquencies increased during the year, certain lender servicing routines fell behind which created processing delays and caused backlogs of delinquencies." Ex. W (5/5/2012 Tr.) at 7. Mr. Upton 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.[13] Despite Plaintiffs' creative quote-splicing, Mr. Upton never said or "admitted" that "backlogs of delinquencies" occurred because "defaults were so significant" in 2011, and most importantly, he never said or "admitted" that Genworth Australia's reserves were wrong because Defendants knowingly did not reserve the appropriate amount for these delinquencies. Pl. Opp.

[13] *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).

at 7.[14] Indeed, Mr. Upton's comments confirm that it was the Q1 2012 claims experience (particularly the claims paid amount from March) related to these delinquencies that informed the reserve-setting assumptions and contributed to the $82 million reserve strengthening, not the mere fact of a delinquency alone (as Plaintiffs appear to imply throughout their opposition).

3. Even if Genworth "Should Have" Reserved More During the Class Period, Plaintiffs Fail to Plead that Defendants Knew That Reserves Were Inadequate

Defendants' opening brief demonstrated that the complaint is "devoid even of conclusory allegations" that Defendants subjectively "'did not believe in their statements of opinion'" when expressed. Def. Br. at 23 (quoting *CBS*, 679 F.3d at 68-69). Indeed, as Defendants showed, instead of pleading details "such as information from internal reports or firsthand employee accounts" that could conceivably demonstrate subjective falsity, Plaintiffs rely exclusively "on conclusory statements about housing trends premised on information that was public during the class period."[15] Def. Br. at 23 (citing AC ¶¶ 34-35, 67). Neither these allegations nor any others concerning the Australian economy, Genworth's insuring of low-doc loans, or delinquency trends establish that "defendants did not think [the] reserves were adequate" during the class period. *NECA-IBEW Pension Trust Fund v. Bank of Am. Corp.*, 2012 WL 3191860, at *10 (S.D.N.Y. Feb. 9, 2012) (quoting *In re CIT Grp., Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004)).

[14] Unable to plead that the actual delinquency rates that Genworth disclosed during the class period were false, Plaintiffs fall back on the unparticularized argument that "Defendants' statements about delinquencies were, at the very least, misleading, if not actually false, because of the build-up of delinquencies, particularly in [Queensland], from low-doc loans that were manifesting their susceptibility to economic pressures." Pl. Opp. at 16. For the reasons explained above, this was a backlog related to lender processing delays and had nothing to do with "significant" defaults in low-doc loans. The complaint contains no pleaded facts demonstrating with specificity why and by how much the disclosed delinquency rates were false.

[15] In their opposition, Plaintiffs state, without elaboration or support, that Defendants' description of the complaint's failure to plead any internal, contradictory information known to Genworth is "clearly untrue." Pl. Opp. at 23. But the paragraphs of the complaint referenced in Defendants' opening brief do, in fact, cite unemployment data and public reports on the Australian labor and housing markets – not any first-hand accounts or reference to internal Genworth knowledge. *See* AC ¶¶ 34-35, *cited in* Def. Br. at 23.

In their opposition, Plaintiffs repeatedly insist that Defendants "knew" that certain loans from "an especially high-risk category of borrower" were "highly likely to default and present for claim" because the loans were based on "manipulated income," and thus Defendants purportedly "knew" Genworth Australia was under-reserved. Pl. Opp. at 20-21, 22-23. Even crediting Plaintiffs' unsupported assertions about the banks' underwriting of 2007 and 2008 loans, Plaintiffs do not plead a single fact suggesting that Defendants *knew* about these allegedly fraudulent underwriting practices but nonetheless knowingly failed to reserve adequately for the risks associated with this group of loans. Plaintiffs simply ascribe their legally irrelevant assessment of the risks of low-doc loans to Defendants, with no alleged factual basis for doing so.[16] This is fatal to their claims. Def. Br. at 23-24 (citing, *inter alia*, *Wachovia*, 753 F. Supp. 2d at 361-62 (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")).

Moreover, having pled no internal documents or employee accounts describing what Defendants knew about Genworth Australia's reserves and when they knew it, Plaintiffs are left to rely on the illogical theory that Defendants were aware that Genworth had insured fraudulently underwritten loans carrying significant risks (Pl. Opp. at 29), that Genworth publicly wound down its insuring of these loans because of those risks (*id.* at 22), but that Defendants nevertheless knowingly short-changed Genworth Australia's reserves, deriving no

[16] Plaintiffs' fallback suggestion that they are not required to plead subjective falsity because Defendants purportedly publicly "admitted" to previously concealed increasing delinquencies (Pl. Opp. at 1-2, 6, 18, 21, 22, 33, 39, 42, 45) rests upon a fundamental mischaracterization of Defendants' public statements. *See* Section I.A.2 above; Def. Br. at 20-23.

apparent benefit from doing so, until the house of cards came down in Q1 2012. This illogical premise cannot support a securities fraud claim. In any event, Genworth's tightening of its Australia mortgage underwriting practices "does not show that earlier ones were recognized as deficient"; moreover, "[d]rawing any inference from this would be incompatible with Fed. R. Evid. 407, which provides that subsequent remedial measures may not be used as evidence of liability." *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) (affirming dismissal of securities fraud claim alleging that a company hired an outside firm to "beef up financial controls").

B. Plaintiffs Fail to Plead that Defendants' Statements About Genworth Australia's Planned IPO Were False or Not Genuinely Believed by Defendants

Defendants set forth a number of shortfalls in Plaintiffs' allegations challenging Defendants' statements about IPO plans for Genworth Australia. In response, Plaintiffs effectively abandon the complaint's allegations and argue that all of the IPO-related statements were false because Defendants' opinion that the IPO could be achieved on the announced timetable was false. No pleaded facts support this claim.

1. Plaintiffs Concede Their Failure To Plead That the IPO-Related Statements Were False

Defendants' opening brief explained that, although "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," Genworth in fact "disclosed the exact opposite," advising investors that "'*there can be no assurance that this transaction can be executed within the targeted timeframe or on the desired terms*.'" Def. Br. at 25. In response, Plaintiffs half-heartedly accuse Defendants of misconstruing their claims, but the complaint's allegations (however conclusory) are clear: "Defendants … continued to represent that the

planned IPO of Genworth Australia *would go forward* in 2012" (AC ¶ 88 (emphasis added)); "defendants … assur[ed] investors that the upcoming IPO *would be executed* 'from a position of strength'" (AC ¶ 95 (emphasis added)). In their opposition, Plaintiffs effectively concede that—contrary to the complaint's characterizations—Defendants did not "assure" investors that the IPO "would" be executed within the announced timetable. *See* Pl. Opp. at 26 (recasting Plaintiffs' argument as challenging "defendants' assurances related to the present fact about Genworth Australia being in a position to do an IPO").

