UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re BARCLAYS BANK PLC SECURITIES LITIGATION	:	Master File No. 1:09-cv-01989-PAC CLASS ACTION
This Document Relates To: ALL ACTIONS.	:	[FILED UNDER SEAL]

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE BARCLAYS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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GLOSSARY OF DEFINED TERMS

1Q08	The three-month period ending March 31, 2008
2007 20-F	Barclays' Annual Report on Form 20-F for the year-ended December 31, 2007, filed with the SEC on March 26, 2008 and incorporated by reference into the Offering Documents
4Q07	The three-month period ending December 31, 2007
ABS	Asset-backed security
ADS	American depositary share
Board	Barclays' Board of Directors
CDO	Collateralized debt obligation
CRE	Commercial real estate
Credit Market Positions Disclosure	Section of Barclays' 2007 20-F titled "Barclays Capital credit market positions"
D. Br.	Memorandum of Law in Support of the Barclays Defendants' Motion for Summary Judgment
Defendants or 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
EquiFirst	EquiFirst Financial Corporation
Ex. __	Exhibits to the Declaration of Sharan Nirmul in Support of Plaintiff's Memorandum of Law in Opposition to the Barclays Defendants' Motion for Summary Judgment
FSA	U.K. Financial Services Authority
Kleidon Brief or Kleidon Br.	Plaintiff's Memorandum of Law in Support of Lead Plaintiff's Motion to Exclude Expert Opinions and Testimony of Allan W. Kleidon, Ph.D. (ECF No. 177)
IAS 10	International Accounting Standard No. 10, *Events after the Reporting Period*

Offering	Barclays' April 8, 2008 public offering of 100 million ADS representing Non-Cumulative Callable Dollar Preference Shares, Series 5 at $25 per share
Offering Documents	The registration statement and prospectus filed with the SEC on August 31, 2007 and the 424(b)(5) prospectus supplement dated April 8, 2008, and the documents incorporated by reference therein, including the 2007 20-F
Plaintiff	Dennis Askelson
Plaintiff's Rule 56.1 Statement	Plaintiff's Response to the Barclays Defendants' Local Rule 56.1 Statement and Counterstatement of Additional Material Facts
PwC	PricewaterhouseCoopers, LLP
RWA	Risk-weighted assets
SAC	Plaintiff's Second Consolidated Amended Complaint for Violation of the Federal Securities Laws (ECF No. 66)
SEC	United States Securities and Exchange Commission
Securities Act	Securities Act of 1933

I. PRELIMINARY STATEMENT

The theory of this case is straightforward. Barclays conducted the Offering in what Defendants have described as a "period of widely publicized, immense dislocation in the credit markets." D. Br. at 7. Yet, in this context, the Offering Documents concealed and misstated material credit and capital risks that Barclays faced from the ***billions*** of British pounds in credit market assets it possessed. Through these defective Offering Documents, Barclays completed the Offering and secured desperately needed capital while transferring massive undisclosed risks to the Series 5 investors. As the risks hidden by the Offering Documents manifested themselves in the months following the Offering, Barclays found itself on the brink of nationalization – a fate it avoided by secretly paying a massive kickback to Qatari investors in exchange for a multi-billion dollar cash infusion. By April 8, 2009 when the first complaint in this matter was filed, the Series 5 shares, which were offered at $25 per share, traded at $12.82, less than half of their original price.

Faced with a herculean task of demonstrating that no triable issues of fact exist, Defendants recast Plaintiff's theories of liability and ignore much of the evidentiary record. For example, Defendants contend that Plaintiff's case is limited to: (i) two categories of misstatements and omissions relating to Barclays' credit market positions, (a) Barclays' monoline exposure and (b) 1Q08 writedowns; and (ii) misstatements and omissions regarding Barclays' capital adequacy at the time of the Offering. In so doing, Defendants mischaracterize Plaintiff's claims and ignore multiple misstatements and omissions concerning Barclays' credit market disclosures that Plaintiff has pursued throughout the duration of this case, and thus will necessarily be submitted to a jury. *See infra* §III.B.

