UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION PURSUANT TO FED. R. CIV. P. 54(B) FOR RECONSIDERATION OF THE COURT'S JUNE 16, 2015 ORDER DENYING DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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SUMMARY OF REPLY

Lead Plaintiffs' Memorandum in Opposition to Defendants' Rule 54(b) Motion (hereafter "Opp. at __, or "Opposition") is a masterwork of demonstrably untrue, irrelevant, and/or legally meritless and technical arguments. Plaintiffs proffer irrelevant distractions that try to divert this Court from focusing on the undeniable and complete failure by both confidential witnesses (CWs) to confirm under oath the truth of the *only* scienter allegations in the Second Amended Complaint (SAC). The significance of this failure cannot be overstated, because these were the only "facts" relied upon by this Court when it sustained the SAC in its June 16 Order. (Dkt. 53). Plaintiffs also try to run away from the binding precedent set by the Second and Seventh Circuits, the only two federal appeals courts that have confronted this exact scenario. Both Circuits unanimously affirmed reconsideration of prior Rule 12(b)(6) motions in light of the recanted and disavowed CWs testimony, and the entry of Rule 12(b)(6) dismissals. Both Circuits held that, because the recanted CWs' allegations could no longer support a "strong inference of scienter at least as compelling as non-culpable inferences," the SAC failed to meet the heightened pleading requirements under the PSLRA and Rule 9(b).

Contrary to Plaintiffs' protestations, the transcript of CW1 Glenn Meacham's deposition could not be more clear that he was unable to reaffirm under oath the truth of, *i.e.*, completely recanted, the central allegations (SAC ¶¶ 64, 65) of scienter attributed to him in the SAC. Those allegations said Mr. Meacham stated that at a December 2011 L&M meeting, senior Genworth executives presented and discussed a PowerPoint reflecting an undisclosed quarterly increase in claims of $100-$125 million in 2011, and stated that claims losses exceeded AU MI's loss reserves. (SAC ¶¶ 18, 40, 62, 64-65, 92). However, Mr. Meacham admitted that he could not testify whether, nor when, nor where, he saw the alleged December 2011 PowerPoint. Mr. Meacham further testified that he could not confirm under oath that either "Mr. Upton or

Mr. Schneider or anyone else at the company said, at any time in 2011, that the Australian MI unit had a poor quarter due to increased claims leading to a miscalculation of reserves."

Plaintiffs in their Opposition proffer a new sworn Declaration by Mr. Meacham, which presents yet another, third version of "the truth according to Mr. Meacham." Unfortunately for Plaintiffs, in his new declaration he further recants the central allegations of scienter attributed to him. Mr. Meacham now can only speculate under oath that "[t]he $100-$125 million figure conceivably could have been presented at a different meeting, such as an all employee meeting or another meeting." (emphasis added). In other words, Mr. Meacham has no personal knowledge of what meetings took place and when, of what if anything was shown by way of PowerPoint, or of what was said by whom, when, and at what L&M or any other meeting.

By failing to confirm, and admitting his inability to swear under oath -- now twice -- to the specifics of each of the allegations of scienter attributed to him in the SAC, Mr. Meacham has completely undermined and recanted those allegations. Mr. Meacham can no longer provide "specific" facts with "particularity" that give "rise to a strong inference" of scienter by any Defendant. (Dkt. 41, at 3-4). As the district court concluded in *Boeing*, "it matters not whether, as plaintiffs argue, [the confidential witness] told their investigators the truth, but he is lying now for ulterior motives," because the factual basis for the complaint's scienter allegations was now "at best unreliable and at worst fraudulent", and "the information from the confidential source should not have been considered at all." As Judge Posner succinctly stated in the Seventh Circuit's affirmance, "The [confidential witness] is out of the case."

Plaintiffs fare no better with CW2 Robert Mullins, who provided a sworn Declaration to Defendants contradicting and/or disavowing the only scienter allegations attributed to him in the SAC, stating under oath: (1) that he never told Plaintiffs there were internal reports showing a significant increase in delinquencies in Australia "throughout 2011" (contrast Mullins Dec. ¶10,

with SAC ¶ 68); (2) that he did not have firsthand knowledge of what reports were shared with Defendant Fraizer on a monthly basis (contrast Dec. ¶ 8, with SAC ¶ 70); and (3) that he did not and does not know what "L&M" meetings are, and thus he could not have confirmed that Jerome Upton (Genworth's International MI COO) led these meetings (contrast Dec. ¶ 9, with SAC ¶ 68). (Dkt. 53, at 2-3). What Plaintiffs call Mr. Mullins's "minor clarifications" actually disavow the truth of the only remaining scienter allegations relied upon by the Court in crediting that Defendants "willfully suppressed" this information in its 3Q and 4Q 2011 financial reports.