Defendants' opening brief also explained that, despite challenging Defendants' statements concerning their plan and efforts to execute the IPO, Plaintiffs fail to "allege even once that Defendants did not actually plan to do an IPO" or that Defendants "were not 'devoting a lot of time' and 'working really hard' to complete the IPO." Def. Br. at 26 (internal citations omitted) (citing *In re Sanofi-Aventis Sec. Litig.*, 774 F. Supp. 2d 549, 566 (S.D.N.Y. 2011), and *City of Roseville Emps.' Ret. Sys. v. Nokia Corp.*, 2011 WL 7158548, at *9 (S.D.N.Y. Sept. 6, 2011)). Here, too, Plaintiffs effectively concede that Defendants are correct, acknowledging that the complaint contains no "allegations suggesting that defendants were not spending a lot of time on the IPO." Pl. Opp. at 26.

2. Plaintiffs Do Not Plead That Defendants Did Not Genuinely Believe Their Opinions About the IPO

Unable to plead that Defendants were not actually working hard to execute the IPO, Plaintiffs assert that all the IPO-related statements were false because Defendants' opinion that the IPO could be achieved on the announced timeframe was false. But fatal to this claim, Plaintiffs continue to fail to "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." Def. Br. at 27.

In opposition, Plaintiffs assert that they have "supplied a factual basis for finding that defendants knew the IPO was not 'on track'" (Pl. Opp. at 25), but they cite nothing and simply offer their own conclusion that "Genworth Australia's portfolio was deteriorating and likely to derail the IPO" (*id.*). Aside from failing to explain with any degree of particularity why this was the case, this assertion says nothing about Defendants' own beliefs about the likely timing of the IPO. When did Defendants become aware of information that led them to conclude that the IPO could not be achieved on the announced timetable? The complaint suggests that Defendants announced the IPO plan despite knowing from the start that it would fail given the purported reserves inadequacy. *See* AC ¶ 84. Such illogical pleading carries no weight. Further, Plaintiffs plead no particularized facts as to what amount of additional reserves were needed, and when, such that Defendants had concluded that the IPO could not feasibly be achieved as planned. This glaring failure to plead any facts concerning what Defendants knew and when and how this information *actually led Defendants to believe the IPO was not achievable in Q1 2012* warrants dismissal under *Fait*. *See In re Sanofi Sec. Litig.*, 2015 WL 365702, at *23, 28 (S.D.N.Y. Jan. 28, 2015) (dismissing challenge to opinion statement that Defendants were "'on track' to submit [a drug] for FDA approval" where "plaintiffs' pleadings do not come close to supplying a factual basis on which to conclude that defendants disbelieved their own statements.").[17]

C. Plaintiffs Fail to Plead that Defendants' Qualitative Opinion Statements Relating to Genworth Australia's Business Performance Were False

Plaintiffs argue that Defendants misleadingly characterized Genworth's international mortgage insurance business (including Canada and Australia) as having "strong" capital

[17] Plaintiffs' reference to *Basic, Inc. v. Levinson* for the proposition that statements about merger discussions can be material (Pl. Opp. at 25 (citing *Basic*, 485 U.S. 224, 232, 239-40 (1988))) is irrelevant. Defendants are not arguing for purposes of this motion that their IPO statements were immaterial. Defendants are arguing that their statements were opinion statements for which Plaintiffs have failed to plead objective and subjective falsity – a topic that *Basic* says nothing about.

generation, "strong capital positions," and overall "stable origination markets." *See* Pl. Opp. at 13-17. Defendants' opening brief addressed these allegations "in a single, offhand paragraph" (*id.* at 16) because they are nothing more than rehashes of Plaintiffs' claim that Genworth Australia's reserves were inadequate (due to the same allegedly concealed information: low-doc loan exposure, increasing delinquencies, and economic turmoil in Australia). *See* Def. Br. at 25; Pl. Opp. at 14-16.

In their opposition, Plaintiffs have refocused their claim in an effort to avoid the pleading strictures imposed by *Fait*, arguing that the challenged statements reflect facts, not opinions. But Plaintiffs cite no cases for their contention that a qualitative evaluation of a business's strength is not an opinion.[18] Plaintiffs' argument is based solely upon their supposition that "statements of Genworth Australia's then-present condition" cannot be opinions. Pl. Opp. at 16. Plaintiffs are wrong. A statement that "the Yankees are the strongest team in the American League" is an opinion, notwithstanding its being based on the Yankees' "then-present condition." An argument that the current Yankees roster does not support that opinion represents a *difference of opinion*, not proof that no opinion was stated (or that the speaker did not genuinely hold his opinion). The case law bears out this simple concept. *See, e.g.*, *In re DRDGOLD Ltd. Sec. Litig.*, 472 F. Supp.

[18] Further, Defendants' opening brief explained that characterizations like "strong" and "solid" are statements of puffery that are "'too general to cause a reasonable investor to rely upon them.'" Def. Br. at 25 n.11 (quoting *ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.*, 553 F.3d 187, 205-06 (2d Cir. 2009)). In response, Plaintiffs argue that Defendants' statements "are actionable because they contradict existing facts" (Pl. Opp. at 16) and rely on cases in which specific contradictory information conflicted with the defendants' general statements. *See Ark. Teacher Ret. Sys. v. Bankrate, Inc.*, 18 F. Supp. 3d 482, 485 (S.D.N.Y. 2014) (plaintiffs alleged that defendants' "high quality" assets were "entirely worthless"); *In re MF Global Holdings Ltd. Sec. Litig.*, 982 F. Supp. 2d 277, 318 (S.D.N.Y. 2013) (plaintiffs alleged that "MF Global faced substantial strain on its capital and liquidity and met its requirements only through daily intra-company transfers, and collapsed when RTM counterparties demanded additional margin" and thus its liquidity position was not "strong"); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 572-73 (S.D.N.Y. 2011) (jury found statements regarding Vivendi's "sound financial footing" were not vague and generalized because those statements were accompanied by "specific statements of fact regarding Vivendi's resources and financial condition," including that Vivendi had "zero net debt" and "free cash flow"). This argument does not support Plaintiffs' claims because unlike in the cases that Plaintiffs cite, Plaintiffs here have not identified (nor could they) any financial information contradicting Defendants' statements that Genworth Australia was a strong generator of capital during the class period.