The aspects of Plaintiff's case that Defendants do challenge arise from Barclays' 2007 20-F, which was the exclusive source of risk and financial disclosure for the Offering. *See infra*

§III.B. Specifically, Barclays' Credit Market Positions Disclosure purported to disclose the entirety of "Barclays Capital Credit Market Positions," and elsewhere disclosed Barclays' Tier 1 equity and capital ratios. In the context of the dislocated credit markets, these disclosures were critical to understanding the risk of investing in Barclays. Unbeknownst to investors, however, the Credit Market Positions Disclosure misrepresented and omitted to disclose the material risk posed to Barclays from its investment bank, Barclays Capital, which was accruing billions of pounds of credit market assets on its balance sheet through ill-timed investments in subprime and Alt-A positions.

For example, while Barclays held nearly £60 billion in credit market positions on its balance sheet, it disclosed just £37.8 billion in its 2007 20-F Credit Market Positions Disclosure, rendering that disclosure materially false and misleading. *See infra* §III.B.1. Among these undisclosed assets were £21 billion in positions insured by monoline insurers, which warranted disclosure for the additional reason that these insurers were on the brink of collapse. Defendants argue that Barclays had no obligation to disclose the £21 billion "notional" amount of its monoline exposure and assert that the number was "not a real meaningful number" to investors. Yet, Barclays privately disclosed that very same £21 billion position to its regulators, Board, auditors, and large stakeholders to apprise them of its monoline risk. Accordingly, the question of whether Barclays' Credit Market Positions Disclosure was materially misleading to a reasonable investor, given its omission of Barclays' monoline positions, must be put to a jury.

Defendants' challenge to Plaintiff's claim concerning Barclays' reported subprime and Alt-A holdings fares no better. *See infra* §III.B.2. Barclays promoted its subprime and Alt-A loans in the 2007 20-F as high-quality, almost impervious to the delinquencies that imperiled other banks' subprime and Alt-A portfolios. In the three months preceding the Offering, however, as regulatory scrutiny into Barclays' valuations increased and downward credit market trends intensified, the credit market positions that Barclays disclosed in the 2007 20-F had become dramatically impaired. Specifically, Barclays witnessed a dramatic impairment of its £3.205 billion subprime whole loan and £4.9 billion Alt-A asset portfolios immediately preceding the Offering. During 1Q08, rising delinquencies in its subprime loans required Barclays to take over ***£446 million*** in whole loan writedowns – nearly ***four times*** the amount of writedowns it recorded in all of 2007. Likewise, Barclays' Alt-A portfolio declined in value by ***£675 million***, or ***six times*** the amount of writedowns recorded in all of 2007. The erosion of these assets spurred Barclays to devise a plan to terminate its EquiFirst unit, a subprime mortgage originator that it had acquired barely a year earlier and had continued to tout as sound. These events represented dramatic and adverse trends in Barclays' operations, triggering a disclosure duty to the Series 5 investors under Items 303 and 503, which Barclays did not fulfill.

Defendants also challenge Plaintiff's claim that Barclays was required to update its 2007 20-F to inform investors of the deleterious impact that adverse credit market events (and the deterioration of Barclays' credit market assets) had on Barclays' capital position. *See infra* §III.B.3. The 2007 20-F disclosed that Barclays' Tier 1 Capital Ratio and Equity Tier 1 ratio were 7.8% and 5.1%, respectively. But, by the time of the Series 5 Offering, Barclays' Equity Tier 1 Ratio declined by almost 15% to just 4.34% and its Capital Tier 1 Ratio was at 6.69%. Barclays' declining capital ratios were of material concern to Barclays' U.K. regulator, the FSA, which had, in no uncertain terms, demanded that Barclays raise its Equity Tier 1 ratio to 5.25% by year end. Internally, Barclays acknowledged that meeting the FSA's demand would be extremely challenging and costly as it would require either raising capital in a distressed market or selling RWAs, which had ballooned due to the increasing riskiness of its credit market positions and become largely illiquid. These facts necessitated disclosure under Items 303 and 503 of Regulation S-K, and "the adequacy of disclosure under Item 303 is . . . normally a jury question." *In re Surebeam Sec. Litig*, 2005 WL 5036360, at *13 (S.D. Cal. Jan. 3, 2005).