At their depositions, neither Mr. Meacham nor Mr. Mullins could confirm from personal knowledge that there were *any* internal financial reports which contradicted Genworth's publicly released 3Q (and 4Q) 2011 quarterly financial results. To the contrary, Mr. Meacham actually testified that Genworth never discussed quarterly financial results at employee meetings before they were made public, and Mr. Mullins testified that he had no reason to believe Genworth had any internal reports that differed from Genworth's publicly available financial reports.

Plaintiffs have no answer to the governing law (*Campo*, *Boeing*) in this unique situation where both of their confidential witnesses have recanted and/or disavowed personal knowledge of *all* of the SAC's CW "factual" allegations of scienter. Both the district courts and the unanimous Second and Seventh Circuit courts have made clear that when this happens, (1) the district court needs to reconsider its prior order upholding the amended complaint, (2) the district court must disregard the scienter allegations attributed to the confidential witnesses, and (3) absent those allegations of scienter, the amended complaint must be dismissed with prejudice.

Plaintiffs respond to these fatal factual and legal problems with their now scienter-less allegations not with substance, but with two meritless and legally erroneous arguments. As discussed below, Defendants properly took Mr. Meacham's deposition as part of class discovery,

and Defendants' Rule 54(b) motion is timely as S.D.N.Y. Local Civil Rule 6.3 has no application to this motion as a matter of well-settled law. Neither of Plaintiffs' arguments have merit.

Finally, contrary to Plaintiffs' devout wish here, the District Court may not reward Plaintiffs' initial evasion of the PSLRA gate by allowing Plaintiffs to proceed to voluminous discovery, because their scienter pleading has proven to be defective. As discussed below, this would turn Congress's PSLRA strict gatekeeping and pleadings mandates upside down.

This Court is not responsible for the posture the case is now in, given its understandable reliance on the specific allegations of "willfully suppressed" quarterly internal reports attributed to the CWs. However, this Court is the judicial officer now obliged to, and only this Court can, give the Defendants the relief to which the PSLRA entitles them, given the scienter-less complaint now before the Court. Like the First Amended Complaint (FAC) this Court initially dismissed, the SAC now must be dismissed as well, this time with prejudice. As the Seventh Circuit unanimously held, "Without evidence from the confidential source then, the first dismissal [of the FAC] stood, its validity unassailable."

A. CW1 Glenn Meacham Recanted the Alleged Material "Facts" Plaintiffs Attributed to Him in the SAC

Simply put, CW1 Glenn Meacham "recanted" and "disavowed," under oath, personal knowledge of the key assertions the SAC attributes to him and on which this Court relied in denying Genworth's motion to dismiss. Even assuming, *arguendo*, that Mr. Meacham originally told Plaintiffs' investigator what was pled in the SAC,[1] he could not confirm under oath those allegations when he testified at his deposition. He has now proffered a third version of his story that can attest only to what "conceivabl[y] could" have happened. The fact remains that, when

[1] Of course, neither Genworth nor the Court will ever know what Mr. Meacham actually told Plaintiffs' investigator, because Plaintiffs have chosen not to provide to the Court or to Defendants their investigator notes.

tested under oath, Mr. Meacham "formally withdrew or repudiated a statement or belief" (the SAC allegations) that (1) he could recall a December 2011 "L&M meeting," and (2) at that L&M meeting he saw a PowerPoint slide that reflected a $100-$125 million increase in claims for AU MI, and several other key allegations. That is literally the dictionary definition of "recant."[2]

Mr. Meacham's latest declaration (Dkt. 99, Ex. H) does not undo his recantations. Rather, it confirms that Mr. Meacham had no basis to make the assertions the SAC attributed to him. He swears yet again that he has "no basis to know or verify" whether there were PowerPoint slides presented at L&M meetings between August 2011-February 2012 beyond those he was shown at his deposition, none of which reflected the $100-$125 million increase in claims he allegedly "recalled" seeing. Assuming Mr. Meacham had ***actual*** knowledge of, or actually could recall, a PowerPoint from late 2011 showing an increase in claims of $100-$125 million, he would be in a position to refute Genworth's counsel's representation. And Mr. Meacham's latest sworn speculation that the PowerPoint "conceivably could have been presented" somewhere other than an L&M meeting, rids the SAC of the specificity required to plead scienter adequately.

Plaintiffs' contention that Defendants' counsel improperly elicited the recantations by cross-examining Mr. Meacham with "selected" documents is both irrelevant and wrong. First, Mr. Meacham's key recantations were unequivocal and **not** tied to any documents. Specifically:

- Mr. Meacham admitted that he was "not sure" there was an L&M meeting in December 2011, and that he had "no reason to dispute" Genworth's

[2] *See* Black's Law Dictionary 1459 (10th ed. 2014) ("To withdraw or renounce prior statements or testimony formally or publicly."); Oxford English Dictionary "Recant" (3d ed. 2009) ("To withdraw, retract, renounce, or disavow (a former statement, opinion, belief, action, etc.) as erroneous, esp. formally or publicly."); Merriam-Webster's Collegiate Dictionary "Recant" (11th ed. 2014), available at http://www.merriam-webster.com/dictionary/recant (last visited Feb. 15, 2016) ("to withdraw or repudiate (a statement or belief) formally and publicly;" "to make an open confession of error").

sworn interrogatory response that there was *no such meeting* in December 2011. This admission came **before** Defendants' counsel showed him all of the relevant PowerPoint slides and made any representations concerning their completeness. (Dkt. 89, Ex. A, Meacham Tr. 185:2-5; 186:15-187:22; 189:2-19).