2d 562, 569 (S.D.N.Y. 2007) (defendants' statements regarding a "'strong balance sheet'" are "optimistic statements of opinion as opposed to fact"); *Wang v. Bear Stearns Cos.*, 14 F. Supp. 3d 537, 545, 548 (S.D.N.Y. 2014) (holding that the statement that "Bear Stearns was a sound investment" "reflect[ed] [the defendant's] own subjective beliefs" and observing that findings that "statements were opinions as opposed to factual statements … are routinely made by courts on motions to dismiss") (collecting cases).

Moreover, Plaintiffs allege no facts suggesting that Defendants' qualitative assessments of "strong" and "solid" were false. For example, Plaintiffs argue that Defendants misled investors with respect to the "strength of Genworth Australia" (Pl. Opp. at 13) based on statements in the Q4 2011 press release that "[i]nternational platform capital generation remained strong" and that "Canada and Australia paid total dividends to the holding company of $215 million in 2011 and continued to maintain strong capital positions." AC ¶ 78, *quoted in* Pl. Opp. at 13-14. But Plaintiffs allege no facts indicating that Genworth Canada and Australia did not pay "total dividends to the holding company of $215 million in 2011" and plead no facts suggesting that Defendants did not believe their opinions that these dividends reflected "strong" capital generation. Similarly, from the investor call for Q4 2011, Plaintiffs challenge as false Mr. Fraizer's statement that "'International Mortgage Insurance achieved its dividend goals and remains a strong generator of capital.'" Pl. Opp. at 14 (quoting AC ¶ 80). But, again, Plaintiffs allege no facts challenging any statement about the amount of dividends paid or suggesting that Genworth's international mortgage business did not "achieve[] its dividend goals," or that Mr. Fraizer was not of the opinion that this information showed that International Mortgage Insurance was a "strong generator of capital." *Id.*

Finally, from an investor call later that same day, Plaintiffs challenge Mr. Klein's

statement that "[w]e expect the Canadian and Australian markets to remain solid" (Ex. P (2/3/2012 Tr.) at 5) and a statement from the presentation Mr. Klein was reviewing that predicted "Stable Origination Markets" under "2012 Trends" (Ex. BB (2/3/2012 Presentation) at 16). *See* Pl. Opp. at 14; AC ¶¶ 82, 92. But Plaintiffs plead no facts indicating that mortgage originations were not "solid" or suggesting that Mr. Klein or any other Defendant did not expect mortgage originations to remain "solid with mortgage originations and [mortgage insurance] market size in both Canada and Australia to remain fairly flat and with marketshare improvement in Canada." Ex. P (2/3/2012 Tr.) at 5.[19] Having failed to allege that any of the factual bases for these statements were false, Plaintiffs are left only with challenges to Defendants' qualitative opinions that capital generation was "strong" and that mortgage originations would remain "solid"—paradigmatic expressions of opinion that Plaintiffs do not allege were disbelieved by the speakers. *See In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 578-79 (S.D.N.Y. 2014) (dismissing challenge to "[w]e believe the following strengths differentiate us from our competitors and are important to our success," and other opinion statements, because the complaint was "'devoid even of conclusory allegations that defendants did not believe in their statements of opinion … at the time they made them'") (quoting *CBS*, 679 F.3d at 68-69); *Wang*, 14 F. Supp. 3d at 548 (dismissing complaint where "Plaintiff's allegations [did] not give rise to a plausible inference that [the defendant] did not subjectively believe" his alleged representation that "Bear Stearns was a sound investment"); *Ross v. Lloyds Banking Grp., PLC*, 2012 WL 4891759, at *6 (S.D.N.Y. Oct. 16, 2012) ("[T]he characterization that the combined entity would have 'very strong liquidity' was an opinion, and the Complaint [did] not plausibly allege that the

[19] Plaintiffs also argue that Genworth misled investors when it disclosed in its Q3 2011 press release that "'[i]nternational capital generation remained strong.'" Pl. Opp. at 13 (quoting AC ¶ 65). But Plaintiffs allege no facts challenging Genworth's disclosure that "[t]he company continues to expect at least $350 million in dividends from the International segment on a full year basis." Ex. K (11/3/2011 Press Release) at 12.

opinion was not sincerely held.").

D. Plaintiffs Fail to Plead that Defendants Concealed Information about Genworth Australia's Insurance of "Low-Doc" Mortgages in 2007 and 2008

Throughout their opposition, Plaintiffs assert that Genworth "concealed" the fact that "Genworth Australia was sitting on an $8 billion exposure to high-risk low-doc mortgages that, as defendants later admitted, began defaulting at an increasing rate 'in the second half of 2011.'" Pl. Opp. at 6; *see also id.* at 1, 9, 14-16, 20, 22, 29. Plaintiffs assert that this "concealed" information rendered Genworth's statements about reserves, as well as its plan for the IPO, false when made. *Id.* at 18-19, 24. Putting aside that Plaintiffs fail to plead any facts demonstrating why or when Defendants' statements were rendered false based on the mere fact that Genworth issued insurance policies covering low-doc loans (*see* Sections I.A-C above), Plaintiffs' assertion that Defendants concealed information about low-doc loans from investors is demonstrably false.

Plaintiffs' complaint and opposition quote the supposedly "concealed" facts about the 2007 and 2008 books from *Genworth's own publication* from 2007 entitled "Low-Doc Lending in Australia," posted on Genworth's website. *See* AC ¶¶ 4, 40-41, 115 (citing Ex. CC (2007 Flyer) at 1-2, 7); Pl. Opp. at 6, 15, 22 (quoting Ex. CC (2007 Flyer) at 1-2). In this document, Genworth explained that low-doc loans typically have "self-employed borrowers," that there is "greater risk associated with offering loans to this group" because of "the style of product and borrower," and that Genworth had insured "over 200,000 prime low-doc loans" since 1999. Ex. CC (2007 Flyer) 1-2, 5, *quoted in* AC ¶¶ 4, 40 *and* Pl. Opp. at 6, 22. Assuming hypothetically that the average insured mortgage loan amount is only $40,000 for these 200,000 loans, the $8 billion number that Plaintiffs allege is easily discoverable and hardly hidden. Also contrary to Plaintiffs' claims, in this document Genworth explained lending practices for these low-doc loans, specifically stating that "[r]ather than showing proof of income, as in a fully documented

loan, a low-doc borrower self-certifies their income, which means they certify their income on which a serviceability assessment is then undertaken." *Id.* at 1, *quoted in* AC ¶ 41 *and* Pl. Opp. at 6.