Defendants next contend that the misstatements and omissions were immaterial. Yet, summary judgment can only be granted on the issue of materiality "if the established omissions are so obviously unimportant to an investor, that reasonable minds cannot differ on the question of materiality," *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 450 (1976), which showing has not been made here. *See infra* §III.B.4.[1] *First*, the misstatements and omissions concerning, *inter alia*, more than £21 billion in undisclosed credit positions, greater than £1 billion in subprime and Alt-A writedowns, and deteriorating capital ratios cannot be deemed immaterial to investors during the financial crisis as a matter of law. *Second*, the materiality of the multiple misstatements and omissions that Defendants ignore in their Motion necessarily are reserved for the jury. *Third*, the volatile market into which the Series 5 shares were sold creates factual issues as to the materiality of the misstatements and omissions. Indeed, the Second Circuit recognized in this very matter that in the context of "a quickly deteriorating credit market . . . the particulars about a firm's exposure to that market could assume a level of importance, and hence materiality, that may not have been the case in less economically stressful times." *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 139-40 (2d Cir. 2013). Thus, there is no basis to conclude that the misstatements and omissions at issue in this case are immaterial as a matter of law.

Finally, Defendants incorrectly argue that they have proved negative causation on the grounds that their causation expert, Dr. Allan Kleidon, found that the release of corrective information related to Plaintiff's claims was not associated with any statistically significant price

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[1] Unless otherwise noted herein: (i) all internal citations and quotation marks are omitted and all emphasis is added; and (ii) references to "¶__" are to Plaintiff's Rule 56.1 Statement, filed contemporaneously herewith.

declines in the Series 5 shares. *See infra* §III.C. First, Defendants have failed to satisfy their burden under Section 11(e) to show that none of the price diminution in the Series 5 shares from the time of the Offering until the initial complaint was filed was caused by something other than the alleged misstatements and omissions. Second, Kleidon's analysis, upon which Defendants rely, is fatally flawed, as it cannot establish a lack of causation. As detailed in the Kleidon Brief, Kleidon relies on an event study, which is traditionally used to show that an event caused an observed stock price reaction, to opine that an event *did not* cause an observed stock price decline. In doing so, he commits the same basic statistical error that this Court recently rejected in *SEC v. Mudd*, 2016 WL 2593980, at *7 (S.D.N.Y. May 4, 2016) (Crotty, J.) (excluding expert who incorrectly opined that lack of statistical significance under an event study proves the lack of materiality).

Defendants also try to resurrect the argument, which the Second Circuit implicitly rejected on appeal and this Court directly rejected at class certification, that all of the information that was omitted from the Offering Documents was disclosed by August 2008, such that investors who acquired shares thereafter either knew of the misstatements in the Offering Documents or the misstatements would not have been material to them. As set forth herein, Defendants fail to demonstrate, as a matter of law, that the full truth was revealed to the market by August 7, 2008.

II. RELEVANT FACTUAL BACKGROUND

The relevant facts in this case are fully set forth in Plaintiff's Rule 56.1 Statement submitted herewith and discussed in the relevant argument sections below. Additionally, Plaintiff set forth in his motion for class certification the principle theories of liability which he intends to pursue at a trial of this matter. *See* ECF No. 142.

III. ARGUMENT

A. Applicable Legal Standards

1. Summary Judgment Standard

A motion for summary judgment should be denied unless "there is no genuine issue as to any material fact" such that "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists." *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010). "[I]f there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Id.* "The function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 326 (2d Cir. 2011). Thus, "[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006).

2. Liability Under Section 11

"Section[] 11 . . . of the Securities Act impose[s] liability on certain participants in a registered securities offering when the registration statement or prospectus contains material misstatements or omissions." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012) (citing 15 U.S.C. §§ 77k). Under Section 11, "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). An omission is actionable under Section 11 if it is material and renders affirmative statements in the offering documents false or misleading, or is "in contravention of an affirmative legal disclosure obligation." *Panther Partners*, 681 F.3d at

120. A misstated or omitted fact is material if "a reasonable investor would consider [it] important." *Meyer v. JinkoSolar Holdings Co. Ltd.*, 761 F.3d 245, 251 (2d Cir. 2014).

a. Affirmative Duty to Disclose Known Adverse Trends

Item 5 of Form 20-F requires foreign issuers like Barclays to identify, "any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the company's net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition." Item 5 is substantially similar to Item 303 of Regulation S-K. *See* 17 C.F.R. § 229.303(a)(1)-(5) (requiring disclosure of, *inter alia*, known trends, demands, or uncertainties that are reasonably likely to adversely affect issuers' financial condition). As a result, the SEC has stated that Item 5 of Form 20-F "call[s] for the same disclosure as Item 303 of Regulation S-K." *See* Ex. 232.