- Mr. Meacham also admitted, **before** Defendants' counsel showed him all of the relevant PowerPoint slides and made any representations concerning their completeness, that there was no L&M meeting where Genworth disclosed financial results to its employees prior to their being publicly reported. (*Id*. at 147:23-148:18).

- Mr. Meacham testified that, contrary to SAC ¶ 64, he could not "say under oath here today that Mr. Upton or Mr. Schneider or anyone else at the company said at any time in 2011 that claims paid for the Australian MI unit were exceeding the reserves for that unit[.]" (*Id*. at 323:5-15). Mr. Meacham does not contend that this recantation was tied to any documents he was shown at his deposition.

- Mr. Meacham testified that he could not "say that Upton or Schneider or anyone else… at the company made that statement [in paragraph 64 of the SAC] about claims exceeding reserves in 2011[.]" (*Id.* at 326:21-327:3). Mr. Meacham does not contend that this recantation was tied to any documents he was shown at his deposition.

- Mr. Meacham admitted that it was "possible" that he saw the supposed PowerPoint slide at issue at some time in 2012, rather than 2011, and that it was "possible" that the slide did *not show* a $100-$125 million increase in claims. (*Id*. at 228:10-229:3). Mr. Meacham does not contend that this admission was tied to documents he was shown at his deposition.

In sum, when asked to confirm under oath his personal knowledge of the truth of the critical allegations attributed to him in the SAC, Mr. Meacham could not do so. Defendants were entitled to test Mr. Meacham's recollections of these critical scienter allegations by using documents at his deposition. Mr. Meacham failed that test in every respect, leaving Plaintiffs without any basis for their scienter allegations that Genworth either had, displayed, or discussed internally financial results in 2011 which contradicted Genworth's 2011 financial reporting.

Plaintiffs' argument that they are entitled to full-blown merits discovery to test the veracity of Defendants' counsel's representation that Mr. Meacham was shown all of the L&M meeting slides for the relevant time period is baseless. Defendants already have produced to

Plaintiffs *all* of the PowerPoint slides and related documents from all of the L&M meetings between August 2011 and February 2012, even before the parties' January 8, 2016 conference with the Court. This Court can rest assured that, had the L&M PowerPoint slide in question existed, Plaintiffs no doubt would have made that the centerpiece of their Opposition.

More to the point on this PSLRA gatekeeping reconsideration motion, Plaintiffs' argument would turn the PSLRA on its head. As the Court stated in *In re BISYS Securities Litigation*, "the PSLRA effectively shifted the burden to plaintiffs to acquire particularized knowledge of a party's *scienter prior* to obtaining discovery." 496 F. Supp. 2d 384, 387 (S.D.N.Y. 2007) (citing *Medhekar v. United States Dist. Court for the N. Dist. of Cal.*, 99 F.3d 325, 328 (9th Cir. 1996) ("Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by defendants after the action has been filed.")); *In re Optionable, Inc. Sec. Litig.*, No. 07 CIV 3753 (LAK), 2008 WL 4629985, at *1 (S.D.N.Y. Oct. 20, 2008) (Kaplan, J.). Under each of the PSLRA, Fed. R. Civ. P. 9(b), and this Court's March 25, 2015 Order, which required Plaintiffs to "allege, 'with respect to each act or omission' that is false and misleading, and with 'particularity,' the facts giving rise to a strong inference that the defendant acted with *scienter*" (Dkt. 41, at 3), Plaintiffs bear the threshold burden to proffer "cogent and compelling" allegations *before* proceeding to justify full merits discovery. *Tellabs Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 310 (2007). Plaintiffs are not entitled to force Genworth to expend additional massive amounts of time and millions of dollars more on a fishing expedition in order to see whether there is a document that can salvage their now-undermined, scienter-less SAC.

Even if it was proper for Plaintiffs to re-write their pleading at this stage—which it is not—by contending that the PowerPoint at issue "conceivably could have been presented at a different meeting such as an all-employee meeting," rather than an L&M meeting,

Mr. Meacham's latest Declaration (Dkt. 99, Ex. H, ¶ 5) is a startling reversal from the SAC, which devoted four paragraphs to describing a specific December 2011 "L&M meeting" at which the slide in question purportedly was shown and discussed. (SAC ¶¶ 62-65). This latest version of the truth was also *expressly* contradicted by Mr. Meacham's deposition testimony! Mr. Meacham under oath denied having any knowledge that the PowerPoint slide in question was shown at any all-employee meeting, as opposed to the December 2011 L&M meeting:

> Q. So now you're saying that this slide that you may have seen may not have been at an L&M meeting, it may have been at a Global **all-employee** meeting?
>
> A. That's – ***no, that's not what I'm saying***.

