UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re BARCLAYS BANK PLC SECURITIES LITIGATION This Document Relates to: ALL ACTIONS	Master File No. 1:09-cv-01989-PAC ECF Case **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF THE BARCLAYS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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1933 Act	Securities Act of 1933, 15 U.S.C. §§ 77a *et seq*.
2007 20-F	Barclays' 2007 Annual Report on Form 20-F, filed with the SEC on March 26, 2008, including financial statements for the year ended December 31, 2007
ADS	American Depositary Shares
Barclays	Barclays Bank PLC and Barclays PLC
Barclays Defendants	Barclays Bank PLC, Barclays PLC, Marcus Agius, David G. Booth, Sir Richard Broadbent, Richard Leigh Clifford, Fulvio Conti, Daniel Cronje, Dame Sandra J.N. Dawson, Robert Edward Diamond, Jr., Gary A. Hoffman, Sir Andrew Likierman, Dr. Christopher Lucas, Sir Nigel Rudd, Stephen George Russell, Frederik Seegers, John Michael Sunderland and John Silvester Varley
CDO	Collateralized debt obligation
CDS	Credit default swap
FSA	U.K. Financial Services Authority
NYSE	New York Stock Exchange
PwC	PricewaterhouseCoopers LLP
RMBS	Residential mortgage-backed securities
SCAC	Second Consolidated Amended Complaint in this action, filed on September 16, 2013 (ECF No. 66)
SEC	U.S. Securities and Exchange Commission
Series 5 ADS	Barclays' ADS, Series 5, representing U.S. dollar-denominated non-cumulative callable preference shares of Barclays

PRELIMINARY STATEMENT

After years of discovery—in which plaintiff received 1.7 million pages of documents and took 24 fact depositions—there is no evidence to satisfy the elements of plaintiff's claim that the offering materials for Barclays' April 2008 offering of Series 5 ADS violated Section 11 of the 1933 Act. The core theory, as alleged in the SCAC, is that the offering materials—including Barclays' 2007 20-F and financial statements as of 12/31/07—did not adequately disclose or write down Barclays Capital's exposure to certain credit market assets. This Court dismissed the prior complaint, without leave to replead, because the Series 2, 3 and 4 ADS claims were untimely, and the claims as to all offerings (including Series 5) failed because the valuations (including write-down decisions) were subjective judgments, not actionable without allegations that the Barclays Defendants disbelieved them when they were made. The Second Circuit affirmed the dismissal of the untimely claims, but vacated and remanded as to Series 5 because it found that the proposed SCAC, which added new allegations that the Barclays Defendants disbelieved the valuations, stated a plausible claim that should be permitted to proceed past the pleading stage. *Freidus* v. *Barclays Bank PLC*, 734 F.3d 132 (2d Cir. 2013).

Now, however, the SCAC's allegations are no longer accepted as true, and the time has come to put an end to this action. The Barclays Defendants are entitled to summary judgment because the undisputed material facts show that there were no actionable misrepresentations (misstatements or omissions) in the Series 5 offering materials; the alleged misrepresentations were not material to a reasonable investor in the Series 5 ADS; and the losses on the Series 5 ADS were caused by factors *other than* the alleged misrepresentations.

No Actionable Misstatements. The Second Circuit agreed with this Court that the 12/31/07 asset valuations (including write-downs) disclosed in the Series 5 offering materials were statements of opinion and subjective judgment. *Id*. at 140-41. Thus, under the Supreme

Court's decision in *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1327 (2015), plaintiff's Section 11 claim requires proof that those statements were both objectively false and subjectively false (not honestly believed). There is no evidence to support either one. The undisputed facts show that the valuations were the result of rigorous processes, reviewed and approved by Barclays' auditor, PwC, which issued a "clean" opinion on Barclays' 12/31/07 financial statements; they have never been restated. Tellingly, plaintiff's experts do not opine that the valuations were erroneous. And there is no evidence that Barclays executives or any individual defendant disbelieved the reported valuations.

No Actionable Omissions. Finding nothing to support a misstatement claim as to the 12/31/07 valuations, plaintiff pursued three "omissions" theories in discovery, claiming that the Series 5 offering materials should have disclosed:

- the "notional" amount of monoline insurance contracts (*i.e.*, the par value of the underlying insured assets), in addition to Barclays' exposure to the monoline insurers (*i.e.*, the fair value of the insurance itself), which Barclays *did* disclose;
- interim first-quarter 2008 write-downs (actual or expected), *after* 12/31/07; and
- information concerning Barclays' capital ratios that arose *after* 12/31/07.

Similar theories, however, have been rejected by the Second Circuit and courts in this District, and this Court should reject them here.

Notional Amount of Monoline Insurance. Barclays disclosed £1.3 billion in exposure to monoline insurers in the 2007 20-F, and plaintiff does not claim that this figure was incorrect. Instead, plaintiff asserts that Barclays also should have disclosed the par value of the underlying insured assets—the "notional" amount of Barclays' credit default swaps with the insurers. But there was no duty to disclose that additional information, as the Second Circuit held in a similar case involving another bank's ADS. *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund* v. *Royal Bank of Scot. Grp., PLC*, 783 F.3d 383, 391-92 (2d Cir. 2015)

("*RBS*"). In addition, the 12/31/07 financial statements *did* disclose that Barclays held derivative swaps in the notional amount of £2.472 trillion, which included the monoline CDS.

Interim 1Q08 Write-downs. Even though Barclays clearly informed investors that the Series 5 ADS were being offered based on the 12/31/07 financial statements, which were incorporated by reference into the offering materials, plaintiff contends that Barclays had to disclose interim write-downs on credit market assets, taken or expected to be taken *after* the 12/31/07 financial statements date, during the first quarter of 2008 ("1Q08"). There was no such duty. Where the financial information in the offering materials is less than 135 days old on the effective date of the offering materials, the issuer need not disclose such interim information unless it represents an "extreme departure from the range of results which could be anticipated based on currently available information." *In re N2K Inc. Securities Litigation*, 82 F. Supp. 2d 204, 208 (S.D.N.Y. 2000) (quotations omitted), *aff'd on opinion below*, 202 F.3d 81 (2d Cir. 2000) (*per curiam*). Here, the 12/31/07 financial information was less than 135 days old as of the April 8, 2008 effective date of the Series 5 offering materials, and the interim 1Q08 write-downs were not an "extreme departure" from what could have been anticipated based on the 12/31/07 information. Barclays' actual results for the full 1Q08—which were not even known by the time of the offering—included write-downs on credit market assets of £1 billion, as compared with write-downs on such assets of £1.135 billion in the fourth quarter of 2007; they were thus *in line with*, not an "extreme departure" from, the prior reported write-downs. Moreover, Barclays as a whole recorded an overall *profit* for 1Q08 of £1.1 billion.

Capital Ratios. The 2007 20-F disclosed that, as of 12/31/07, Barclays' "Tier 1 capital ratio" and "Tier 1 equity capital ratio" were 7.8% and 5.1%, respectively, well above the regulatory minima of 4% and 2%. Plaintiff does not claim that these ratios were inaccurate.

Instead, he claims that Barclays should have disclosed before the Series 5 offering that the Tier 1 equity capital ratio had decreased slightly during 1Q08, and that the FSA had asked Barclays in March 2008 about its *contingency* plans for raising more equity capital if necessary. Plaintiff contends that these disclosures were required in order to inform Series 5 investors that Barclays might need to raise more equity capital in the future. That is incorrect, for several reasons. *First*, Barclays' ratios remained well above the regulatory minima at all times before and after the offering. *Second*, the offering documents clearly disclosed that Barclays might raise additional capital through future offerings. *Third*, an equity offering to raise Barclays' Tier 1 equity capital ratio would *benefit* holders of Series 5 preference shares, which ranked above equity in the capital structure, so any alleged "failure to disclose" a possible future equity offering would not have been a material omission for Series 5 investors. *Finally*, the Second Circuit in *RBS* rejected the claim that RBS had a duty to disclose that the FSA, also in early 2008, had "specifically required" RBS to raise more capital—a fact *not* present here. *RBS*, 783 F.3d at 393-94.

No Materiality. The undisputed facts show that a reasonable investor would not have considered the alleged misrepresentations material to the Series 5 ADS investment decision. Courts have recognized that the materiality inquiry differs, sometimes fundamentally, depending on the class of security involved. Plaintiff here testified that he bought the Series 5 ADS for the 8.125% dividends (all of which have been paid), and he knew there could be further write-downs but bought the ADS anyway because the possibility of more write-downs was of "no interest" to him and "wasn't important" to him as an investor. His indifference to possible further write-downs was entirely reasonable, given that Barclays' balance sheet at 12/31/07 had £1.2 trillion in assets and £32.4 billion of common shareholder equity available to absorb losses before any preference shares could be impacted. In addition, the lack of price reaction to the supposed "corrective" disclosures (described below) provides further evidence that the alleged misrepresentations were immaterial.