Instruction 3 to Item 303(a) provides that the Management Discussion and Analysis section incorporated within a prospectus "shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir. 2011). "The SEC's interpretive release regarding Item 303 clarifies that the Regulation imposes a disclosure duty where a trend, demand, commitment, event or uncertainty is both [1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial condition or results of operations." *Id.*

"[F]ailing to comply with Item 303 by omitting known trends or uncertainties from a registration statement or prospectus is actionable under Section 11." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015); *accord Panther Partners*, 681 F.3d at 120; *Litwin*, 634

F.3d at 716. The Second Circuit has "emphasize[d]" that the "key information" that must be disclosed under Item 303 is not just the "downward trend" itself, but rather "the manner in which that then-known trend, event or uncertainty might reasonably be expected to materially impact" the corporate defendant. *Panther Partners*, 681 F.3d at 121 (citing *Litwin.*, 634 F.3d at 719). Materiality is the touchstone for a company's disclosure duty under Item 303. *See In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, 986 F. Supp. 2d 524, 541-42 (S.D.N.Y. 2014) (Sweet, J.) ("*Litwin* applied a materiality standard" to Item 303 disclosure duty). The determination of whether omitted information is material is intensely factual and thus, the adequacy of disclosure under Item 303 is "normally a jury question." *See Surebeam*, 2005 WL 5036360, at *13; *In re Adams Golf, Inc., Sec. Litig.*, 618 F. Supp. 2d 343, 348-49 (D. Del. 2009) (same).

b. <u>Affirmative Duty to Disclose the Most Significant Risks</u>

Item 3 of Form F-3, which governs foreign issuers' registration statements, incorporates by reference Item 503 of Regulation S-K. Item 503 requires a registration statement to include a "plain English . . . discussion of the most significant factors that make the offering speculative or risky" and an explanation of "how the risk affects the issuer or the securities being offered." 17 C.F.R. § 229.503. Failure to comply with Item 503 can support Section 11 liability and the same facts giving rise to an Item 303 violation can also give rise to a violation of Item 503. *In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429, at *27 (S.D.N.Y. July 25, 2016) (sustaining Section 11 claim where complaint "sufficiently alleges a claim under Item 303" and "for many of the same reasons . . . the allegations are also sufficient to state a claim under Item 503").

c. <u>Affirmative Duty to Disclose Material Subsequent Events</u>

Barclays' year-end financial statements included in its 2007 20-F, which was incorporated by reference in the Offering Documents, are subject to IAS 10. IAS 10 required Barclays to disclose material events arising after the close of the annual reporting period

(December 31, 2007) through the filing of the 20-F. *Id*. (requiring that the "entity shall disclose the following for each material category of non-adjusting event after the reporting period: (a) the nature of the event; and (b) an estimate of its financial effect, or a statement that such an estimate cannot be made."). Similarly, AU § 560, *Subsequent Events*, requires disclosure of events or transactions occurring "subsequent to the balance-sheet date, but prior to the issuance of the financial statements, that have a material effect on the financial statements and therefore require adjustment or disclosure in the statements." AU § 560.01.

B. <u>The Evidence Shows That The Offering Documents Contained Materially False And Misleading Statements And Omitted Material Information</u>

Defendants have limited their Motion to just a subset of the Section 11 violations that Plaintiff is pursuing. For instance, Defendants do not challenge the following misstatements in, and omissions from, the Offering Documents:

- Barclays' false and misleading representation in the 2007 20-F that none of the hedges on its disclosed ABS CDO positions "were held with monoline insurance counterparties," when, in fact, the Company held over £6 billion in undisclosed ABS CDO positions that were hedged with monoline insurers. *See infra* at III.B.1.
- Barclays' representation in the 2007 20-F that its "Credit market positions" totaled £37.8 billion, when in fact, it held over £21 billion in additional CDOs, leveraged finance and CRE assets wrapped by monoline insurance, and at least an additional £1 billion in CDOs wrapped by bank insurance. *Id.*; *see also* ¶¶125, 241, 244, 248.
- Barclays' false and misleading representation in the 2007 20-F that "[o]ur ABS CDO Super Senior positions were reduced during the year and our remaining exposure reflected netting against writedowns, hedges, and subordination," when, in fact, Barclays did not reduce its ABS CDO Super Senior positions in 2007. ¶¶134, 397-398; Ex. 66 at Exhibit 5.
- Barclays' failure to disclose that two of its CDO positions suffered events of default prior to the Offering, thereby necessitating mark-to-market writedowns. ¶¶390-396; Ex. 66 at ¶¶111-13.
- Barclays' failure to disclose its gross writedowns of £2.999 billion for the year-end 2007. ¶¶112, 373-389.