(Dkt. 89, Ex. A, Meacham Tr. 214:6-10) (emphasis added). He later testified that he **could not recall** any all-employee meeting at which the slide in question was shown:

> Q. [I]n the first sentence of Paragraph 65 of the second amended complaint, you reference seeing a PowerPoint presentation showing an increase in claims in Australia equaling around 100 to $125 million. My question is: ***You have no specific recollection of seeing such a slide at a Global all-employee meeting at any time in 2011, correct***?
>
> [Objections omitted]
>
> A. No specific recollection, ***correct***.
>
> Q. (BY MR. KATTAN) And ***you have no recollection of seeing such a slide at any USMI all-employee meeting at any time in 2011, correct***?
>
> [Objections omitted]
>
> A. Same answer. ***No specific recollection***.

(*Id*. at 358:2-22) (emphasis added). Mr. Meacham's speculation in his latest declaration is thus wholly at odds with both the SAC and his deposition testimony.

Finally, Plaintiffs miss the point entirely when they contend that Mr. Meacham did not "recant" his statements because he confirmed at his deposition that the SAC accurately states what Mr. Meacham told Plaintiffs' investigators. The critical point is that when asked to swear

to the truth of the specific assertions Mr. Meacham (allegedly) originally made—and, specifically, that he "recalled a PowerPoint presentation at this [December 2011 L&M] meeting showing the increase in claims in Australia equaling around $100-$125 million" (SAC ¶ 65)—he could not do so. That allegation was the ***only one*** in the SAC and cited in the Court's June 16 Order that charges specific Genworth personnel with knowing information in late 2011 that was at odds with what the company reported in its 2011 financials. (Dkt. 53, at 2-3).

Without the specific details Mr. Meacham supposedly provided, the SAC is no different than the FAC the Court found deficient and dismissed. ***That*** is the basis on which the SAC should be dismissed. Neither this motion, nor the inadequacy of Plaintiffs' now scienter-less SAC, turns on Plaintiffs' irrelevant questions of whether Mr. Meacham misremembered, misspoke, or just lied when speaking to Plaintiffs' investigators in 2014, or of whether Plaintiffs' investigators misunderstood or misrepresented what Mr. Meacham allegedly told them.

Both the District Court and the Seventh Circuit in *Boeing* dealt with the very arguments Plaintiffs now raise, and both Courts rejected them out of hand. The District Court stated:

> It matters not whether, as plaintiffs argue, [the confidential witness] told their investigators the truth, but he is lying now for ulterior motives. **The reality is that the informational basis for [the relevant paragraphs in the plaintiffs' complaint] is at best unreliable and at worst fraudulent.**

City of Livonia Employees' Ret. Sys. v. The Boeing Co., No. 09 C 7143, 2011 WL 824604, at *4 (N.D. Ill. Mar. 7, 2011) (emphasis added), *aff'd*, 711 F.3d 754 (7th Cir. 2013) (hereafter "*Boeing*").

The Seventh Circuit likewise determined that after the confidential witness "made opposite assertions on the two occasions", he was "out of the case." 711 F.3d at 760-61. Because this confidential witness's assertions were the sole support for the plaintiffs' key scienter allegations, his about-face was fatal to the plaintiffs' claim. *Id*. Similarly, here,

Mr. Meacham is "out of the case" because, under oath, he admitted he has no personal knowledge that would allow him to swear that he saw a PowerPoint "at any time in 2011" reflecting the alleged "$120-$125 million increase in claims" that was the principal basis for Plaintiffs' scienter theory.

B. CW2 Robert Mullins Denied Under Oath Making Each of the Scienter Allegations Attributed to Him in the SAC

In denying Genworth's motion to dismiss, the Court cited the SAC statements purportedly attributed to Mr. Mullins that internal Genworth reports showed an "undisclosed increase in delinquencies" which "were increasing throughout 2011." (Dkt. 53, at 2-3; SAC ¶¶ 40, 58, 92). However, in both his December 2015 Declaration, (Dkt. 89, Ex. B), and at his subsequent deposition, Mr. Mullins swore that he ***never discussed AU MI's internal delinquency reports with Plaintiffs***, nor that such reports showed undisclosed increasing delinquencies "*throughout 2011*." (*See, e.g.*, Dkt. 99, Ex. B, Mullins Tr. 153:23-155:6; 207:19-208:24; 208:20-209:5; Dkt. 89, Ex. B, Mullins Dec. ¶ 10).