No Loss Causation. Under Section 11(e), a plaintiff cannot recover losses that the defendant proves were the result of factors other than the alleged misrepresentations. The absence of loss causation as shown by stock price reactions is a sufficient basis for granting summary judgment to defendants in a 1933 Act case. *See Akerman* v. *Oryx Commc'ns, Inc.*, 810 F.2d 336, 343 (2d Cir. 1987). Here, plaintiff seeks to recover losses based on declines in the Series 5 ADS from the offering price of $25 to the low of $4.95 on March 9, 2009. All of the allegedly misstated or omitted information, however, was accurately disclosed on or before August 7, 2008; the price declines occurred well after that, proving that they were not caused by the alleged misrepresentations. The Series 5 price activity conclusively refutes loss causation:

- May 15, 2008: Barclays released its 1Q08 results, including 1Q08 write-downs; the Series 5 closed at $25.23, an ***increase*** from the prior day's close.
- June 25, 2008: Barclays announced an equity offering to raise £4.5 billion in capital; the Series 5 closed at $24.96, an ***increase*** from the prior day's close.
- August 7, 2008: Barclays released its results for the first half of 2008, including write-downs through 6/30/08, and disclosed the notional amount of all monoline insured assets at 6/30/08; the Series 5 closed at $24.46, a ***decrease*** of only 23 cents (less than 1%) from the prior day's close, which was ***not statistically significant***, meaning that it cannot be said to have resulted from that disclosure.

These undisputed facts show that the Series 5 "losses" that plaintiff seeks to recover did not result from the alleged misrepresentations. The "event study" done by the Barclays Defendants' expert (Dr. Kleidon) confirms this. Plaintiff's expert (Mr. Coffman) did not do an event study and points to no evidence linking the price declines to the alleged misrepresentations; his conclusory opinions are insufficient to overcome summary judgment.

FACTUAL BACKGROUND[1]

A. Barclays and the Series 5 ADS Preference Shares

Barclays is a global financial institution headquartered in London. In 2007-2008, Barclays had seven primary business groups, one of which was Barclays Capital, the investment bank based in New York. Barclays Capital was itself divided into various business lines, including Credit, which held the credit market assets at issue here (*e.g.*, CDOs, RMBS). As of 12/31/07, Barclays had assets of £1.2 trillion and shareholders' equity of £32.5 billion, and net income of £23.5 billion for 2007. (56.1 ¶¶ 1-4.)

Barclays' business involves raising capital to lend and invest. The Series 5 ADS offering was the fifth Barclays preference share offering between June 2005 and April 2008. The offering occurred on April 8, 2008, at a price of $25 per share. (56.1 ¶ 14.) Preference shares are debt-like securities that carry a fixed dividend (or "coupon") payment and rank higher than ordinary shares (equity) in the capital structure. The Series 5 ADS, traded on the NYSE, carry an 8.125% annual dividend, and Barclays has made every dividend payment. (56.1 ¶¶ 15-22.) Plaintiff—who bought 2,400 Series 5 ADS for $60,000 in the offering, as a long-term investment based on that dividend—has received over $41,000 in dividends on that investment, which he admits was "the best investment [he's] made since April 2008." (56.1 ¶¶ 9-12.)

B. The Series 5 Offering Materials and Events Leading Up to the Offering

The Series 5 offering materials comprised an August 31, 2007 "shelf" registration statement and an April 8, 2008 prospectus supplement, which incorporated by reference Barclays' 2007 20-F. (56.1 ¶ 13.) The 2007 20-F, which is the focus of plaintiff's claims,

[1] Citations to "56.1 ¶ __" are to the Barclays Defendants' Local Rule 56.1 Statement of Undisputed Facts, and citations to "Ex. __" are to exhibits to the Declaration of Thomas C. White, both of which are submitted herewith.

contained Barclays' financial statements for the year-ended 12/31/07. PwC issued an unqualified ("clean") audit opinion on Barclays' 12/31/07 financial statements, and they have never been restated. (56.1 ¶¶ 13, 81-83.)

The Series 5 offering occurred during a period of widely publicized, immense dislocation in the credit markets.[2] Even before releasing its 12/31/07 financial statements, Barclays announced—in an unscheduled "update" on November 15, 2007—substantial write-downs of £1.3 billion (through 10/31/07) on assets held in Barclays Capital that were impacted by the market turbulence. (56.1 ¶¶ 23-24; Ex. 4.) Of that £1.3 billion, £500 million was taken in the third quarter (July-September 2007), and £800 million was taken in October 2007 alone. (Ex. 4 at 4.) Barclays Capital's president Bob Diamond warned on a public conference call in connection with the write-downs that "certain sectors . . . will be very, very difficult in '08. Our sub-prime is the poster child for that." (56.1 ¶ 26.) Continued market deterioration led to additional write-downs in November and December of 2007, and throughout 2008.

C. The 2007 20-F and Barclays Capital's Credit Market Exposures at 12/31/07

The 2007 20-F reported £1.635 billion in write-downs taken in 2007 on Barclays Capital assets (or "exposures") "impacted by the turbulence in the credit markets." (56.1 ¶ 37; Ex. 1 at 53.) Of that, £1.135 billion was taken in the fourth quarter (October-December 2007) and, as discussed, £500 million in the third quarter. The 20-F highlighted information about the write-downs on these Barclays Capital assets, explaining that they resulted in "net losses of

[2] As this Court observed: "The early 2000s experienced a sharp rise in real estate prices, which then went upside down starting in 2006-7. The sudden collapse cascaded through the financial markets, causing distress in the securities issued by banks and other financial institutions to finance real estate investment." *In re Barclays Bank PLC Sec. Litig.*, 2011 WL 31548, at *1 (S.D.N.Y. Jan. 5, 2011); *see Woori Bank* v. *Merrill Lynch*, 923 F. Supp. 2d 491, 493 (S.D.N.Y. 2013) ("the United States residential real estate market suffered a massive decline that paralyzed credit markets and sent [s]hockwaves through the entire financial system"), *aff'd*, 542 F. App'x 81 (2d Cir. 2013).

£1,635m in 2007 due to dislocations in the credit markets." (56.1 ¶ 37.)[3] The 2007 20-F also included a table showing Barclays Capital's exposures for the impacted asset classes at 12/31/07—as compared with the exposures at 6/30/07, which was "the reporting date immediately prior to the credit market dislocations"—as shown below (56.1 ¶ 37):

Financial review
Barclays Capital credit market positions

Barclays Capital credit market positions

Barclays Capital credit market exposures resulted in net losses of £1,635m in 2007, due to dislocations in the credit markets. The net losses primarily related to ABS CDO super senior exposures, with additional losses from other credit market exposures partially offset by gains from the general widening of credit spreads on issued notes held at fair value.

Credit market exposures in this note are stated relative to comparatives as at 30th June 2007, being the reporting date immediately prior to the credit market dislocations.

	As at	
	31st December 2007 £m	30th June 2007 £m
ABS CDO Super Senior		
High Grade	4,869	6,151
Mezzanine	1,149	1,629
Exposure before hedging	6,018	7,780
Hedges	(1,347)	(348)
Net ABS CDO Super Senior	4,671	7,432
Other US sub-prime		
Whole loans	3,205	2,900
Other direct and indirect exposures	1,832	3,146
Other US sub-prime	5,037	6,046
Alt-A	4,916	3,760
Monoline insurers	1,335	140
Commercial mortgages	12,399	8,282
SIV-lite liquidity facilities	152	692
Structured investment vehicles	590	925

Many of the assets were valued with models that used assumptions, and the 20-F disclosed that using "reasonably possible alternative assumptions" could affect the reported asset valuations by "a range of £1.2bn . . . lower to £1.5bn . . . higher than the fair values recognised in the financial statements"—a potential swing of £2.7 billion simply by using different, but still reasonable,

[3] Barclays noted that the net loss figure of £1.635 billion reflected losses that were "partially offset" by £658 million of "gains from the general widening of credit spreads on issued notes held at fair value." (56.1 ¶ 37; Ex. 1 (2007 20-F) at 53.) In other words, the reduced costs of Barclays Capital's outstanding notes generated gains that partially offset losses in this period.

assumptions in the models. (Ex. 1 (2007 20-F) at 48.) The 20-F also warned investors that these assets were especially vulnerable to market downturns.[4] Discovery has shown that the valuations reported in the 2007 20-F were the result of extensive and rigorous processes at Barclays, which included the review and approval of PwC as part of its 2007 audit work. (56.1 ¶¶ 40-86.)

1. Barclays' Valuation Processes

Barclays had, as explained by former CEO John Varley, "a very extensive and rigorous process for securities valuation," which "started at the trading desk" and also involved the Product Control Group ("PCG"), finance teams from Barclays Capital and Barclays, PwC and others. (56.1 ¶ 40.) Traders on each desk were responsible for gathering market data and "marking" (valuing) their positions, and the marks were reviewed by the trading desk heads. The desk valuations were then subject to a rigorous price-testing process, in which PCG assessed the marks using various price-testing models. (56.1 ¶¶ 40-52.) As PCG director Sean Teague testified, PCG came "up with [its] own marks to ensure the integrity of the balance sheet" and would "challenge a trader [] if there was a price discrepancy creating a material variance between where product control believed that a position should be priced versus where trading

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[4] *See*, *e.g.*, Ex. 1 (2007 20-F) at 65 ("The results of severe disruption in the US sub-prime mortgage market were felt across many wholesale credit markets in the second half of 2007, and were reflected in wider credit spreads, higher volatility, tight liquidity in interbank and commercial paper markets, more constrained debt issuance and lower investor risk appetite. . . . At the end of the year, market conditions remained difficult with reduced liquidity in cash and securitised products, and reflected stress at some counterparties such as the monoline insurers."); *id.* ("Going into 2008, the credit environment reflects concern about weakening economic conditions in our major markets. Credit spreads and other indicators signal that the credit cycle has changed after a long period of stability. We expect some deterioration in credit metrics as default probabilities move toward their medium-term averages. The environment has led to a more cautious approach to credit assessment, pricing and ongoing control in the financial industry, which we believe will continue through the year."); *id.* at 50 (judgments regarding valuations "change with time as new information becomes available or as work-out strategies evolve, resulting in frequent revisions to the impairment allowance as individual decisions are taken. Changes in these estimates would result in a change in the allowances and have a direct impact on the impairment charge"). The Prospectus Supplement for the offering warned that Barclays' "business, financial condition, and results of operations could suffer, and the trading price and liquidity of the . . . ADSs could decline, in which case you could lose some or all of your investment." (Ex. 3 at S-11.)

had marked it." (56.1 ¶ 50.) PCG and trading desk personnel sometimes disagreed about valuations—unsurprising given that they required subjective judgment—and attempted to resolve disagreements as part of the checks and balances that were built into the process. Unresolved disagreements were escalated to senior management, including the CFO of Barclays Capital, for resolution. (56.1 ¶ 48.)