Defendants' failure to challenge these and other false statements and omissions preserves material issues of fact for the jury to consider.[2]

Defendants' actual challenges likewise fail. The Motion challenges Plaintiff's claims regarding the following disclosures: (i) Barclays' monoline exposure; and (ii) Barclays' whole loan and Alt-A credit market positions set forth in the Form 20-F and relatedly, its obligation to disclose known writedowns in these asset classes. Defendants also challenge Plaintiff's claims that Barclays' capital position disclosed in the 2007 20-F was materially misleading as of the time of the Offering. These arguments are addressed in turn below.

1. <u>Barclays' Monoline Disclosures Were Materially Misleading And Hid Billions In Credit Market Assets</u>

Defendants argue that, as a matter of law, that Barclays' actual monoline disclosures were not materially misleading, and that Barclays had no duty to disclose the notional value of its monoline positions because the notional value was "not a real meaningful number." D. Br. at 14-16. Contrary to Defendants' arguments, (1) Barclays' disclosures in the 2007 20-F were rendered materially misleading by Barclays' omission of over £21 billion in credit market assets insured by monoline insurers, and (2) Barclays was required under Item 503 to disclose its notional monoline exposure as one of the significant risks facing the Series 5 investors.

a. <u>Barclays Hid £21 Billion In Credit Market Assets Wrapped By Monolines Through Its Misleading Monoline Disclosure</u>

The Offering was conducted amidst intense scrutiny of both the credit market positions of financial institutions, and also, more specifically, the extent to which such positions were insured

[2] A complete list of the alleged misstatements and omissions at issue in this matter is set forth in ¶¶116-136 of Plaintiff's Rule 56.1 Statement. These alleged misstatements and omissions were pled in the SAC, asserted and clarified through discovery, and addressed in Plaintiff's (i) responses to Defendants' interrogatories (Ex. 226); (ii) class certification briefing (ECF No. 142); (iii) expert reports (Exs. 4, 66, 228-29, 231, 233); and (iv) a letter sent to Barclays' counsel during the course of the parties' summary judgment meet-and-confer process (Ex. 227). Defendants were thus "aware long before trial" that Plaintiff intended to pursue additional misrepresentations and omissions beyond those addressed in Defendants' motion. *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 at n.11 (2d Cir. 2016).

by the collapsing monoline industry. ¶¶203-233; 262-294; 401-404. For instance, in January of 2008, famed Oppenheimer analyst Meredith Whitney stated that "[t]he fate of the monoline insurers is ***of paramount importance***" to financial institutions like Barclays. ¶¶263-264. By mid-February 2008, Congress was holding hearings on "[t]he state of the bond insurance industry," where Governor Eliot Spitzer described the monoline insurers' exposures as a "crisis." ¶269.

Within this context, Barclays stated the following in the Offering Documents: (1) Barclays "had assets with insurance protection or other credit enhancement from monoline insurers. ***The value of exposure to monoline insurers under these contracts was £1,335m (30th June 2007: £140m)***," ¶130; (2) Barclays held £7,368 million in exposure to Leveraged Finance positions, £12,339 million in CRE assets, and £4,671 million in "ABS CDO Super Senior" positions, which were "stated net of writedowns and charges of £1,412m . . . and ***hedges of £1,347m***," ¶¶125, 127-129, and (3) none of the ABS CDO hedges "were held with ***monoline insurer counterparties***." ¶127.

These representations were materially false and misleading, as they omitted to disclose that Barclays held an ***additional*** £21 billion in credit market positions wrapped by monoline insurance, including ABS CDO Super Senior (£6.18 billion), Leveraged Finance (£12.17 billion) and CRE (£2.44 billion) assets. ¶¶241, 244; *see also* Ex. 69. Barclays also held at least £1 billion in CDOs wrapped by bank insurance. ¶243. Thus, Barclays' actual Credit Market Positions approached ***£60 billion,*** not £37.8 billion as the 2007 20-F disclosed. ¶¶125, 244. By comparison, Barclays' total shareholders' equity at year-end 2007 was only £32.47 billion. ¶4.