Plaintiffs also allege that Defendants "covered up a seriously troubling and growing fact—the high-risk low-documentation loans that the business wrote in 2007 and 2008 were driving losses in the business at an increasing rate" (AC ¶ 84)—and "told investors that Genworth was not being significantly impacted by the slowing economy in Australia, especially in Queensland" (*id.* ¶ 38). This is also false. In September 2011, Genworth expressly disclosed that the 2007 and 2008 portfolios were experiencing delinquencies "Above Expected Levels" in part because "Small Business/Self Employed" borrowers had been "Impacted By [The] Retail Spending Decline." Ex. J (9/26/2011 Presentation) at 26.[20] Genworth also disclosed that the "Small Business/Self Employed Impact" was "More Pronounced" specifically in the Queensland region, which was "Clearly Impacted By Flooding." *Id.* at 28. Moreover, each quarter during the class period, Genworth specifically disclosed the delinquency rates of the 2007 and 2008 books (that included the "low-doc" loans),[21] as well as the risk-in-force related to those books (*i.e.*, the risk associated with the 2007 and 2008 policies as a percentage of all "in-force" (issued) policies),[22] and also provided delinquency rates and risk-in-force broken down for each

[20] Plaintiffs contend that Exhibit J "cannot be considered on defendants' motion" and that the supposed lack of "analyst commentary about the presentation[] suggest[s], at very least, that whatever disclosure was contained in that presentation had minimal penetration in the market." Pl. Opp. at 45 n.27; *see also* Pl. Mot. to Strike Opening Br., ECF No. 33 at 3; Pl. Mot. to Strike Reply Br., ECF No. 36 at 2, 11. But Plaintiffs' complaint (AC ¶ 100) and opposition (Pl. Opp. at 11) cite a Morgan Stanley report dated April 18, 2012, that discusses the postponement of the Genworth Australia IPO and specifically references Genworth's prior discussions of the Australian housing market, "including publishing an in-depth presentation in September 2011 in order to demonstrate the strength of its fundamentals." Ex. DD (4/18/2012 Morgan Stanley Report) at 2.

[21] Plaintiffs assert only that the "low-doc" loans to self-employed and small business owners were concentrated in the 2007 and 2008 books. *See* Pl. Opp. at 3 (Genworth "discontinued offering insurance on these loans" in "'late 2008'").

[22] *See*, *e.g.*, Ex. B (Q2 2011 Quarterly Fin. Supp.) at 40 (disclosing "% of Primary Risk In-Force" and "Primary

geographic region, including Queensland.[23] *See* Def. Br. at 21 (citing *In re Pfizer, Inc. Sec. Litig.*, 538 F. Supp. 2d 621, 637 (S.D.N.Y. 2008) ("That the information was publicly available when the allegedly misleading statements were made weakens any inference that defendants intended to defraud the market."), and *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.").

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

Defendants' opening brief established that 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." Def. Br. at 28-31. Plaintiffs dispute that these statements are forward-looking or accompanied by "meaningful cautionary language" and, misconstruing *Slayton v. American Express Co.*, 604 F.3d 758 (2d Cir. 2010), contend that, in any event, the statements are actionable because Defendants had actual knowledge of their falsity. Pl. Opp. at 27-30. None of Plaintiffs' arguments have merit.

A. Defendants' Statements About the IPO Were Forward-Looking

Plaintiffs argue that Defendants' statements about Genworth's plans for a minority IPO of Genworth Australia "do not qualify for safe harbor protection" because "they were representations of current fact designed to convince investors about Genworth Australia's

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Delinquency Rate" "By Policy Year," including for 2007 and 2008, which represented 13% and 12% primary risk in-force respectively with delinquency rates of 1.16% and 1.35% respectively); Ex. C (Q3 2011 Quarterly Fin. Supp.) at 40 (2007 and 2008 policy years represented 13% and 12% of primary risk in-force respectively, with delinquency rates of 1.22% and 1.50% respectively); Ex. R (Q4 2011 Quarterly Fin. Supp.) at 43 (2007 and 2008 policy years represented 12% and 12% of primary risk in-force respectively, with delinquency rates of 1.18% and 1.40% respectively).

[23] *See*, *e.g.*, Ex. B (Q2 2011 Quarterly Fin. Supp.) at 40 (disclosing "% of Primary Risk In-Force" and "Primary Delinquency Rate" by "State and Territory," including for Queensland, which represented 23% of the primary risk in-force with a delinquency rate of 0.74%); Ex. C (Q3 2011 Quarterly Fin. Supp.) at 40 (Queensland represented 22% of the primary risk in-force with a delinquency rate of 0.84%); Ex. R (Q4 2011 Quarterly Fin. Supp.) at 43 (Queensland represented 22% of the primary risk in-force with a delinquency rate of 0.81%).

capacity to complete the IPO in 2Q 2012." Pl. Opp. at 27-28. But Plaintiffs focus their attack on Genworth's statements that it "*plans* to pursue a minority initial public offering (IPO) of its Australian mortgage insurance business in the second quarter of 2012, subject to market conditions and regulatory review and approval," and that the IPO was "*targeted* for the second quarter of 2012, subject to market conditions."[24] AC ¶¶ 65, 67 (emphasis added); *see also id.* ¶¶ 69, 78, 80. The challenged statements announcing "plans" and "target[s]" are quintessential forward-looking statements. Indeed, the PSLRA defines forward-looking statements "as those which speak predictively about the future" (*Gissin v. Endres*, 739 F. Supp. 2d 488, 505 (S.D.N.Y. 2010)), including statements about "plans and objectives of management for future operations." 15 U.S.C. § 78u-5(i)(1).

Under Plaintiffs' logic, no statement could ever qualify for protection as a forward-looking statement because inherent in any such statement is an assessment or belief about the future based on present information. This is not the law. "Forecasts of future events are necessarily contingent on present circumstances, but it is a game of semantics to label them as grounded in the present." *Gissin*, 739 F. Supp. 2d at 505-06 & n.106 (finding that the statement, "'[b]ased on our *current* expectation of cash flows from operations … we feel we will be in a position to fund those capital investments for the year,'" "'say[s] only that, whatever that situation is, it makes the future projection attainable,'" which is an "'assertion [that] is necessarily implicit in every future projection'").[25]

[24] Plaintiffs' selective emphasis in their opposition on statements that "the IPO was 'on track' ([AC] ¶82) and 'moving down the track right in accordance with our plans' [AC] ¶81" (Pl. Opp. at 28) is misleading. Plaintiffs cherry pick statements that describe the "then-present status of the IPO" (Pl. Opp. at 27), but Defendants did not argue in their opening brief that these statements are protected by the safe harbor. *See* Def. Br. at 28 (not citing to statements in paragraphs 81 and 82 as protected statements). Rather, as set forth in Section I.B above and in Defendants' opening brief (at 25-28), Plaintiffs do not plead that these statements were false, *i.e.*, that Defendants knew that the IPO was not, in fact, on track.