At his deposition, Mr. Mullins referred Plaintiffs to Genworth's external, public disclosures about delinquencies, which, he testified, **were consistent with Genworth's internal reporting** and did **not** show that delinquencies were increasing throughout 2011:

> Q: (Mr. Gennardo): It's equally true then that you did not disclose to Plaintiffs that there were internal reports showing that delinquencies at Genworth Australia were increasing in 2011?
>
> [Objection omitted]
>
> A: (Mr. Mullins): I think I expressed that there was **public information about our delinquencies and that that was accurate**, as far as I know of, and there was some increases in delinquencies listed in those.
>
> Q: And were . . . the delinquencies that were shown in the public documents **increasing throughout 2011?**
>
> A: **They were not.**

(Dkt. 99, Ex. B, Mullins Tr. 207:19-208:9 (emphasis added)). Mr. Mullins further testified, answering a question from Plaintiffs' counsel:

> I did not give you specific information... about [Genworth's] reports ... other than what you already see externally . . . **the information that was being put out there, it was, as far as I know, accurate** and you had . . . access to that . . . I did not specifically take the position of saying here's what you would see in [Genworth's internal] reports.

(*Id*. at 153:23-155:6 (emphasis added)).

Plaintiffs quote extensively from Genworth's quarterly and fiscal year-end 2011 published financials in their SAC. These publicly disclosed reports, referenced by Mr. Mullins, show that AU MI's delinquencies, in fact, did not increase "throughout" 2011 ***but rather decreased in the last quarter of 2011***:

Quarter	Disclosed Delinquencies[3]
1Q 2011	rose from 7062 to 7557
2Q 2011	rose from 7557 to 8193
3Q 2011	rose from 8193 to 8464
4Q 2011	declined from 8464 to 7874

Genworth then disclosed in its 2011 10-K that while delinquencies had decreased in 4Q 2011, that the number of delinquencies were still above year-end 2010 levels:

> ***During the second and third quarters of 2011, there was an increase in the number of outstanding delinquencies and reserves***.... During the fourth quarter of 2011, ***total delinquencies decreased but remained above 2010 levels . . . .***

(SAC ¶ 12 (Genworth 2011 10-K dated 2/27/12 at p.104) (emphasis added)).

[3] These numbers are within the publicly disclosed documents cited by Plaintiffs in the SAC. *See* 11/3/11 8-K Financial Supp. p.40, Danilow Dec. in Support of the Memorandum of Law in Support of Defendants' Motion to Dismiss the SAC (Danilow Dec.), (Dkt. 45, Ex. E), available at http://www.sec.gov/Archives/edgar/data/1276520/000119312511295277/d221921dex992.htm; 2/2/12 8-K Financial Supp. p.43, Danilow Dec., (Dkt. 45, Ex. F), available at http://www.sec.gov/Archives/edgar/data/1276520/000119312512036838/d264173dex992.htm.

Thus, Mr. Mullins's declaration, his testimony, and Genworth's public disclosures, put the lie to Plaintiffs' SAC allegations that Genworth failed to disclose AU MI's increasing delinquencies "throughout" 2011. Their allegations are all the more troubling because the SAC cites to Genworth's 11/3/11 8-K and 2/2/12 8-K referenced in the chart above, and quotes this very language from Genworth's 2011 10-K. (*See, e.g.*, SAC ¶¶ 12 and 89 (chart) and fn.5).

While Plaintiffs assert that Mr. Mullins confirmed the "vast majority" of the statements the SAC attributes to him, Plaintiffs do not dispute that Mr. Mullins disavowed telling Plaintiffs about increasing delinquencies "throughout 2011"—the only SAC allegation on which this Court relied in denying Genworth's motion to dismiss. None of the other SAC statements attributed to Mr. Mullins so much as suggest that Genworth had any contemporaneous internal financial reports that it "willfully suppressed" (Dkt. 53, at 2), or that contradicted anything in Genworth's 3Q and 4Q 2011 publicly-reported results.[4]

Mr. Mullins also confirmed that he has "no knowledge" as to whether the reports referenced in the SAC were provided to Defendant Fraizer. (Dkt. 99, Ex. B, Mullins Tr. 131:19-132:25; 132:18-133:10). Thus, there are **no** fact allegations in the SAC supporting Plaintiffs' assertion that Mr. Fraizer was supplied with any information about AU MI's financial results that contradicted Genworth's 3Q, 4Q or year-end 2011 publicly reported results. The fact that Genworth International MI COO Jerome Upton spoke with or reported to Mr. Fraizer does not support scienter, given that there are no longer any facts alleged stating that the published 3Q or

[4] To correct Plaintiffs' misstatements, however, Mr. Mullins's Declaration identifies more than 10 statements that were incorrect and/or incorrectly attributed to him in the SAC, even after he specifically corrected some of them in a call with Plaintiffs' counsel. Mr. Mullins also reconfirmed at deposition that *all* of the disavowals noted in his Declaration were accurate and carefully reviewed to the best of his ability. (Dkt. 89, Ex. B, Mullins Dec. ¶¶ 3, 7-14; Dkt. 99, Ex. B, Mullins Tr. 201:5-201:21).

4Q 2011 financial quarterly reports were known to be inaccurate at the time they were put forward.