Furthermore, Barclays' representation that none of the ABS CDO hedges "were held with ***monoline insurer counterparties***," ¶127, was simply false. In truth, Barclays held £6.18 billion in risky CDO assets wrapped by monoline insurance, and an additional £1.1 billion in CDOs insured by other banks. *E.g.,* ¶244. Thus, Barclays misrepresented that (1) it had only £6 billion in risky Super Senior CDO positions, when it actually had £13.3 billion, and (2) none of its risky CDO exposure was insured by monolines, when nearly half of them were. Whether a reasonable investor would have found the disparity between what Barclays actually held in monoline exposure and related assets, and what it disclosed in the Offering Documents to be materially misleading is a question of fact for the jury. *Meyer,* 761 F.3d at 251.

b. Barclays' Claim That Its Monoline Exposure Was £1.335 Billion Was Materially Misleading

Barclays' representation that the "value" of its exposure to monoline insurers was just £1.335 million as of year-end 2007 was materially misleading. Unlike the asset values disclosed for Barclays' other credit market assets included in the Credit Market Positions Disclosure, the £1.335 billion "value" of Barclays' monoline exposure did not convey the maximum potential loss on the £21 billion in wrapped assets, the true size of the exposure, or any other meaningful assessment of Barclays' burgeoning risk from monoline insurers. *E.g.,* ¶¶248-49, 253, 255-56, 259; Ex. 66 ¶¶115-24. Rather, the £1.335 billion line item was limited to the theoretical insurance claim that it had against a monoline insurer in the event of default of any insured asset on December 31, 2007. *E.g.,* ¶248; Ex. 66 ¶¶118, 123.

Citing testimony from a PwC auditor, Douglas Summa, Defendants argue that the notional value of Barclays' monoline exposure in the context of the disclosed "value" of its exposure was "not a real meaningful number" to investors. *See* D. Br. at 15. However, Mr. Summa's testimony is belied by numerous facts, including: (i) the FSA's request, in November 2007, that Barclays provide it with information regarding the notional value and composition of Barclays' monoline exposure (¶¶246-249); (ii) a large stakeholder's, Temasek, request for information concerning Barclays' notional exposure to monolines in March 2008 (¶¶257-261); (iii) management's recognition that Barclays could "expect significant scrutiny" of its 2007 monoline "positions and remaining exposures" (¶284); (iv) Barclays' admission that "[c]oncern over the future of the major Monolines remains an important factor" facing the bank (¶288); and (v) Barclays' competitors' disclosure of notional monoline exposure in their 2007 annual reports. (¶¶289-294). Likewise, prior to the Offering, Barclays' own analysts recognized the capital risk posed by monoline insurance and the need for banks to disclose their notional exposure. *See* ¶266; Ex. 83.

Mr. Summa's testimony is also contradicted by that of Plaintiff's expert, Fiachra O'Driscoll, who, unlike Mr. Summa, extensively monitored bank exposures to monoline insurers in 2007 and 2008 as a managing director and Co-Head of CDO Structuring at Credit Suisse, and analyzed the importance of notional exposures in the context of the financial crisis. Ex. 66 at Exhibit 1. Mr. O'Driscoll opines that, given the market conditions in April 2008, notional exposure "would have provided [investors with] a more complete assessment of Barclays' exposure to monoline insurers." Ex. 66 ¶123. Indeed, the disclosure of just £1.335 billion in monoline exposure misleadingly understated the potential capital risks that Barclays faced as a result of its exposure to monolines. *See* Ex. 234 ¶36 ("the notional amounts . . . were important to investors' understanding of the potential capital shortfalls a bank might face due to monoline downgrades").[3] This "battle of the experts" raises additional disputed issues for the trier of fact. *McClellan*, 439 F.3d at 144; *see also In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 500-01 (S.D.N.Y. 2005) (stating that "courts are wary of granting summary judgment" where record includes conflicting expert opinions).

[3] Similarly, Plaintiff's accounting expert, D. Paul Regan, has opined that Barclays' "exposure to monoline counterparties represented the full notional value of the assets they insured," because "a monoline insurer's non-performance put at risk the insured's ability to collect the entire notional value." Ex. 228 ¶36.