2. PwC's Audit Work

PwC issued a clean audit opinion on Barclays' 12/31/07 financial statements, concluding that they "present fairly, in all material respects, the financial position of Barclays PLC (the 'Company') and its subsidiaries." (56.1 ¶¶ 81-83; Ex. 1 (2007 20-F) at 147-48.) PwC further concluded that Barclays "maintained, in all material respects, effective internal controls over financial reporting as of 31st December 2007." (*Id.*) PwC's unqualified opinion rested in part on extensive analysis of the assets at issue here. PwC used a specialized internal team (the Financial Analytics group) to evaluate the valuations of Barclays Capital's credit market exposures. (56.1 ¶¶ 53-70.) As shown in PwC memoranda, the PwC specialists met with PCG and "discussed each product area to gain an understanding of the exposures to subprime assets" and "perform[ed] substantive audit procedures over the valuation of these product areas." (56.1 ¶ 58.) PwC's specialists concluded that Barclays' valuations, and underlying methodologies, were reasonable. (56.1 ¶¶ 55-70.) Doug Summa—who led the team of PwC specialists—was deposed in this case and testified that he stands by PwC's analyses and conclusions to this day. (56.1 ¶¶ 56, 67.)

Although the 2007 20-F reported Barclays' financial position as of 12/31/07, the financial statements included a "Note 43, Events after the balance sheet date" for certain events after 12/31/07 but before the financial statements were authorized for issue. (Ex. 1 (2007 20-F) at 212.) PwC—which attended Barclays' Audit Committee and Risk Committee meetings—was aware that the market turbulence was impacting Barclays Capital's credit market assets. (56.1 ¶¶ 71-80.) PwC's audit work during 1Q08 included a "subsequent events" analysis, including a review of Barclays Capital, to assess which, if any, post-12/31/07 developments required disclosure in Note 43. (56.1 ¶ 76.) After completing its review of post-12/31/07 developments, PwC U.S. issued a letter to PwC U.K. confirming that it had performed this subsequent events review and had "not identified any subsequent events material to the Group." (56.1 ¶ 76.) The only event that warranted disclosure in Note 43 was Barclays' March 3, 2008 agreement to acquire a Russian bank, with the closing expected in summer 2008. (Ex. 1 (2007 20-F) at 212.)

In addition, in connection with Barclays' filing the April 8, 2008 Series 5 prospectus supplement, PwC issued a "comfort letter" to Barclays and the underwriters stating that the financial statements audited by PwC that were incorporated into the Series 5 offering materials complied "as to form in all material respects with the applicable accounting requirements of the [1933] Act and the Securities Exchange Act of 1934, as amended, and the related rules and regulations adopted by the SEC." (56.1 ¶¶ 84-86.)

ARGUMENT

I. THE DISCOVERY RECORD CONFIRMS THERE WERE NO ACTIONABLE MISREPRESENTATIONS IN THE SERIES 5 OFFERING MATERIALS.

To prevail on a claim under Section 11, plaintiff must prove that the Series 5 offering materials "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Plaintiff cannot carry his burden.[5]

[5] Plaintiff's Section 15 "control person liability" claims thus "fail for want of a primary violation." *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 207 (2d Cir. 2009).

A. There Is No Triable Issue of Fact Concerning Barclays' 12/31/07 Valuations.

The SCAC's core theory is that Barclays did not adequately value or write down certain credit market assets held at Barclays Capital and reflected in the 2007 20-F. The Second Circuit agreed with this Court that valuations and write-downs of complex assets like these are matters of subjective judgment and opinion. *Freidus*, 734 F.3d at 140-41. After the Supreme Court's decision in *Omnicare*, an opinion statement is not actionable unless it is objectively false and either (i) "is not 'honestly held'" or (ii) omits facts that "conflict with what a reasonable investor would understand from the statement itself." *In re Petrobas Sec. Litig.*, 116 F. Supp. 3d 368, 380 (S.D.N.Y. 2015) (quoting *Omnicare*, 135 S. Ct. at 1327).

After years of discovery, there is no evidence to support plaintiff's claim as to the 12/31/07 valuations. *First*, there is no evidence that Barclays' valuations were *objectively false*. The "mere fact that writedowns . . . subsequently turned out to be insufficient does not render those figures false at the time that they were made part of . . . public filings." *NECA-IBEW Pension Trust Fund* v. *Bank of Am. Corp.*, 2013 WL 620257, at *15 (S.D.N.Y. Feb. 15, 2013), *aff'd*, 607 F. App'x 79 (2d Cir. 2015); *accord In re Fannie Mae 2008 Sec. Litig.*, 742 F. Supp. 2d 382, at 408-10 (S.D.N.Y. Sept. 30, 2010) (Crotty, J.). Tellingly, none of plaintiff's experts opines that Barclays' 12/31/07 valuations were erroneous or that their underlying methodologies were unreasonable. Indeed, plaintiff's proffered accounting expert testified that he did not opine on the valuations or methodologies due to the "limited time frame that we had in which to work on this case and to reach an informed and well-based opinion," and "I informed counsel that that's an enormous task and that I didn't intend to get into that." (Ex. 46 (Regan Dep.) at 23-24.) By contrast, Barclays' expert (John Dolan) extensively analyzed the valuations of all assets types at issue, as well as the underlying methodologies, and concluded that they were reasonable and appropriate. (Ex. 34 ¶¶ 86-88 & App'x A.) Moreover, PwC's valuation analyses and conclusions—and its clean audit opinion on Barclays' 12/31/07 financial statements (which have never been restated)—also refute plaintiff's claims.[6] Plaintiff does not (and could not) challenge the independence or comprehensiveness of PwC's audit, because the record shows that PwC's work was extensive and thorough, and that PwC received all information it requested during its audit. (56.1 ¶¶ 53-80 & Exs. 51-55, 58.) Barclays' Audit Committee not only relied on but *invited* PwC's involvement in valuing Barclays Capital's credit market exposures. (Ex. 47 (Russell Dep.) at 106.)

Second, the valuation claim fails because there is no evidence of subjective falsity. As former CEO John Varley testified, he and others in management relied on "a very extensive and rigorous process for securities valuation. It started at the trading desk. It involved [PCG], who were separate from the trading desk," and also involved finance teams from both Barclays Capital and Barclays, and "then as appropriate went to auditors, underwriters, external advisors." (56.1 ¶ 40.) There is no evidence that the reported valuations did not reflect honestly held judgments reached after employing reasonable methodologies, with the involvement of personnel from several areas of Barclays, the Audit Committee of the Board and PwC.[7]

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[6] *See*, *e.g*., *In re JP Morgan Chase Sec. Litig*., 2007 WL 950132, at *13 (S.D.N.Y. Mar. 29 2007) (auditor's failure to require restatement "defeats plaintiffs' claim of recklessness"), *aff'd,* 553 F.3d 187 (2d Cir. 2009); *In re Levi Strauss & Co. Sec. Litig*., 527 F. Supp. 2d 965, 987-88 (N.D. Cal. 2007) (given unqualified opinions issued after KPMG's audits, complaint failed to raise plausible inference that financial statements were misstated).

[7] Plaintiff may argue that it was an actionable omission for page 53 of the 2007 20-F not to disclose Barclays Capital's *gross* write-downs on credit market exposures for 2007, in addition to the £1.635 billion *net* write-downs that were disclosed there. (*See* SCAC ¶ 195 (alleging that the £2.999 billion *gross* figure for 2007 was "vital" information that was not disclosed until Barclays' 2008 annual report was released in March 2009).) That is incorrect. Page 53 clearly stated that the £1.635 billion figure represented "net losses," and expressly stated that they were "partially offset by gains" of £658 million "from the general widening of credit spreads on issued notes held at fair value." (Ex. 1 (2007 20-F) at 53.) It was thus clear to investors that the "gross loss" figure was not being disclosed, but that it had to be more than £2.293 billion (£1.635 plus £0.658) because the £658 million was only a "partial offset" in arriving at the net figure of £1.635 billion. *See In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429, at *28 (S.D.N.Y. July 25, 2016) (the "Court will not infer that no losses is the accounting equivalent of no net write downs"). Moreover, the remaining portion of the "gross" figure that was not separately broken out on page 53 of the 2007 20-F was an offset of approximately £700 million from income and hedges. (Ex. 12 at 22.)