[25] The only authority Plaintiffs muster for their position is a recent magistrate judge's report and recommendation in *In re Fairway Group Holding Corp. Securities Litigation*, 2015 WL 249508 (S.D.N.Y. Jan. 20, 2015). *See* Pl. Opp.

B. Defendants' IPO Statements Were Accompanied by Meaningful Cautionary Language

Defendants' opening brief identified meaningful cautionary language accompanying Defendants' statements about their plans to complete the IPO. Def. Br. at 29-30. Plaintiffs argue in response that Defendants' risk disclosures were not meaningfully cautionary because, according to Plaintiffs, "[t]hey are nothing more than the boilerplate disclosures of hypothetical and unspecified risks." Pl. Opp. at 29. Plaintiffs are wrong.

First, Plaintiffs' contention that risk disclosures are not "meaningful" if they include "conditional" language like "may" or "could" (*id.* at 29) ignores that terms like these are what separate risk disclosures from clairvoyance. The PSLRA unsurprisingly does not demand the latter. Rather, language is "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) (emphasis added).

As Defendants' opening brief set forth (Def. Br. at 29-30), Genworth's forward-looking statements concerning the IPO were accompanied by extensive and meaningful cautionary language, not the "boilerplate disclosures" of "unspecified" risks described in the cases cited by Plaintiffs. Pl. Opp. at 28-29. The authority that Plaintiffs cite demonstrates, rather than impugns, the sufficiency of Genworth's risk disclosures. For example, in *In re American International Group, Inc. 2008 Securities Litigation*, 741 F. Supp. 2d 511 (S.D.N.Y. 2010), the court held that

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at 28. The decision does not hold precedential value and, respectfully, was simply not correct. The magistrate judge held that Fairway's statements about plans for future growth were statements of present or historical fact, and not forward-looking, because of "the implication" that these statements "rest[] on a factual basis." *Id.* at *9. As discussed above, this conclusion would eviscerate the safe harbor and is incompatible with the Court's holding in *Gissin* that statements that "refer to the present only as a means for gauging future possibilities … cannot meaningfully be distinguished from the future projection of which they are a part." 739 F. Supp. 2d at 505, *quoted in In re WEBMD Health Corp. Sec. Litig.*, 2013 WL 64511, at *6 (S.D.N.Y. Jan. 2, 2013) ("statements are plainly forward looking" where they "us[e] current facts only to describe an expectation for the future"). The *Fairway* defendants have filed objections to the report on this ground, among others, and their objections are currently pending before Judge Kaplan. Case No. 14-CV-00950-LAK-AJP, ECF No. 79.

defendants' cautionary language only identified the "various risks of investment in AIG securities" but did not disclose "the known weaknesses of … models; the deliberate weakening of … risk controls; the scope of the exposure to [residential mortgage backed securities] … and the securities lending program; and the valuation and collateral risk presented by the [credit default swap] portfolio that rendered misleading AIG's frequent placement of emphasis on the 'remote' credit risk." *Id.* at 531-32.[26] By contrast, Genworth's cautionary language "conveyed substantive information about the risk[s] that ultimately materialized" and thus "w[as] meaningful … not mere boilerplate." *Sanofi*, 2015 WL 365702, at *21.

For instance, Genworth disclosed 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. Z (FY 2010 Form 10-K) at 61. This is precisely what Plaintiffs allege happened in Queensland. Pl. Opp. at 14-16. With respect to the IPO, Genworth warned, for instance, 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," including because of adverse market or other conditions. Ex. M (Q3 2011 Form 10-Q) at 148. This is precisely what happened with the IPO. Each of these cautionary statements clearly "identif[ied]

[26] Similarly, in *In re Prudential Securities Inc. Ltd. Partnerships Litigation*, 930 F. Supp. 68 (S.D.N.Y. 1996), the court analyzed whether language is meaningfully cautionary under the "bespeaks caution" doctrine rather than under the PSLRA safe harbor. Under the "bespeaks caution" doctrine, "cautionary language does not protect material misrepresentations or omissions *when defendants knew they were false when made*." *Id.* at 72 (emphasis added). Thus, the court's holding that defendant's risk disclosures were "simply carefully masked general warnings that residual values of its aircraft could decline" and not meaningfully cautionary rests on its conclusion that defendant "had in its possession when these assertions were made" "residual value appraisals and studies" "which projected material vanishing residual values." *Id.* at 74. That holding is clearly inapplicable under the PSLRA's disjunctive test. *See* p. 30 below. Moreover, *Prudential* is factually distinguishable because Plaintiffs here have no well-pleaded allegations that Genworth concealed its exposure to low-doc loans, delinquency rates, or loss pressures from Australia's economic downturn or the Queensland flooding. *See* Section I.A and I.D above.

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)), and, 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.'" *WEBMD*, 2013 WL 64511, at *8 (citation omitted). *See also* Def. Br. at 29-30.[27]

In their opposition, Plaintiffs also suggest that the PLSRA safe harbor for meaningful cautionary language is not available before discovery. Pl. Opp. at 28 (citing *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 729 (7th Cir. 2004)). Plaintiffs are wrong. In *Asher*, the Seventh Circuit merely suggested in dicta that the statute's requirement that cautionary language be "meaningful" has little utility, which "makes administration of the safe harbor difficult if not impossible." *Asher*, 377 F.3d at 729. In any event, courts in the Second Circuit routinely dismiss securities fraud claims on this ground at the pleading stage. *See, e.g.*, *Sanofi*, 2015 WL 365702, at *21 (holding, on a motion to dismiss, that statements "conveyed substantive information about the risk that ultimately materialized" and, "[a]s such, they were meaningful cautionary language, not mere boilerplate"); *WEBMD*, 2013 WL 64511, at *7 ("[T]he Complaint is alternatively subject to dismissal on the grounds that Defendants are protected by their cautionary language throughout the Class Period."); *Gissin*, 739 F. Supp. 2d at 511 n.144 (on a motion to dismiss, defendants "prevail[ed] on the 'meaningful cautionary language' prong of the safe harbor"). To hold otherwise would mean that defendants would have to forgo one of the PSLRA's

[27] Plaintiffs' contention that Genworth's risk disclosures "say nothing about the added risk from low-doc borrowers whose loans were underwritten and insured in 2007 and 2008 using manipulated sources of income" (Pl. Opp. at 29) rests on the erroneous presumptions that (i) the existence of these loans was concealed from investors, (ii) the loans were underwritten using manipulated income and thus "added risk," and (iii) this never-specified "added risk" was not reflected in Genworth's publicly disclosed reserves and performance metrics. No well-pleaded facts support these presumptions. *See* Sections I.A.1 and I.D above. Moreover, to qualify for safe harbor protection,"[t]he warning need only cite 'important factors'" – as Genworth did here – "and need not mention 'the particular factor that ultimately causes the forward-looking statement not to come true.'" *In re Avon Prods., Inc. Sec. Litig.*, 2009 WL 848017, at *17 (S.D.N.Y. Feb. 23, 2009) (quoting *Ehlert v. Singer*, 245 F.3d 1313, 1319-20 (11th Cir. 2001), and H.R. Rep. No. 104-369, at 44 (1995)), *report and rec. adopted*, Case No. 05-CV-06803 (LAK), ECF No. 129 (Mar. 18, 2009).

protections—the automatic stay of discovery (15 U.S.C. § 77z-1(b)(1))—to avail themselves of another, the safe harbor. No provision of the statute or Second Circuit precedent supports that result.