Mr. Mullins also confirmed at his deposition that he did not know what an "L&M" or "Leadership and Management" meeting was. (*Id.* at 123:20-125:3). Thus, Plaintiffs' attempt to improperly use Mr. Mullins to bolster and corroborate Mr. Meacham's faulty recollections about a purported December 2011 L&M meeting—which did not take place—or about statements allegedly made by Mr. Upton at such meetings, also fails.

Plaintiffs next try to impugn Mr. Mullins's integrity, by suggesting that he changed his story and lied under oath in his Declaration and at his deposition because he was concerned about violating his severance agreement. (Opp. at 20). As previously discussed, whether Mr. Mullins lied to Plaintiffs or, as Plaintiffs assert, lied under oath, Plaintiffs' attack on their own confidential witness "puts [Mullins] out of the case." *Boeing*, 711 F.3d at 760-761. A witness who changes his story under oath simply cannot support a strong inference of scienter.

We note, however, that Mr. Mullins testified that nobody from Genworth or its counsel ever discussed the severance agreement with Mr. Mullins in the context of this matter (Dkt. 99, Ex. B, Mullins Tr. 93:13-16; 106:19-107:18; 199:4-200:12), and that the first and only people to raise the severance agreement were *Plaintiffs'* counsel in the context of their attack on his credibility at Mr. Mullins's deposition. (*Id.* at 200:13-201:2). Mr. Mullins further testified that his own, independent counsel (that he selected himself) had advised him before he submitted his Declaration that he was in "good shape" concerning his severance agreement as related to his prior discussions with Plaintiffs' counsel. (*Id*. at 9:16-10:18).[5]

[5] Indeed, a full and fair reading of Mr. Mullins's testimony shows that Mr. Mullins's only goals were to be impartial and helpful to both sides and to ensure that his statements and the record were presented accurately. (*See, e.g.*, Dkt. 99, Ex. B, Mullins Tr. 13:14-16 ("I want[] to be an

C. Plaintiffs' Efforts to Avoid the *Boeing*, *Campo*, and *Belmont* Precedential Decisions are Meritless

Plaintiffs ineffectively strain to distinguish *Boeing* and *Campo* by arguing that the former is "sui generis" and the latter "technically" was not called a 54(b) motion. Neither of these arguments changes the fact that the only two federal appellate precedents to have addressed the problem of confidential witnesses who recant the key scienter allegations—including the binding Second Circuit decision in *Campo*— both upheld **reconsideration** of, and dismissals pursuant to, PSLRA Rule 12(b)(6) motions. And both decisions were predicated on the fact that the confidential witnesses did not have personal knowledge of, and could not under oath corroborate (like Mr. Meacham), or actually disavowed (like Mr. Mullins), the statements attributed to them in the amended complaints that had supported Plaintiffs' scienter allegations.

The point is not — as Plaintiffs erroneously argue — whether what was (allegedly) said by Mr. Meacham to Plaintiffs' investigators was accurately recounted in the SAC. The point is not, as Plaintiffs claim, whether Plaintiffs' investigation followed Plaintiffs' counsel's internal guidelines for dealing with confidential witnesses. (Plaintiffs cite irrelevant Rule 11 sanctions decisions — none are Rule 54(b) decisions — to defend their investigators (Opp. at 24-26). But this motion does not seek Rule 11 sanctions.) The point is not, whether the CWs had held the employment positions attributed to them. The point is not whether the CW claimed to have a better memory when he first talked to Plaintiffs' investigators than when he was later deposed. If any of this were the law, a confidential witness could misspeak to Plaintiffs' investigators, carelessly or fraudulently, then at his deposition confirm that he misspoke previously, while

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impartial witness in all this, and I've stated that to you [Mr. Gardner], and I've stated that to Genworth"); 92:6 -13 (Mullins was willing to and met with both Plaintiffs and Defendants); 103:2-5 ("I made it clear to . . . Genworth and to Amy, on your side that . . . I'm being impartial on this and I'm not joining working with any sides"); 104:22- 105:4 ("I'm still trying to be impartial.")).

failing to corroborate under oath the underlying truth of his prior statements — and the case would proceed for years of discovery based squarely on recanted allegations.

Neither *Campo* nor *Boeing* allow this result. This Rule 54(b) motion is all about the recanted and disavowed scienter allegations in the SAC. The point is that when the confidential witnesses cannot corroborate under oath with personal knowledge the specific scienter allegations attributed to them in the SAC — the who, what, when, where, how of the alleged fraud — the complaint based on those allegations must be revisited and dismissed. This is why the Second Circuit unanimously affirmed Judge Kaplan's approach that "the Court considers only those allegations that later were corroborated by those [confidential] witnesses in depositions." *Campo v. Sears Holding Corp.*, 635 F. Supp. 2d 323, 330 (S.D.N.Y. 2009) *aff'd*, 371 Fed. Appx. 212, 216-217 (2d Cir. 2010) ("[T]he confidential witness testimony discussed precludes us from concluding that an inference of scienter is cogent and at least as compelling as [the] opposing inference.").