(*footnote continued*)

B. There Was No Duty To Disclose Notional Amount of Monoline Insurance.

Barclays disclosed that the "notional" amount of its credit derivatives, which included monoline CDS, was £2.472 trillion at 12/31/07. (Ex. 1 (2007 20-F) at 89, 172.) The 2007 20-F also highlighted that "Barclays Capital held assets with insurance protection or other credit enhancement from monoline insurers," and the "value of exposure to monoline insurers under these contracts" at 12/31/07 was £1.335 billion, up from £140 million at 6/30/07. (*Id.* at 53.) Plaintiff's expert (Mr. O'Driscoll) does not dispute the accuracy of the £1.335 billion figure or the process used to calculate it.[8] Plaintiff claims, however, that Barclays should have also disclosed the notional amount of the monoline CDS (*i.e.*, the par value of all underlying insured assets). That claim fails. Indeed, plaintiff's counsel here made the same claim in *RBS*, arguing that "RBS failed to disclose an additional $14.4 billion in insured risk." 783 F.3d at 389.[9] The Second Circuit rejected the claim, noting that "plaintiffs fail to explain how the $14.1 billion monoline insurers constitute subprime exposures or that RBS had an obligation to disclose them as U.S. subprime exposures 'net of hedges.'" *Id.* at 391-92.

(*footnote continued*)

It was not materially misleading for Barclays to report write-downs that were net of gains. *See Deutsche Bank*, 2016 WL 4083429, at *31 (disclosure of write-downs net of gains not misleading under *Omnicare*). And even assuming (despite the lack of any evidence) that a reasonable investor would have cared about the gross number, "a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that." *Dalberth* v. *Xerox Corp.*, 766 F.3d 172, 183 (2d Cir. 2014).

[8] The £1.335 billion monoline exposure figure was calculated using a £59 million reduction (called a credit valuation allowance or "CVA") to the value of the CDS. Plaintiff's expert admitted that he does not challenge the £1.335 billion figure or the £59 million CVA, which reflected a judgment about the probability of default by the insurer and the loss given default. (Ex. 45 (O'Driscoll Dep.) at 180, 195-96.)

[9] Plaintiffs in *RBS* argued that RBS "omitted" from its disclosures a "$14.4 billion exposure to the monoline insurers." (Ex. 28 (*RBS* Pl. Br.) at 10.) This argument was based on an allegation that those disclosures "omitted [RBS'] CDO and Subprime U.S. RMBS holdings that were covered by monoline insurers," *i.e.*, the notional amount of RBS' monoline insurance. (Ex. 29 (*RBS* Joint App'x) at 1356-57.)

The same reasoning applies here. The 2007 20-F disclosed Barclays Capital's exposures to various asset types (*e.g.*, CDOs, subprime) and separately disclosed its exposure to monoline insurers. For assets that are not insured, the exposure is to changes in value of *the assets*; for assets that are insured, the exposure is to *the monolines*. Barclays highlighted both on page 53 of the 2007 20-F. Plaintiff's argument conflates the par amount of *assets insured* under monoline contracts with the value of the *insurance itself*. The 2007 20-F clearly disclosed that the £1.335 billion exposure to monoline insurers was the latter: "The value of exposure to monoline insurers under these contracts was £1,335m." (Ex. 1 (2007 20-F) at 53.) This £1.335 billion figure accurately reflected Barclays Capital's "exposure" to monolines because it was the amount at risk in the event of a monoline default. Doug Summa, the PwC partner and specialist who evaluated Barclays Capital's credit market assets and monoline exposures, testified that the "undisclosed" notional amount of underlying insured assets was "not a real meaningful number" for valuing exposure to monolines. (Ex. 48 (Summa Dep.) at 211.)

In addition, Barclays disclosed that it *did not* consider the notional amount of underlying insured assets to be its *exposure to monoline insurers*: "Derivative instruments [such as CDS] are contracts whose value is derived from one or more underlying financial instruments or indices defined in the contract. They include swaps . . . . *[n]otional amounts of the contracts are not recorded on the balance sheet*." (Ex. 1 (2007 20-F) at 89 (emphasis added); *id.* at 172 ("notional amounts . . . *do not indicate the Group's exposure to credit or price risks*").) These disclosures reveal that the monoline exposure figure being provided was *not* the notional amount of underlying insured assets, but the value of the monoline *insurance*. *See Omnicare*, 135 S. Ct. at 1330 ("[A]n investor reads each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information. And the investor takes into account the customs and practices of the relevant industry."); *see also Jensen* v. *Kimble*, 1 F.3d 1073, 1078 (10th Cir. 1993) (no duty to disclose where "affirmative statements by [defendant] clearly notified [plaintiff] that [defendant] was not disclosing certain information").

Moreover, plaintiff's expert (Mr. O'Driscoll) admitted that he is not opining that the notional amount of monoline insurance contracts or the value of the underlying insured assets were "left out of the financial statements or notes." (Ex. 45 (O'Driscoll Dep.) at 210-15.) Mr. O'Driscoll also admitted that there are various ways to express monoline exposure, including the one used by Barclays (which he does not claim was incorrect); he merely opines that disclosing the notional amount of insured assets or some other measure "would have provided a more complete assessment of Barclays' exposure to monoline insurers." (Ex. 33 (O'Driscoll Report) ¶¶ 118-23.) Even assuming that this naked assertion (inadmissible under Rule 702) is correct, Barclays was "not required to disclose a fact merely because a reasonable investor would very much like to know that." *Dalberth*, 766 F.3d at 183; *see Freeman Grp.* v. *Royal Bank of Scot. Grp. PLC*, 540 F. App'x 33, 36 (2d Cir. 2013) (offering documents "need not identify every type of asset" if disclosures are "broad enough to cover" asset at issue).

C. There Was No Duty To Disclose Interim 1Q08 Write-downs.

Barclays' 2007 20-F expressly stated that the valuations presented therein were as of 12/31/07 and that the financial statement data was "[f]or the year ended 31st December." (*See, e.g.*, Ex. 1 (2007 20-F) at 54-55.) On a February 19, 2008 public conference call announcing the 2007 results, Barclays executives emphasized that the valuations were moving with the markets, that "we continually mark the [credit market] positions as we go across the whole business on a daily, weekly, monthly basis," and that the 2007 results reflected valuations as of 12/31/07: "they are the December 31 marks. We draw the line there and take those market prices and inputs that are available to us on the 31st" of December 2007. (56.1 ¶¶ 29-30.)

The 2007 20-F also cautioned that the credit market exposures were vulnerable to future write-downs: "Going into 2008, the credit environment reflects concern about weakening economic conditions in our major markets," which "has led to a more cautious approach to credit assessment, pricing and ongoing control in the financial industry, which we believe will continue through the year." (Ex. 1 (2007 20-F) at 65.) On the February 19, 2008 public conference call, Barclays executives explained that market conditions remained difficult and that they "expect[ed] the first half [of 2008], no mistake, to be extremely challenging." (56.1 ¶ 31.) It was abundantly clear that the values of Barclays' assets were constantly changing with market developments, including during the early months of 2008 leading up to the Series 5 offering. *See In re ProShares Trust Sec. Litig.*, 728 F.3d 96, 102 (2d Cir. 2013) ("[W]hen a registration statement warns of the exact risk that later materialized, a [S]ection 11 claim will not lie as a matter of law.") (quotations omitted); *In re AES Corp. Sec. Litig.*, 825 F. Supp. 578, 588 (S.D.N.Y. 1993) ("[W]hen defendants warn investors of a potential risk, they need not predict the precise manner in which the risks will manifest themselves.").

Plaintiff nevertheless contends that Barclays was obligated to disclose interim first-quarter 2008 write-downs (or estimates of write-downs) based on information available *after* the 12/31/07 financial statement date. That is not the law. The SEC has promulgated regulations governing the appropriate "[a]ge of financial statements" at the "effective date of [a] registration statement." 17 C.F.R. § 210.3-12. Under Regulation S-X, a U.S. issuer's financial statements must be less than 135 days old when the registration statement becomes effective. *Id.* § 210.3-12(a), (g)(1)(ii). Even though the rule for foreign private issuers is less strict, Barclays complied with the 135-day rule; the 12/31/07 financial statements incorporated by reference into the offering documents were less than 135 days old as of the April 8, 2008 effective date of the Series 5 registration statement.[10] There is no duty to disclose interim financial information if the offering documents are within the "135-day window" unless the interim information represents an "extreme departure" from the range of results that could be expected from the information reported in the offering documents.

In *In re N2K Inc. Securities Litigation*, for example, Judge Baer held that an issuer whose financial statements were within the "135-day window" had no duty to disclose "actual losses for the interim period [which] were not beyond the range of plausible results based on available information at the time of offering," because they did not reflect "'an *extreme departure* from the *range of results* which could be anticipated *based on currently available information*.'" 82 F. Supp. 2d at 208 (quoting *Shaw* v. *Digital Equipment Corp*., 82 F.3d 1194, 1210 (1st Cir. 1996)) (emphasis in original). The Second Circuit affirmed "on the opinion of Judge Baer" (except for one footnote in his opinion), 202 F.3d 81, 81 (2d Cir. 2000) (*per curiam*), thereby adopting it. *See Victor Talking Mach. Co.* v. *Hoschke*, 188 F. 326, 328 (2d Cir. 1911) ("[W]hen an order is 'affirmed on the opinion of the court below,' [the appeals court] approves the reasoning, adopts the findings, and concurs in the conclusions of the court below."). Other courts in this District have applied the "extreme departure" standard in rejecting claims that an issuer should have disclosed interim information. *See Stadnick* v. *Vivint Solar, Inc.*, 2015 WL 8492757, at *11-12 (S.D.N.Y. Dec. 10, 2015) (Forrest, J.); *In re Lone Pine Res., Inc.*, 2014

[10] A foreign private issuer like Barclays is only required to update a shelf registration statement to include financial information from its current fiscal year if the prospectus supplement is dated more than nine months after the end of its last fiscal year. *See* 17 C.F.R. § 229.512(a)(4); Item 8.A of Form 20-F (17 C.F.R. § 249.220f). Under SEC rules, the effective date of the registration statement for the Series 5 offering is April 8, 2008—the date of the prospectus supplement. *See* 17 C.F.R. § 230.430B(f)(1).