Finally, Plaintiffs' assertion that, "should the Court find Genworth's purportedly cautionary language to be meaningful, the PSLRA's safe harbor would still fail to insulate defendants from liability because they had actual knowledge that their statements about the IPO were false and misleading" (Pl. Opp. at 30) is wrong as a matter of law. As indicated in Defendants' opening brief, the safe harbor is phrased in the disjunctive. Def. Br. at 28. Thus, forward-looking statements cannot form the basis of a securities fraud claim if they are [i] "identified and accompanied by meaningful cautionary language *or*, [ii] immaterial *or* [iii] the plaintiff fails to prove that [the statement] was made with actual knowledge that it was false or misleading." *Slayton*, 604 F.3d at 766 (emphasis in original). Any one of these three prongs operates independently as a complete defense. Thus, should the Court find that Genworth's cautionary language was meaningful, dismissal is appropriate *on that basis alone*, regardless of whether Plaintiffs have pleaded that Defendants' statements were knowingly false when made. *See Gissin*, 739 F. Supp. 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"); *Sanofi*, 2015 WL 365702, at *14, 21 ("Because the statute is written in the disjunctive, statements are protected by the safe harbor if they satisfy any one of these three categories" and dismissing under the "independent" cautionary language prong); *WEBMD*, 2013 WL 64511, at *7 (noting that the "safe harbor is written in the disjunctive" and that "the Complaint [was] alternatively subject to dismissal on the grounds that Defendants are protected by their cautionary language").

C. Plaintiffs Fail to Plead that Defendants' Forward-Looking Statements Were Made With Actual Knowledge of Falsity

As set forth above, because the three prongs of the PSLRA safe harbor operate independently, even if the Court determines that 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). Plaintiffs' repetition of its conclusory "backlogs of delinquencies" allegation in a footnote to its opposition (Pl. Opp. at 30 n.20) fails to respond to Defendants' argument that 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 Sanofi*, 2015 WL 365702, at *22 (allegation that "defendants were aware of the FDA's concerns and therefore 'knew *or* were severely reckless in disregarding' the misleading nature of their statements" does not constitute "concrete factual particulars that support an inference that the statements were 'made with actual knowledge that [they were] false or misleading'") (citation omitted). Thus, Plaintiffs' claims must be dismissed under the "actual knowledge" prong of the safe harbor. *See Slayton*, 604 F.3d at 766 (dismissing for failure to plead actual knowledge).

III. PLAINTIFFS FAIL TO PLEAD SCIENTER

The "showing of fraudulent intent" with respect to GAAP-related allegations (such as Plaintiffs' allegations here) "is especially crucial where … the accounting procedures in question [are] complex and require[] the application of multi-part tests." *In re China N. E. Petroleum Holdings Ltd. Sec. Litig.*, 2015 WL 223779, at *3 (S.D.N.Y. Jan. 15, 2015). Plaintiffs' opposition advances a handful of scienter theories, including a newly minted theory that the IPO

incentivized Defendants to overstate Genworth's financial position. Pl. Opp. at 31. None of these theories pleads scienter under controlling Second Circuit law, or gives rise to an inference of scienter that is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314.

A. Plaintiffs' Complaint Fails to Plead Any Motive for the Alleged Fraud, and Their Attempt to Repackage The IPO Argument as a Motive Allegation Makes No Sense

Defendants' opening brief argued that "Plaintiffs do not allege a single motive Defendants had to commit fraud." Def. Br. at 31-32. Plaintiffs' opposition offers a single motive theory in response: Defendants purportedly misled investors in order "to raise much needed capital through a minority interest IPO" of Genworth Australia. Pl. Opp. at 31; *see also id.* at 2.

First, the complaint's allegations do not support Plaintiffs' new theory that Defendants "misrepresent[ed] the strength of [Genworth Australia's] business and conceal[ed] its deteriorating low-doc exposure" so that they could raise capital through the IPO. Pl. Opp. at 32. The complaint merely alleges that the IPO was "a critical transaction for Genworth" because it would provide the means for "a substantial capital infusion into [Genworth's] U.S. Mortgage Insurance segment." AC ¶ 112. The complaint does not offer this allegation as a basis for Defendants' supposed motive to "misrepresent[] the strength of [Genworth Australia's] business" (Pl. Opp. at 32), but rather to support the complaint's assertion that "defendants oversaw and had actual knowledge of the transaction's progress—or lack thereof" (AC ¶ 113). In other words, the complaint uses the allegation to infer that Defendants knew the IPO would not occur within the announced timeframe, not as the sole motive underlying the supposed fraud. "'[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.'" *In re Sanofi-Aventis Sec. Litig.*, 774 F. Supp. 2d 549, 562 (S.D.N.Y. 2011) (citations omitted) (collecting cases).

Second, Plaintiffs' new IPO motive theory is fundamentally at odds with one of Plaintiffs' principal fraud theories alleged in the complaint: that Defendants told investors that an IPO would happen in Q2 2012 yet knew that the IPO was "highly improbable" (Pl. Opp. at 3), "could not possibly be 'on track'" (*id.* at 25), and was "likely to [be] derail[ed]" (*id.* at 24). *See also, e.g.*, AC ¶ 84 (alleging that Defendants "*knew* that Genworth Australia was in no shape to complete the announced IPO") (emphasis added). The cases Plaintiffs cite supporting their new motive theory involve, unsurprisingly, offerings that actually occurred, rather than an IPO that Defendants allegedly knew would not occur.[28] Plaintiffs' illogical assertion that Defendants pumped up Genworth's stock price in anticipation of an IPO they knew would be "derail[ed]" by Genworth Australia's performance should be rejected. "[A]llegations of irrational motive cannot support a fraud claim under Rule 9(b)." *See Hampshire Equity Partners II, L.P. v. Teradyne, Inc.*, 2005 WL 736217, at *3 (S.D.N.Y. Mar. 30, 2005); *see also* Def. Br. at 40 & n.20 (collecting cases for this proposition).[29]