Unable to credibly distinguish *Boeing* and *Campo*, Plaintiffs cite two district court decisions. The first is *In re Pfizer Inc. Sec. Litig.*, No. 04 CIV. 9866 (LTS) (HBP), 2012 WL 983554 (S.D.N.Y. Mar. 22, 2012), a 2012 decision by Judge Swain which never mentioned, discussed or apparently considered either the S.D.N.Y. District Court's or the Second Circuit's 2010 *Campo* decisions, and thus failed to follow its precedent. That decision was also rendered a year before Judge Posner's Seventh Circuit *Boeing* decision, unanimously affirming the Illinois District Court's reasoning and decision with which Judge Swain had disagreed.

The only other decision Plaintiffs proffer is off point, and is *dicta*. It is a 2013 memorandum opinion written by Judge Rakoff explaining the Court's earlier denial of a *summary judgment* motion in a case which reached settlement after the motion's denial but before the memorandum was issued. *See City of Pontiac* v. *Lockhead Martin*, 952 F. Supp. 2d

633 (S.D.N.Y. 2013); (Opp. at 13). It is not a Rule 54(b) reconsideration motion decision at all. Because the case had been settled, and the motion being decided was for summary judgment, Judge Rakoff did not have to deal with applying the continuing gatekeeping obligation under the PSLRA. Thus, the Memorandum opinion does not even mention, nor follow, the Second Circuit's *Campo* decision (a summary judgment motion precludes the district court from weighing the evidence, whereas the PSLRA requires the district court to "weigh competing inferences."). So the case is *dicta* and is completely inapposite legally.

City of Pontiac also is factually different in two respects. It dealt with five confidential witnesses, three of whom recanted the complaint allegations attributed to them, and two of whom confirmed under oath the truth of the statements attributed to them in the amended complaint. In this case, neither Mr. Meacham nor Mr. Mullins confirmed under oath the substantive truth of the scienter allegations. Second, Judge Rakoff was focused on whether Plaintiffs' investigators had accurately reported "in all material respects" what all of the CWs said to him. 952 F. Supp. 2d at 637. However, under *Campo*, *Boeing*, and *Belmont Holdings Corp. v. SunTrust Banks, Inc.*, 896 F. Supp. 2d 1210 (N.D. Ga. 2012), the central issue is not whether the complaint accurately reflects what the witnesses initially said to Plaintiffs' investigators, but whether the witnesses could corroborate the factual truth of those allegations under oath — or, as here, disavowed and recanted all of the scienter allegations.

D. Defendants' Motion is Timely and is Based on Properly-Obtained Evidence

Underscoring how weak their substantive arguments are, Plaintiffs' *lead* argument is that Local Rule 6.3 precludes this motion as untimely. Yet Defendants' motion is made pursuant to Rule 54(b), which expressly allows a party to move for reconsideration "***at any time*** before entry of a judgment adjudicating all the claims" (emphasis added), based on "the availability of new evidence, [and/or] the need to correct a clear error or prevent manifest injustice." *Shervington v.*

Vill. of Piermont, 732 F. Supp. 2d 423, 425 (S.D.N.Y. 2010); *see also Parmar v. Jeetish Imports, Inc.*, 180 F.3d 401, 402 (2d Cir. 1999) (stating that denial of defendant's motion to dismiss, like "[a]ll interlocutory orders remain subject to modification or adjustment prior to the entry of a final judgment.") (citing Rule 54(b)).

Courts within this District repeatedly have held that a "Rule 54(b) motion is not untimely under Local Rule 6.3 if the evidence upon which the motion is based is newly discovered." *System Mgmt. Arts Inc. v. Avesta Technologies, Inc.*, 160 F. Supp. 2d 580, 583 (S.D.N.Y. 2001); *Cohen v. UBS Fin. Servs., Inc.*, No. 12 CIV. 02147 (LGS), 2014 WL 240324, at *3 (S.D.N.Y. Jan. 22, 2014) ("[F]ar more time has elapsed than the 14 days provided by Local Rule 6.3 for motions for reconsideration or reargument… Nevertheless, in light of the language in Rule 54 providing that any order subject to the Rule 'may be revised at any time before the entry of judgment,' the Court will address Plaintiffs' Rule 54(b) argument on the merits."); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 182 F.R.D. 97, 101 n.5 (S.D.N.Y. 1998) ("The Court notes that Local Rule 6.3 notwithstanding, it may revise an interlocutory order at any time before the entry of a final judgment under Fed. R. Civ. P. 54(b) where justice so demands."). Plaintiffs cite no contrary authority.[6]