WL 1259653, at *5 (S.D.N.Y. Mar. 27, 2014) (Daniels, J.); *In re Focus Media Holding Ltd. Litig.*, 701 F. Supp. 2d 534, 542-44 (S.D.N.Y. 2010) (Swain, J.); *In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 202 F. Supp. 2d 8, 12-13 (S.D.N.Y. 2001) (Buchwald, J.). These courts declined to "impose a reporting requirement more stringent than the 135-Day Rule in SEC Regulation S-X," *Stadnick*, 2015 WL 8492757, at *12, because the "disclosure structure set out by the SEC . . . recognizes how unworkable and potentially misleading a system of instantaneous disclosure out [of] the normal reporting periods would be," *Focus Media*, 701 F. Supp. 2d at 540 (quotations omitted).

Even using the actual first-quarter 2008 write-downs of £1 billion as reported on May 15, 2008 rather than the lower interim figures seen during the quarter in progress (56.1 ¶ 92), the write-downs were not an "extreme departure" from what Barclays had previously disclosed, including in the 2007 20-F, for the impacted asset classes: Barclays took £500 million in write-downs for the third quarter of 2007 and £1.35 billion for the fourth quarter of 2007, including £800 million for October alone (56.1 ¶¶ 23-24, 37 & Ex. 4 at 4):

3Q 2007	4Q 2007	1Q 2008
£500 million	£1.135 billion	£1 billion

The £1 billion in 1Q08 losses on these assets was thus in line with—not an "extreme departure" from—the range of results that could be anticipated based on Barclays' reported information. Moreover, Barclays as a whole[11] reported a *profit* of £1.1 billion for the first quarter of 2008,

[11] Courts applying the "extreme departure" standard have emphasized the importance of looking at the company as a whole. *See*, *e.g.*, *Stadnick*, 2015 WL 8492757, at *12 (evaluating "broader financial data" in rejecting claim that changes in net income and earnings per share were "disastrous and unexpected shift" requiring interim disclosure); *Focus Media*, 701 F. Supp. 2d at 542-43 (decline in gross margin not an extreme departure when considered "in the context of the overall revenue and income figures"); *Turkcell*, 202 F. Supp. 2d at 13 (no extreme departure where "Plaintiffs allege a decline in [company's] operating income, but not in any other financial indicator").

despite the challenging market conditions and write-downs. (56.1 ¶ 94.)[12]

D. There Was No Duty To Disclose Capital Ratio Changes or Communications with the FSA.

Barclays' 2007 20-F disclosed various capital ratios as of 12/31/07, including a "Tier 1 capital ratio" of 7.8% and a "Tier 1 equity capital ratio" of 5.0%.[13] (2007 20-F at 43.) Both were far in excess of the regulatory minimum ratios of 4% and 2%, respectively. (56.1 ¶¶ 7-8.) Plaintiff contends that the offering materials misleadingly portrayed Barclays' capital position because (i) Barclays' 12/31/07 capital ratios—which Plaintiff does not dispute were accurate—had declined slightly by the April 8 offering, making it more likely that Barclays would need to raise more capital in the future, and (ii) Barclays had communications with the FSA, its U.K. regulator, concerning its Tier 1 equity ratio. This "omissions" theory fails as well.

First, plaintiff does not dispute that Barclays' capital ratios were well above regulatory minima before the Series 5 Offering. In *Solow* v. *Citigroup, Inc.*, 507 F. App'x 81, 82 (2d Cir. 2013), the Second Circuit held that even where a plaintiff had pled that the defendant bank "took actions which suggest that it risked falling under the well-capitalized threshold in the future," including the alleged failure to mark down tens of billions in subprime assets, there was no "duty to disclose those actions." Plaintiff makes no allegations here that Barclays' ratios were

[12] Plaintiff may argue that Barclays was required to disclose interim 1Q08 write-downs as "known trends or uncertainties" under Item 303 of Regulation S-K. 17 C.F.R. § 229.303(a)(3)(ii) (registrant must "[d]escribe any known trends or uncertainties that have had or the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations"). That is not correct. A trend must reflect persistent conditions that would cause reported financial results to no longer be "indicative of the [company's] future operating results or of future financial condition." *Litwin* v. *Blackstone Grp.*, 634 F.3d 706, 716 (2d Cir. 2011). That was not the case here, but even if it were, there was no "trend" that was "known" to Barclays but not to investors, because 1Q08 conditions were a continuation of well-publicized market dislocation and disclosed write-downs in prior periods.

[13] The Tier 1 capital ratio is the ratio of Tier 1 capital (which has various components) to risk-weighted assets ("RWAs"). RWAs are a bank's total assets multiplied by a regulatory risk weighting ascribed to those assets. The Tier 1 *equity* capital ratio is the ratio of common equity to RWAs. (56.1 ¶¶ 5-6.)

in danger of falling below regulatory minima. The lack of any actionable omission about Barclays' capital ratios is further confirmed by the fact that Barclays "disclosed its exposure to the . . . assets Plaintiff claims had the potential to decrease [its] capitalization levels," *Solow* v. *Citigroup*, *Inc.*, 2012 WL 1813277, at *4 (S.D.N.Y. May 18, 2012).

Second, the offering documents disclosed that Barclays "may, at any time and from time to time, without the consent or sanction of the holders of preference shares, create or issue further preference shares or other share capital of one or more series ranking equal or junior to the preference shares" (*e.g.*, equity). (Ex. 3 (Prospectus Supplement) at S-9.) In addition, Barclays CEO John Varley stated on a public conference call on February 19, 2008 concerning Barclays' 2007 results that Barclays' equity ratio of 5.1% had fallen below its internal target of 5.25%. (56.1 ¶ 33.) A reasonable investor would have understood that Barclays might in the future raise more capital.

Third, plaintiff's focus is on the Tier 1 equity ratio, but raising *equity* capital increases the amount of "cushion" available to absorb losses. So the supposedly undisclosed risk of Barclays raising more equity capital would have made the Series 5 ADS—which sit above equity shares in Barclays' capital structure—a *safer* investment. (56.1 ¶ 16.) *See Berger* v. *Beletic*, 248 F. Supp. 2d 597, 603 (N.D. Tex. 2003) (failure to disclose need to raise additional capital not actionable where undisclosed events "were in fact good for" the issuer). Thus, when Barclays announced an additional equity offering on June 25, 2008, the price of the Series 5 ADS *increased*. (56.1 ¶ 96.)

Finally, plaintiff's claim that Barclays had a duty to disclose its discussions with the FSA concerning capital is meritless. This claim is based on a March 2008 memo describing discussions between Barclays chairman Marcus Agius and the FSA chairman, which states:

> [The FSA chairman] expressed particular concern that our Tier 1 equity ratio is only 4.6 per cent (as compared with our own figure of 5 percent.) and, he believes, is forecast to be at or above our target of 5.25 per cent in 2 of the next 24 months. (Interestingly, he made no reference at any time to our Tier 1 ratio of 7.8 per cent, which is surprising given that the Tier 1 ratio, not the equity ratio, is the standard to which the regulators normally pay most attention). He queries whether we have any readily realisable assets for sale and so was keen to know what our contingency arrangements would be in an emergency – 'What would be the impact on Barclays of another sudden 10 percent fall in the US housing market?'. . . He referred to our equity profile ratio as being 'alarming' and said he needed to know 'as a matter of urgency' what our contingency plans were in order to decide 'whether we would need to take any action'. . . . [He] wants me to report back in due course to confirm that contingency planning has been 'fully and completely discussed' with the Board.

(Ex. 57.) As the document itself makes clear, the FSA did not even ask—much less require—Barclays to raise equity capital; it merely asked whether Barclays had contingency plans for raising equity capital, if it became necessary to do so. This is a far cry from the situation in *RBS*, where RBS had stated publicly that it "was 'not asked to raise capital by anyone,' including the FSA," when the FSA had "specifically required" RBS to raise capital. 783 F.3d at 393. But the Second Circuit held that even those allegations "are not a basis for a securities fraud claim," because "RBS was not deemed by the FSA to have violated FSA's minimum capital guidelines" and "critical facts were already known to the investing market," including "a steep deterioration in market conditions." *Id.* This reasoning applies *a fortiori* here.[14]

[14] This Court has also held that there is no generalized duty to disclose conversations with regulators, particularly where there has been no official regulatory action. *Richman* v. *Goldman Sachs Grp., Inc*., 868 F. Supp. 2d 261, 274-75 (S.D.N.Y. 2012) (disclosure only required when "regulatory investigation matures to the point where litigation is apparent and substantially certain to occur"); *see Christine Asia Co., Ltd.* v. *Alibaba Grp. Holding Ltd.*, 2016 WL 3648965, at *11 (S.D.N.Y. June 24, 2016) ("courts have held repeatedly that a company is not compelled to disclose every communication it has with a regulator—even where . . . a regulator has informed a company of deficiencies in its operations").