Third, even putting aside the procedural impropriety and fundamental illogic of Plaintiffs' new motive theory, the law in the Second Circuit could not be clearer: motives shared by all companies (*e.g.*, a motive to "raise needed capital" (Pl. Opp. at 31)) do not demonstrate

[28] *See Van Dongen v. CNinsure Inc.*, 951 F. Supp. 2d 457, 474 (S.D.N.Y. 2013) (plaintiffs alleged that "Defendants were able to raise $109.6 million in the offering that they otherwise would not have been able to if they presented a more complete and accurate financial snapshot"); *In re Silvercorp Metals, Inc. Sec. Litig.*, 26 F. Supp. 3d 266, 275 (S.D.N.Y. 2014) (finding that "the $117 million stock offering in December 2010" provided motive); *In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 648 (E.D. Va. 2000) ("Defendants raised approximately $48 million").

[29] Plaintiffs cite *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671 (6th Cir. 2004), for the proposition that "'[t]hese more particularized sorts of motive allegations,' such as the need '*to preserve the Company's ability to borrow pursuant to its credit facility*,' 'warrant closer scrutiny' and 'are more probative of scienter.'" Pl. Opp. at 31 (emphasis added) (quoting *PR Diamonds*, 364 F.3d at 690). The Second Circuit has flatly rejected that "a company's desire to maintain a high bond or credit rating qualifies as a sufficient motive for fraud in these circumstances, because '[i]f scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.'" *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 814 (2d Cir. 1996) (quoting *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 54 (2d Cir. 1995)).

scienter. *See In re PXRE Grp., Ltd. Sec. Litig.*, 600 F. Supp. 2d 510, 533 (S.D.N.Y. 2009) ("[R]aising capital as part of an amorphous scheme to stave off a company's collapse, as in this case, does not suffice" because, "if scienter could be pleaded on that basis alone, virtually any company that attempted to raise capital, especially in a woeful economic climate, would face specious securities fraud allegations."), *aff'd sub nom. Condra v. PXRE Grp. Ltd.*, 357 F. App'x 393 (2d Cir. 2009).

B. Plaintiffs Fail to Plead Conscious Misbehavior or Recklessness

1. Plaintiffs Fail to Identify Sources for Their "Information and Belief" Allegations About Purportedly Internal Genworth Information

Defendants' opening brief showed Plaintiffs' failure—with respect to their allegations about Genworth's internal up-the-chain reporting processes and a meeting "about the pending IPO" that allegedly took place in December 2011—to "'state with particularity all facts on which that belief is formed.'" Def. Br. at 32 (quoting 15 U.S.C. § 78u–4(b)(1)). Without such allegations, Defendants and the Court cannot "'review [Plaintiffs'] sources and determine, at the pleading stage, whether an inference of fraud may be fairly drawn from the information contained therein.'" Def. Br. at 33 (quoting *In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 589 (S.D.N.Y. 2007)).

Plaintiffs respond that they "rely extensively on documentary evidence" and therefore are not required to identify any of their other sources. Pl. Opp. at 39. The "documentary evidence" upon which Plaintiffs rely consists of Defendants' SEC filings and investor presentations—which obviously do not speak to what anyone said at an internal "Leadership and Management" meeting in December 2011. *Id.* at 38-39. Plaintiffs otherwise make no attempt to explain where this information-and-belief allegation comes from. They simply boast of the specificity of their allegations as to "when these meetings occurred, their location, the executives who presented,

and the topics specific to Genworth Australia that were discussed." *Id.* at 38. This dodges, rather than responds to, Defendants' argument. Plaintiffs do not, because they cannot, argue that they have satisfied the PSLRA's "information and belief" requirement with respect to their handful of allegations purportedly discussing internal Genworth information, and thus these allegations should be disregarded. *See* Def. Br. at 33-38.[30]

In any event, these allegations add nothing to Plaintiffs' claims. Plaintiffs aggrandize what they have alleged with respect to the December 2011 meeting. As Defendants' opening brief explained, "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" (Def. Br. at 36), Plaintiffs' allegations are rife with ambiguities that render these allegations meaningless (*id.*), and "the most that can be gleaned … 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" (*id.* at 36-37). Plaintiffs' opposition offers no response to these criticisms.

The fact that Plaintiffs have alleged no internal information, other than unsupported assertions about a meeting for which they refuse to identify any source, remains "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).[31]

[30] Plaintiffs' attempt to distinguish *Janbay v. Canadian Solar, Inc.*, 2012 WL 1080306 (S.D.N.Y. Mar. 30, 2012), on the basis that Plaintiffs here rely on documentary evidence (Pl. Opp. at 42 n.25) does not save their allegations about an "L&M" meeting, which, as explained above, are unsupported by any documents, and Plaintiffs refuse to identify the (presumably inadequate) source of this information.

[31] Plaintiffs' citation to "the 2014 Prospectus and Upton's May 2, 2012 Presentation," both of which, according to Plaintiffs, "provide insight into Genworth's internal operations" (Pl. Opp. at 35 n.23), does not cure the "significant

2. Plaintiffs' Remaining Scienter Arguments All Fail to Establish What Information Defendants Had that Allegedly Caused them to Know that Genworth Australia Was Under-Reserved

With respect to Plaintiffs' remaining scienter theories, Defendants' opening brief explained that they "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." Def. Br. at 35. Plaintiffs offer two responses, both suffering from the same fatal flaw.

First, Plaintiffs reiterate their allegations concerning (i) Mr. Upton's statements about "increasing delinquency levels" "[i]n the second half of 2011" and "backlogs of delinquencies," (ii) Genworth's insurance of low-doc loans in 2007 and 2008 (including Genworth's backing away from low-doc loan insurance), and (iii) "[a] slowing economy and falling housing prices" in Australia. Pl. Opp. at 33-36. As explained in Section I.A above and in Defendants' opening brief (Def. Br. at 18-23), all of this information was disclosed during the class period and thus cannot constitute information that Defendants concealed from the market. But even accepting *arguendo* that this information was not disclosed, Plaintiffs miss a critical point: none of these allegations plead that Defendants *knew (or should have known)* specific contradictory information showing Genworth Australia's reserves to be understated or the IPO to be unachievable. Plaintiffs' assertions about Genworth's upward-reporting practices (Pl. Opp. at 36-38) similarly get them nowhere. Even assuming that this reporting system gave Defendants a crystal-clear picture of delinquencies, Genworth's exposure to low-doc loans, and economic turmoil in Australia, Plaintiffs' allegations say nothing about *what specific contradictory*

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flaw" Defendants identified in the complaint stemming from the absence of internal information. *See* Def. Br. at 35 (citing *City of Monroe*, 2011 WL 4357368, at *18). The public disclosures Plaintiffs cite do not save Plaintiffs' claim because they do not reveal any internal contradictory information contemporaneously available to Defendants. *See* Section I.A above.

information Defendants received showing Genworth Australia's reserves to be understated or the IPO to be unachievable. The absence of such facts from the complaint warrants dismissal. *See Local No. 38 IBEW Pension Fund v. Am. Express Co.*, 724 F. Supp. 2d 447, 461 (S.D.N.Y. 2010) (dismissing complaint where plaintiff's "allegations [did] not establish what specific contradictory information the Individual Defendants received or when they received it"), *aff'd*, 430 F. App'x 63 (2d Cir. 2011).