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[6] In every one of the cases Plaintiffs cite (Opp. at 4-7), either the evidence presented on the purported Rule 54(b) motion was not newly discovered evidence which was not available when the original motion was decided (*see Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167-68 (2d Cir. 2003); *Polin v. Kellwood Co.*, 132 F. Supp. 2d 126, 130 (S.D.N.Y. 2000); *Sea Trade Co. v. FleetBoston Fin. Corp.*, No. 03 CIV. 10254 (JFK), 2009 WL 4667102, at *4 (S.D.N.Y. Dec. 9, 2009); *Manti's Transp. v. Kenner*, No. 13-CV-6546 (SJF) (AYS), 2015 WL 1915004, at *7 (E.D.N.Y. Apr. 27, 2015); *DDR Const. Servs., Inc. v. Siemens Indus., Inc.*, No. 09 CIV. 9605 (ALC) (JLC), 2012 WL 4711677, at *3 (S.D.N.Y. Sept. 26, 2012); *In re CRM Holdings, Ltd. Sec. Litig.*, No. 10 CIV 00975 (RPP), 2013 WL 787970, at *9 (S.D.N.Y. Mar. 4, 2013); *In re Shengdatech, Inc. Sec. Litig.*, No. 11 CIV. 1918 (LGS), 2015 WL 3422096, at *4 (S.D.N.Y. May 28, 2015); *Malibu Media, LLC v. Doe*, No. 15-CV-1862 (RJS), 2015 WL 4271825, at *1-2 (S.D.N.Y. July 14, 2015)), or did not involve a motion for reconsideration (*see United States v. American Soc'y of*

Local Rule 6.3, on its face, applies only if the movant demonstrates that the Court "overlooked controlling decisions or factual matters that were put before the Court on the underlying motion." *Mikol v. Barnhart*, 554 F. Supp. 2d 498, 500 (S.D.N.Y. 2008). Parties moving under Local Rule 6.3 **cannot** submit new evidence, since any such evidence has not been "overlooked" by the Court. *See Vringo, Inc. v. ZTE Corp.*, No. 14-CV-4988 (LAK) (FM), 2015 WL 4743573, at *7-8 (S.D.N.Y. Aug. 11, 2015). Here, by contrast, Defendants are not arguing that the Court overlooked something that was submitted in the briefing that led to the Court's June 16, 2015 Order, but that, subsequent to the Order, the CWs recanted the statements on which the Court expressly relied.

Finally, the Second Circuit in *Campo* requires, and *Boeing* and *Belmont Holdings Corp., supra*, expressly hold, that a district court should consider new evidence of subsequent recantations and disavowals by confidential witnesses of scienter allegations, consistent with the Court's function as "gatekeeper" under the PSLRA. Plaintiffs' Local Rule 6.3 argument completely ignores and fails to distinguish *Campo, Boeing*, and *Belmont Holdings Corp.*, and all of the other Rule 54(b) authority cited in Defendants' Moving Memorandum. (Dkt. 88, at 21-23). According to Plaintiffs' argument, Defendants could *never* have made this motion, because it is based upon the recanted allegations of the two CWs, obtained by the Defendants only after the PSLRA discovery stay was lifted, many months — not 14 days — after the June 16 Order. Local Rule 6.3 neither applies to, nor trumps, this motion. This Court quite properly told Defendants to file this motion, and it is clearly timely under Rule 54(b), as well as the *Campo*

Composers, Authors & Publishers, 323 F. Supp. 2d 588 (S.D.N.Y. 2004) (motion for clarification).

and *Boeing* decisions dealing with this exact issue. (Dkt. 84, Jan. 8, 2015 Tr. 7:4-5; 23:18-20; 25:1; 25:7-8).

* * *

Plaintiffs' other technical argument — that Defendants improperly took Mr. Meacham's "merits" deposition during the "class discovery" phase of this case — is similarly unavailing. As Defendants' papers in opposition to Plaintiffs' Motion To Certify Class (to be filed February 22) will discuss in great detail, the CWs' recantations deprive Plaintiffs of the only alleged "evidence" that in 2011 Genworth senior executives had knowledge of and "willfully suppressed" financial information that was at odds with the company's 3Q and 4Q 2011 public disclosures. Without such evidence (as Defendants' papers in opposition to class will discuss) Plaintiffs cannot prove out the start of the class period, let alone a start on November 3, 2011, the date requested by Plaintiffs.

Defendants thus stated at the September 30 conference that they might need to take depositions of witnesses in addition to the Plaintiffs themselves, and in response the Court permitted Defendants to "[d]o what you need to do." (Dkt. 68, Sept. 30, 2015 Conference Tr. 29:20). The fact that discovery of the CWs not only undermines Plaintiffs' class arguments, but undermines Plaintiffs' case as a whole, does not somehow render that discovery improper.

Moreover, while Plaintiffs provided and paid for Mr. Meacham's counsel, Plaintiffs neither objected to nor filed a motion to quash the subpoena Defendants served on him nor otherwise sought to prevent the deposition. Only now that Plaintiffs are sorely disappointed with the results of Mr. Meacham's deposition do they raise their meritless objection to its taking.

CONCLUSION

For all of the reasons set forth herein and in Defendants' initial Rule 54(b) motion (Dkt. 87) and memorandum (Dkt. 88), and supporting materials (Dkt. 89 and as referenced herein), Defendants respectfully request that this Court reconsider its June 16 Order, and, upon reconsideration, enter an order dismissing the SAC with prejudice.

Dated: February 17, 2016
New York, New York

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