II. THERE IS NO TRIABLE ISSUE AS TO MATERIALITY.

Summary judgment should be granted on the independent ground that no triable issue of fact exists over whether the alleged misrepresentations would have been material to a reasonable investor in the Series 5 ADS. For there to be a triable issue of fact on materiality, plaintiff—who bears the burden of proof on this element of the claim, *Berks Cty. Emps.' Ret. Fund* v. *First Am. Corp.*, 734 F. Supp. 2d 533, 538 (S.D.N.Y. 2010)—must come forward with evidence of "a substantial likelihood that the disclosure of the [truth] would have been viewed by the reasonable investor as having significantly altered the total mix of information [already] made available." *ProShares*, 728 F.3d at 102. Materiality must be assessed in light of the specific security at issue. *See United States* v. *Litvak*, 808 F.3d 160, 182 (2d Cir. 2015) (reversing exclusion of expert testimony on valuation of specific securities at issue because it "would have been highly probative of materiality," especially given "meaningful distinction between the complex securities at issue" and "common equities and bonds traded" on NYSE); *Delta Holdings, Inc.* v. *Nat'l Distillers & Chem. Corp.*, 945 F.2d 1226, 1242-43 & n.4 (2d Cir. 1991) (assessing materiality "in the context of" the transaction as "structured"). Here, summary judgment is appropriate on this ground for at least two reasons.

First, there is no evidence that a reasonable investor in *these securities*—not common equity, but "debt-like" $25-par preference shares yielding an 8.125% dividend—would have considered the alleged misstatements or omissions important to the investment decision. Courts have recognized that the materiality inquiry differs (sometimes fundamentally) depending on the class of security at issue. "[T]he nature of news that would affect the markets for stock can be quite different [than] what would affect the markets for bonds." *In re Enron Corp. Sec. Litig.*, 529 F. Supp. 2d 644, 747 (S.D. Tex. 2006). "The primary concern of a debt holder is actual cash flow, the ability of the debt issuer to pay interest and principal as required," as distinct from "equity investors," who may be "concerned with," for example, "discrepancies in the company's books (because such variances would . . . affect[] the company's stock price)." *AUSA Life Ins. Co.* v. *Ernst & Young*, 206 F.3d 202, 227 (2d Cir. 2000) (Jacobs, J., concurring); *accord Kusner* v. *First Penn. Corp.*, 531 F.2d 1234, 1237 (3d Cir. 1976) (warnings "about earnings potential . . . might be of material interest to a stockholder," but not to a bondholder "because the bondholder will be paid his principal and interest regardless, and the market price of his security will be determined by factors external to the corporation's earnings"). Thus, the "factors affecting debt securities must . . . be examined analytically, not cursorily or superficially, with a view to their distinctive nature and to the kinds of news that would move their market price in contrast to the kind of information that might affect the more volatile stock market." *Enron*, 529 F. Supp. 2d at 749.[15]

Plaintiff's own testimony that the possibility of more write-downs was of "no interest" to him and "wasn't important" to him as an investor reflects the immateriality of the alleged misrepresentations. (Ex. 37 at 258.) Plaintiff's indifference to the possibility of further write-downs was entirely rational, given that Barclays had, as of 12/31/07, £1.2 trillion in assets and £32.5 billion of common shareholder equity (which was available to absorb losses before any preference shares were impacted). (56.1 ¶ 4.) That Barclays subsequently paid each and every 8.125% dividend on the Series 5 ADS (56.1 ¶ 22) shows that plaintiff's disinterest in the possibility of further write-downs was well-founded.

[15] The expert opinions that plaintiff proffers overlook the fundamental distinction between what would be important to an ordinary shareholder as opposed to a preference shareholder. Plaintiff's accounting expert, Mr. Regan, for example, expressly cabins his opinion to *accounting* materiality (*i.e.*, whether a given item was material to Barclays' financial statements, rather than to a preference share investor), and goes so far as to criticize Defendants' expert for distinguishing between different classes of securities in the materiality inquiry. Leaving aside that Mr. Regan's conclusory (and inadmissible) opinions do not establish an accounting violation here, an accounting violation does not answer the question of what would be material to an investor in Barclays' *preference* shares under the authorities cited above.

Second, although "[e]vent studies [that] examine the extent to which stock prices react to the release of new material information . . . are not uncommon in cases where materiality is an issue," *SEC* v. *Mudd*, No. 11 Civ. 9202, slip op. at 4 n.6 (S.D.N.Y. May 4, 2016) (Ex. 30), none of plaintiff's experts conducted an event study here.[16] Plaintiff's calculated decision not to do so is unsurprising given that there was no statistically significant price reaction to the revelation of the allegedly misstated or omitted information (as discussed in the next section), which itself "provides a strong indicator of immateriality." *In re Moody's Corp. Sec. Litig.*, 2013 WL 4516788, at *7 (S.D.N.Y. Aug. 23, 2013). This is because "it is reasonable to presume that a particular public, material misrepresentation will be reflected in the security's price." *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013). The Second Circuit has held that, to be material, "the disclosed information must be reasonably certain to have a substantial effect on the market price of the security." *Elkind* v. *Ligget & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980).[17] Plaintiff's experts did not even try to rebut the compelling evidence of immateriality based on the Series 5 ADS share price movements (or lack thereof).[18]

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[16] Plaintiff does not proffer an expert who, for example, conducted an analysis showing that the alleged misrepresentations concealed a risk that the Series 5 dividend would not be paid. By contrast, Barclays' expert (Dr. Stulz) conducted a "distance to default" analysis showing that none of the alleged misrepresentations jeopardized Barclays' ability to pay the dividend, and that no rational investor in these securities would have considered the alleged misrepresentations important. Dr. Stulz thus concludes the alleged misstatements had "no discernible impact on the holders of these shares." (Ex. 35 ¶ 104 & n.160.)

[17] *See also RMED Int'l, Inc.* v. *Sloan's Supermarkets, Inc.*, 2002 WL 31780188, at *2 & n.4 (S.D.N.Y. Dec. 11, 2002) ("[E]vidence of movement in a stock's price may be considered when determining materiality."); *United States* v. *Martoma*, 993 F. Supp. 2d 452, 457 (S.D.N.Y. 2014); *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000); *Gold* v. *DCL Inc.*, 399 F. Supp. 1123, 1129 n.13 (S.D.N.Y. 1973); *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1479 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993).

[18] One of plaintiff's experts, Joseph Mason, submitted a wholly conclusory opinion that Barclays' slightly lower equity capital ratio and FSA discussions—which he mischaracterizes as a "requirement" to raise capital—"increased the risk that Barclays would need to sell assets at distressed prices and/or raise expensive capital from additional investors." (Ex. 32 ¶ 43.) Such a "purely conclusory" opinion is "insufficient to defeat summary judgment." *Major League Baseball Props., Inc.* v. *Savino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008). This unadorned opinion is not supported by any quantitative or other evidence of what was (or reasonably should have been) important to Series 5

(*footnote continued*)

III. THE UNDISPUTED FACTS DEMONSTRATE THAT NO SERIES 5 LOSSES RESULTED FROM THE ALLEGED MISREPRESENTATIONS.

Under Section 11, defendants are not liable for damages resulting from factors "other than the depreciation in value of [the Series 5 ADS] resulting from" the alleged misrepresentations. 15 U.S.C. § 77k(e). To prevail on this "negative causation" defense, the Barclays Defendants need not prove *what* caused the Series 5 ADS price declines over the class period; they are entitled to summary judgment if they show "that an otherwise recoverable loss was not caused by the alleged misstatement or omission." *Iowa Pub. Emps.' Ret. Sys.* v. *MF Global, Ltd.*, 620 F.3d 137, 145 (2d Cir. 2010). Here the lack of price reaction to revelation of the supposedly misstated or concealed information shows that the alleged misrepresentations did not cause any declines in the Series 5 ADS, and Dr. Kleidon's event study confirms this. Thus, summary judgment on the Barclays Defendants' negative causation defense is warranted. *See Akerman*, 810 F.2d at 343 (affirming summary judgment on negative loss causation where defendants "establish[ed] that the misstatement was barely material and . . . the public failed to react adversely to its disclosure"); *Goldkrantz* v. *Griffin*, 1999 WL 191540, at *1 (S.D.N.Y. Apr. 6, 1999) (granting summary judgment on negative loss causation based on expert analysis demonstrating "that the alleged misrepresentation did not cause . . . any damages"), *aff'd*, 201 F.3d 431 (2d Cir. 1999).

A. The Series 5 ADS Prices Demonstrate That the Alleged Misrepresentations Did Not Cause Any Decline in the Price of Series 5 Shares.

Courts have held that the absence of loss causation, as evidenced by stock price history, is a sufficient basis for granting summary judgment to defendants in an action under the

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(*footnote continued*)

investors, and cannot defeat summary judgment. *See Dalberth*, 766 F.3d at 189 ("An expert may be entitled to his opinion, but he is not entitled to a conclusion that his view of the facts necessarily precludes summary judgment.").

1933 Act. *Akerman*, 810 F.2d at 343; *Ross* v. *Warner*, 1980 WL 1474, at *9 (S.D.N.Y. Dec. 11, 1980). This is because markets assimilate and react to material information quickly, so if previously misstated or undisclosed negative news material to the security in question is revealed, one would expect a corresponding decrease in the price of that security.