3. Plaintiffs' "Core Operations" Allegations Do Not Support an Inference of Scienter

Plaintiffs next rely on the so-called "core operations" doctrine. Pl. Opp. at 42-43. As numerous courts in this District have observed, "there is considerable doubt whether the core operations doctrine survived enactment of the PSLRA." *In re Turquoise Hill Res. Ltd. Sec. Litig.*, 2014 WL 7176187, at *8 (S.D.N.Y. Dec. 16, 2014) (collecting cases). Indeed, "the plain language of the PSLRA, which requires facts supporting the scienter inference to be 'state[d] with particularity,' would seem to limit the force of general allegations about core company operations." *Wachovia*, 753 F. Supp. 2d at 353 (considering "'core operations' allegations to constitute supplementary but not independently sufficient means to plead scienter").

To the extent courts have considered "core operations" allegations, they "have held that general allegations regarding a defendant's involvement in the 'core operations' of a business cannot serve as an independent basis for scienter." *In re ShengdaTech, Inc. Sec. Litig.*, 2014 WL 3928606, at *9 (S.D.N.Y. Aug. 12, 2014) (citing *Wachovia*, 753 F. Supp. 2d at 353); *see also New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 F. App'x 10, 14 (2d Cir. 2011) (noting that "allegations of a company's core operations … can provide supplemental support for allegations of scienter, even if they cannot establish scienter independently"). Thus, under the PSLRA, Plaintiffs "must provide more facts to support a strong inference that any misstatements by

defendants … must have been made with scienter" where plaintiffs seek to rely on the "'core operations' method of pleading conscious misbehavior or recklessness." *In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d 266, 294 (S.D.N.Y. 2006) (finding plaintiffs' allegations lacking in this regard). For all the reasons stated in this Section III, Plaintiffs fail to do so.[32]

4. The Magnitude of Genworth's Reserve Charge Does Not Establish Scienter

Finally, Plaintiffs resort to arguing that the "extraordinary size of the reserve charge" is sufficient to demonstrate scienter. Pl. Opp. at 44. However, "it is well established that 'the size of the fraud alone does not create an inference of scienter.'" *PXRE*, 600 F. Supp. 2d at 545 (citation omitted); *see also In re China N. E. Petroleum Holdings Ltd. Sec. Litig.*, 2014 WL 7243149, at *3 (S.D.N.Y. Dec. 11, 2014) (rejecting "highly generalized" allegation that the "sheer size of [China North's later] restatement bespeaks of Defendants' scienter"); *ShengdaTech*, 2014 WL 3928606, at *9 (rejecting "allegations regarding the magnitude of the fraud" as insufficient to support a strong inference of recklessness).

Plaintiffs' reliance on *Scholastic* and *Freudenberg* (Pl. Opp. at 44) only highlights the inadequacy of Plaintiffs' complaint. Both cases held that plaintiffs established a strong inference of scienter where there were significant, detailed allegations that defendants knew of contradictory information. The complaint in *Scholastic* contained "detailed allegations as to what defendants knew on a daily, weekly and monthly basis about the retail trade of Goosebumps books, while at the same time making public statements that painted a different picture," which the court considered *together with* Plaintiffs' allegations regarding the magnitude of special

[32] Further, Plaintiffs have not pleaded that the "core operations" doctrine applies in this instance. Courts applying the doctrine have generally "required that the operation in question constitute nearly all of a company's business before finding scienter." *Hensley v. IEC Elecs. Corp.*, 2014 WL 4473373, at *5 (S.D.N.Y. Sept. 11, 2014) (quoting *Tyler v. Liz Claiborne, Inc.*, 814 F. Supp. 2d 323, 343 (S.D.N.Y. 2011)). Plaintiffs plead no facts demonstrating that Genworth Australia's mortgage insurance portfolio constitutes "nearly all" of Genworth's business.

charges. *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001) (citation omitted). Similarly, the *Freudenberg* complaint contained extensive confidential witness allegations (absent here (*see* Def. Br. at 32-35)), including allegations by a confidential witness who "report[ed] to management of huge numbers of loans with negative discrepancies" and posed "questions to management as to why it was keeping bad loans" and received "responses from management that E*TRADE wanted to maintain strong relationships with originators," which demonstrated "the type of back and forth that could establish top management's involvement and knowledge, particularly when combined with all the other reports of Defendants' direct involvement." *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 197 (S.D.N.Y. 2010).

Plaintiffs' allegations here are nothing like those in *Scholastic* and *Freudenberg*.

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

As Defendants set forth in their opening brief, Plaintiffs' incoherent theory of fraud fails to plead a "cogent and compelling" inference of scienter that is "at least as compelling as any opposing inference one could draw from the facts alleged," as required by *Tellabs*. Def. Br. at 39-40 (citing *Tellabs*, 551 U.S. at 324). Plaintiffs respond cursorily in their opposition, arguing that Defendants "were aware of the serious problems with low-doc loans facing Genworth Australia" but "concealed those problems" to promote an IPO that they knew was doomed at the outset because of those same problems. Pl. Opp. at 45. This argument not only fails to meaningfully address Defendants' competing non-fraudulent inference, it is facially illogical. A financial pay-off that Defendants allegedly knew would never occur could not have financially motivated Defendants to lie. Plaintiffs' theory does not support a strong inference of scienter. *See* Section III.A above and Def. Br. at 40 & n.20.

CONCLUSION

For the reasons above and those stated in Defendants' opening brief, Plaintiffs' amended complaint should be dismissed in its entirety. Moreover, because Plaintiffs chose to stand on the allegations in their amended complaint in response to Defendants' motion to dismiss, dismissal should be with prejudice. Nothing in Plaintiffs' opposition suggests that the legal insufficiencies Defendants' motion identifies can be cured with a third pleading attempt.

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Respectfully submitted,

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