Here, summary judgment on "negative loss causation" is warranted because (i) plaintiff's alleged misrepresentations were all "corrected" by August 7, 2008 (at the latest), and (ii) when each "correction" was announced, the Series 5 ADS price *went up* or went down by an immaterial amount (less than 1%), which also was not statistically significant:

Misrepresentation Theory	"Correction" Date	Previous Day Closing Price	Closing Price	Change
12/31/07 Write-downs	May 15, 2008	$25.17	$25.23	up $0.06
1Q08 Write-downs				
Need to Raise Capital	June 25, 2008	$24.80	$24.96	up $0.16
Notional Amount of Monoline Insurance	August 7, 2008	$24.69	$24.46	down $0.23[19]

(56.1 ¶¶ 90-100.) This Series 5 price activity warrants summary judgment on negative loss causation. *See Akerman*, 810 F.2d at 343; *Ross*, 1980 WL 1474, at *9 (granting summary judgment on negative loss causation "[i]n light of the minimal materiality of [the] nondisclosures and the market's failure to react in any discernible[] way to the [corrective] revelations").[20]

[19] As Dr. Kleidon concluded from his event study, this mere 23-cent decrease in the Series 5 ADS price on August 7, 2008 was not statistically significant. (56.1 ¶ 100.) Where an event study demonstrates that a stock price decrease is not statistically significant, the decrease may have been "caused by chance and, consequently" does not "establish that the alleged fraud caused" that decrease. *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 2016 WL 4098385, at *11 (S.D.N.Y. July 25, 2016).

[20] *See also Waters* v. *Gen. Elec. Co.*, 2010 WL 3910303, at *8 (S.D.N.Y. Sept. 29, 2010) ("Court cannot find . . . a single section 10(b) case in which the plaintiff prevailed on a motion to dismiss when the stock price *increased* after an announcement revealing an alleged fraud."), *aff'd*, 447 F. App'x 229 (2d Cir. 2011); *W. Palm Beach Firefighters' Pension Fund* v. *Startek, Inc.*, 2008 WL 4838671, at *6 (D. Colo. Nov. 6, 2008) (no loss causation where "[n]o stock price drops occurred in the aftermath of this disclosure; rather, the initial response to the registration statement drove stock prices up"); *Weiss* v. *Amkor Tech., Inc.*, 527 F. Supp. 2d 938, 946-47 (D. Ariz. 2007) ("Plaintiffs have

(*footnote continued*)

Equally compelling is the fact that the Series 5 ADS price declines that plaintiff seeks to recover, which occurred well *after* these "corrective" disclosures—from September 2008 through March 2009—coincided with "one of the worst financial crises in the history of this nation." *Bloomberg L.P.* v. *Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 265 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010). As the Supreme Court made clear in *Dura Pharmaceuticals, Inc.* v. *Broudo*, loss causation *excludes* stock price declines due to "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price."[21] 544 U.S. 336, 343 (2005).

Although Barclays need not show what *did* cause the Series 5 price declines in order to prevail on the negative causation defense, *see Iowa Pub.*, 620 F.3d at 145, it is obvious what caused them here. The Series 5 ADS were offered at $25 per share and were trading at $24.46 after the last "corrective" disclosure on August 7, 2008. The declines from $24.46 on August 7, 2008 to $4.95 on March 9, 2009 (the class-period low) coincided with events unrelated to the alleged misrepresentations, such as the collapse of Lehman Brothers, the U.S. government's bailout of AIG and the U.K. government's injecting £37 billion into British banks other than Barclays. (56.1 ¶¶ 102-06.) Where, as here, "the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases." *Lentell* v. *Merrill Lynch & Co., Inc.*, 396

(*footnote continued*)

failed to link their losses to the alleged misrepresentations by showing that the Amkor stock price dropped upon revelation of the true state of the facts. . . . [O]nce a corrective disclosure was issued the stock price actually increased.").

[21] "[T]he negative causation defense in Section 11 and the loss causation element in Section 10(b) are mirror images." *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 375314, at *6 (S.D.N.Y. Feb. 17, 2005).

F.3d 161, 174 (2d Cir. 2005); *Carpe* v. *Aquila, Inc.*, 2005 WL 1138833, at *8 (W.D. Mo. Mar. 23, 2005) (where "decline in stock price entirely was due to market factors . . . facts establish a 'negative causation' affirmative defense"). Thus, although Dr. Kleidon has done an event study that confirms this (as discussed next), it does not take a Ph.D. in economics to see that the post-August 2007 price declines were not caused by the alleged misrepresentations.

B. Dr. Kleidon's Analysis Demonstrates That the Alleged Misrepresentations Did Not Cause Any Price Declines in the Series 5 ADS.

The event study analysis by Barclays' loss causation expert, Dr. Allan Kleidon, confirms that the Series 5 ADS price declines that plaintiff seeks to recover did not result from any alleged misstatements or omissions. *See Goldkrantz*, 1999 WL 191540, at *1 (granting summary judgment on negative loss causation based on expert analysis demonstrating "that the alleged misrepresentation did not cause . . . any damages").

Dr. Kleidon conducted an event study analyzing Series 5 ADS price changes. The facts underlying Dr. Kleidon's analysis and conclusions are undisputed and in the public domain: (a) closing prices of the Series 5 ADS; (b) closing prices of an index of other preferred securities; and (c) Barclays' disclosures and other publicly available information (which are not offered for their truth, but as part of the total mix of information available in the market). Dr. Kleidon concluded that "[t]here were no statistically significant price declines on any days when (i) any allegedly corrective information cited in the [SCAC] was disclosed to the market, or (ii) any allegedly undisclosed risk cited in the [SCAC] materialized." (Ex. 31 (Kleidon Report) ¶ 5.) Dr. Kleidon's analysis also showed that "[a]ll statistically significant price declines in the Series 5 ADS . . . occurred on days when (i) there was no allegedly corrective information cited in the [SCAC] disclosed to the market, and (ii) no allegedly undisclosed risk cited in the [SCAC] materialized." (*Id.* ¶ 5.) Accordingly, Dr. Kleidon concluded that "the price declines . . . are not attributable in whole or in part to any of the alleged misrepresentations." (*Id.*)[22] Given this showing, plaintiff must adduce "specific facts showing that there is a genuine issue for trial." *Akerman*, 810 F.2d at 343. Plaintiff has not done so.

1. Plaintiff's Expert's Conclusory and Speculative Opinions Do Not Create a Triable Issue of Fact.

In *Akerman*, the Second Circuit affirmed summary judgment on negative loss causation because "Defendants met their burden, as set forth in section 11(e), by establishing that the misstatement was barely material and that the public failed to react adversely to its disclosure," and "[d]espite extensive discovery, plaintiffs completely failed to produce any evidence, other than unreliable and sometimes inconsistent statistical studies and theories, suggesting that [the] price decline actually resulted from the misstatement." 810 F.2d at 343. Thus, if defendants come forward with facts establishing the negative causation defense and "plaintiffs are without a means of demonstrating that any portion of the decline . . . in stock price is due to any alleged fraud," defendants "are entitled to summary judgment." *Carpe*, 2005 WL 1138833, at *8; *see Shanahan* v. *Vallat*, 2008 WL 4525452, at *6 (S.D.N.Y. Oct. 3, 2008) ("Plaintiffs must advance more than mere speculation in order to overcome the showing that their loss was attributable to an intervening cause.").[23] Moreover, a "conclusory critique of

[22] Specifically, Dr. Kleidon's analysis shows that there were ten days on which there were statistically significant residual returns in the Series 5 ADS price. (Ex. 31 (Kleidon Report) ¶ 50.) A residual return "is the difference between the security's actual return and its expected return. A security's expected return is the return one would expect based on general stock market price movements and industry-related factors that are unrelated to the specific event that is being examined." *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *1 n.1 (S.D.N.Y. Sept. 24, 2015) (quotations omitted). Only one of those days—October 13, 2008—is a day on which any allegedly "corrective" information entered the market, and the price of the Series 5 ADS *increased* on that day. (Ex. 31 (Kleidon Report) ¶ 50) On the other nine days, no "corrective" information entered the market. (*Id.*) There was not a single day on which "corrective" information entered the market and the Series 5 price decreased by a statistically significant amount. (*Id.*)

[23] *See also Madden* v. *Deloitte & Touche LLP*, 118 F. App'x 150, 153-54 (9th Cir. 2004) (affirming summary judgment on negative loss causation where "[u]ndisputed expert testimony established that . . . stock decrease . . . was not caused by revelations" of alleged misrepresentations).

defendants' statistical analysis is insufficient to create a material question of fact" with respect to negative loss causation. *Goldkrantz*, 1999 WL 191540, at *5; *see In re Fortune Sys. Sec. Litig.*, 680 F. Supp. 1360, 1368 (N.D. Cal. 1987) ("speculation, unfounded opinions, and misleading comparisons" cannot "create a genuine issue of material fact" about negative loss causation).

When analyzing stock price declines in this context, an "event study or similar analysis is necessary" to "eliminat[e] that portion of the price decline that is the result of forces unrelated to the wrong." *In re Exec. Telecard, Ltd. Sec. Litig.*, 979 F. Supp. 1021, 1026 (S.D.N.Y. 1997); *see In re Vivendi, S.A. Sec. Litig.*, 2016 WL 5389288, at *19 (2d Cir. Sept. 27, 2016) (conducting "event study" to assess loss causation is "standard operating procedure in federal securities litigation"). Plaintiff's proffered loss causation expert, Mr. Coffman, made no serious effort to rebut Dr. Kleidon's showing that the Series 5 ADS price declines resulted from factors unrelated to the alleged misrepresentations. Mr. Coffman admitted that he did not perform an event study. (Ex. 40 (Coffman Dep.) at 117.) Instead, he only speculated that particular events *might* have disclosed information "related to" the alleged misrepresentations—although he did *not* opine that those events *actually* caused a decline in the Series 5 ADS price. (*See*, *e.g.*, *id.* at 29 ("I'm not planning on offering an opinion . . . of what actually did cause a particular price movement at this particular time.").) Mr. Coffman's speculative and conclusory opinions are insufficient to overcome summary judgment.

2. Mr. Coffman's Speculation Is Wrong as a Matter of Law.

Mr. Coffman's "analysis" regarding additional supposed "corrective" disclosures conflicts with well-settled Second Circuit law:

- Mr. Coffman speculates that additional news not identified by Dr. Kleidon—such as December 22, 2008 reports that Barclays might sell part of Barclays Capital—may be "relate[d] to Plaintiff's claims." (Ex. 36 (Coffman Report) ¶¶ 42, 43-76.) But he concedes that he did *not* analyze the cause of any specific Series 5 price change. (*See* Ex. 40 (Coffman Dep.) at 29, 69, 70, 72.) *See Akerman*, 810 F.2d at 343.[24]

- Mr. Coffman did not consider the effect of any of the three "corrective" disclosures discussed above (from May 15, June 25 and August 7, 2008). Instead, he simply assumed that the alleged misrepresentations remained uncorrected for some unspecified period of time. (*See* Ex. 40 (Coffman Dep.) at 63-68.) *See Fortune*, 680 F. Supp. at 1367 (expert testimony did not preclude summary judgment on negative loss causation where plaintiff's expert "*assumed* defendant's liability").

- The news identified by Mr. Coffman (Ex. 36 (Coffman Report) ¶¶ 44-52, 59-62, 72-76)—such as a September 3, 2008 analyst downgrade of Barclays and an October 8, 2008 U.K. government announcement that it would inject capital into the *entire* banking system—are no corrective disclosures under settled law.

  First, a corrective disclosure must reveal "some then-undisclosed fact" about the alleged misrepresentations. *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010). But Mr. Coffman's news did not do so, in light of the three earlier corrective disclosures (which Mr. Coffman ignored).[25]

  Second, he points to no evidence that the market recognized any connection between his purported "related" news events and the alleged misrepresentations. Without evidence of such a link, such events cannot constitute corrective disclosures that could support loss causation. *See Lentell*, 396 F.3d at 173-75 (no loss causation where "corrective" disclosure did not reveal to the market the "truth" regarding the alleged misrepresentations).[26]

[24] Contrary to Mr. Coffman's view, news that is merely "related to" the subject of an alleged misrepresentation is not relevant to the loss causation analysis if it does not correct a prior misstatement or reveal an omission or previously undisclosed risk, because—as Section 11 states and as the Supreme Court held in *Dura*—in order to be recoverable a loss must "result from" the misrepresentation. 15 U.S.C. § 77k(e); *Dura*, 544 U.S. at 343-44.

[25] Many of Mr. Coffman's alleged "related" events were analyst or ratings reports about Barclays. But those reports were, at most, "negative characterization[s] of already-public information," which as a matter of law cannot be corrective disclosures. *Omnicom*, 597 F.3d at 511-12; *see Meyer* v. *Greene*, 710 F.3d 1189, 1199 (11th Cir. 2013) ("mere repackaging of already-public information by an analyst . . . is simply insufficient to constitute a corrective disclosure").

[26] *See also Metzler Inv. GMBH* v. *Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 (9th Cir. 2008) ("Loss causation requires more" than "contend[ing] that the market 'understood' a [disclosure] precipitating a loss as a coded message revealing the fraud."); *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 285 (S.D.N.Y. 2008) (no loss causation where plaintiffs did not allege that "investors expressly drew a connection between" corrective disclosure and alleged misrepresentation).

Mr. Coffman's speculation, which merely quibbles around the edges of Dr. Kleidon's event study analysis, cannot defeat summary judgment. *Akerman*, 810 F.2d at 343; *Goldkrantz*, 1999 WL 191540, at *5; *Fortune*, 680 F. Supp. at 1368; *Shanahan*, 2008 WL 4525452, at *6.

IV. SERIES 5 PURCHASERS AFTER AUGUST 7, 2008 HAVE NO CLAIMS.

At a minimum, the Barclays Defendants are entitled to summary judgment against class members who bought Series 5 ADS after August 7, 2008, by which time all of the alleged misrepresentations were corrected. By then, Barclays had disclosed (i) its first-quarter 2008 results, including write-downs, on May 15, 2008; (ii) that it was raising £4.5 billion in new equity capital, on June 25, 2008; and (iii) its first-half 2008 results, including write-downs and the notional amount of its monoline insurance, on August 7, 2008. No purchaser after August 7 has a viable Section 11 claim for two reasons due to those disclosures: (i) they gave purchasers knowledge of the alleged misrepresentations in the Series 5 offering documents; and (ii) they corrected the alleged misrepresentations, rendering them no longer material (if they ever were).

Knowledge. As this Court recognized in its initial dismissal decision, "a plaintiff 'may not recover under §[] 11 . . . if [the plaintiff] knew of the alleged untruth or omission at the time of purchase." *Barclays Bank*, 2011 WL 31548, at *10 (quoting *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 441 (S.D.N.Y. 2001)). Barclays' three "corrective" disclosures—which were in SEC filings and *directly* corrected the alleged misrepresentations—are precisely the type of "widely known, public information," *N.J. Carpenters Health Fund* v. *Royal Bank of Scot. Grp.*, 709 F.3d 109, 127 n.12 (2d Cir. 2013), that gave investors "specific knowledge of the [alleged] falsity of the particular statements at issue" and preclude Section 11 claims, *Fed. Housing Fin. Agency* v. *UBS Ams. Inc.*, 2013 WL 3284118, at *14 (S.D.N.Y. June 28, 2013). Investors are charged with knowledge of SEC filings as a matter of law. *See Bibeault* v. *Advanced Health Corp.*, 1999 WL 301691, at *5 (S.D.N.Y. May 12, 1999) ("[C]ourts deem reasonable investors on notice of the contents of SEC filings.") It was for this reason that this Court correctly held that former plaintiff Martin Ettin—who purchased his Series 5 ADS after August 7, 2008—had no Section 11 claim as pled in the prior complaint. In its class certification decision, the Court declined to end the class period on August 7, 2008 because (i) the SCAC had removed the prior complaint's concession that Barclays made "adequate" disclosures by August 7 and replaced it with "certain" disclosures, and (ii) "the time when the alleged misrepresentations were sufficiently revealed is a question of fact that is not appropriate for resolution on a motion for class certification." *In re Barclays Bank PLC Sec. Litig.*, 2016 WL 3235290, at *7 (S.D.N.Y. June 9, 2016). Now, at summary judgment, the Court may consider the disclosures themselves, and it is undisputed that no allegedly actionable misrepresentations remained in the market after August 7, 2008.[27]

Immateriality. The disclosures made by August 7, 2008 rendered immaterial as a matter of law any alleged misrepresentations in the Series 5 offering materials. "[A]s a general matter, the 'total mix' of information may . . . include information already in the public domain and facts known or reasonably available to" investors. *Litwin*, 634 F.3d at 718 (quotations omitted). By August 7, 2008, the total mix of information available to potential Series 5 purchasers included Barclays' additional write-downs through June 30, 2008, the notional amount of Barclays' monoline insurance, and Barclays' issuance of £4.5 billion in new equity capital. Thus, just as those disclosures provided "knowledge" precluding any Section 11 claim

[27] If plaintiff argues that some purchasers after August 7, 2008 may have viable Section 11 claims depending on what they knew or did not know when they purchased, then the class would need to be modified to end on August 7, 2008 because individual issues of knowledge would predominate after that date. *See N.J. Carpenters Health Fund* v. *RALI Series 2006-Q01 Trust*, 477 F. App'x 813 (2d Cir. 2012) (affirming denial of class certification where individual knowledge issues predominated).

after August 7, they also rendered any prior alleged misrepresentations immaterial.[28] *See Perrigo Co.* v. *Mylan N.V.*, 2015 WL 9916726, at *16 (S.D.N.Y. Oct. 29, 2015) ("alleged omission is immaterial" in light of subsequent public disclosure that "was widely disseminated").

CONCLUSION

For the foregoing reasons, the Barclays Defendants respectfully request that the Court grant their motion for summary judgment.

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Respectfully submitted,

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[28] Plaintiff may argue that the "omission" of Barclays Capital's 2007 *gross* credit market losses from the 2007 20-F remained "uncorrected" until they were included in Barclays' *2008* results issued in early 2009. But that is incorrect. The "omission" of 2007 gross losses from the Series 5 offering materials, if ever material, was superseded and rendered immaterial by the disclosure of *actual 2008 results* in May 2008 and August 2008. *Cf. Blank* v. *Jacobs*, 2009 WL 3233037, at *6 (E.D.N.Y. Sept. 30, 2009) ("Once a later audit was released, the earlier one becomes irrelevant in determining the price of the stock because it has been superceded."); *Delta Holdings*, 945 F.2d at 1243 ("[C]alculations that might have been made from the . . . February Report would not have been of interest sixteen months later in June 1983. By the very terms of the Report, the February calculations would be stale by December 1982."). Equally unavailing is the SCAC's citation to an October 13, 2008 announcement that Barclays would raise an additional £6.5 billion in equity capital (rather than accepting U.K. government funds). (SCAC ¶ 218.) Here again, any "omission" from the Series 5 offering materials of the possibility that Barclays might need to raise additional equity capital had already been "corrected" by the June 25, 2008 announcement of the £4.5 billion equity offering. In any event, the Series 5 ADS price *increased* on the dates of both of those post-August 7, 2008 disclosures cited in the SCAC. (56.1 ¶¶ 108, 110-13.)