Finally, Barclays' £1.335 billion monoline exposure "value" was stale by the Offering, as it had ballooned to £2.7 billion by March 31, 2008, which increase required disclosure under Item 303. ¶406. Similarly Barclays was required to disclose its notional exposure as a "significant" risk under Item 503 given: (i) the size of Barclays' notional exposure to monolines, which was the third-largest among all large investment banks (¶¶250, 348); and (ii) the industry scrutiny of banks' monoline exposure (¶¶234-236; 262-273).

All of the foregoing creates triable issues as to whether Barclays' Credit Market Positions Disclosure and its monoline disclosure were materially misleading. *See In re Citigroup Bond Litig.*, 723 F. Supp. 2d 568, 589-90 (S.D.N.Y. 2010) (sustaining Section 11 claims and finding Citigroup's disclosure of "$43 billion in direct exposure to subprime-backed CDOs" "materially misstated and underrepresented the full scope of risk" associated with certain assets because it actually held "nearly $66 billion" in CDO exposures).[4]

2. <u>The Dramatic Deterioration of Barclays Subprime and Alt-A Loans Immediately Preceding the Offering Required Disclosure</u>

By April 2008, "the financial environment into which the Series 5 Offering was sold had deteriorated markedly and was continuing to do so." *Freidus*, 734 F.3d at 139-140. As a result, the quality and value of Barclays' credit market positions, particularly its subprime whole loans and Alt-A assets, declined sharply during 1Q08. ¶¶295-320, 405. Barclays' year-end 2007 Credit Market Positions Disclosure was thus obsolete and incomplete at the time of the Offering, vastly understating the risks facing investors and requiring additional disclosure under IAS 10, AU 560 and Items 303 and 503.

[4] That Barclays may have embedded the notional value of its monoline contracts within a multi-trillion dollar line item disclosure of derivative instruments in its financial statements, *see* D. Br. at 15-16, is of no moment because that disclosure did not separately identify Barclays' notional monoline exposure. In any event, Plaintiff's claims do not arise out of Barclays' failure to record assets on its balance sheet, but rather from the quality and accuracy of the "Credit market positions" it elected to disclose to apprise the market of the risks it faced from these asset classes.

Defendants contend that they had no duty to disclose these adverse facts and trends to Series 5 investors because the Offering occurred within the "135-day window" set forth in Regulation S-X, and because the total £1 billion net loss[5] Barclays recorded on its credit market positions during 1Q08 was "not an 'extreme departure' from" its 4Q07 net loss. D. Br. at 18-19. These arguments are misplaced. As an initial matter, Defendants are wrong to rely on the "135-day window" and "extreme departure" rules. *Litwin* and *Panther Partners*, which sustained Section 11 claims premised upon violations of Item 303, "supersede[d] the 135-day and extreme departure rules," and replaced them with "a materiality standard" that requires the disclosure of facts and trends that are materially likely to impact a company's financial condition. *Facebook, Inc.*, 986 F. Supp. 2d at 542.[6]

In any event, regardless of whether a "materiality" or "extreme departure" standard applies, triable issues of fact exist as to whether Defendants were obligated to disclose the material facts and trends that materialized prior to the Offering.

a. Defendants Knew of the Risks of Large Writedowns of Its Alt-A and Subprime Loan Portfolios

Barclays booked just £116 million in writedowns on its £3.205 billion whole loan position in 2007, including £83 million in writedowns during the second half of the year. ¶167.

[5] Barclays' presentation of its credit market writedowns on a "net" basis was, in and of itself, materially misleading. For example, the 2007 20-F disclosed that Barclays' £1.635 billion writedown figure was "partially offset" by £658 million in "gains from the general widening of credit spreads." 2007 20-F at 53. However, the 2007 20-F omitted that Barclays was ***also*** applying a larger, £700 million, offset from income and hedges earned on the written down assets. ECF No. 197-13 at 22. Defendants concede that the Offering Documents created the misimpression that Barclays' gross writedowns were approximately "£2.293 billion (£1.635 plus £0.658)," D. Br. at 13 n.7, when in fact Barclays had recorded gross writedowns of £3 billion.

[6] Barclays itself acknowledged this materiality standard. ¶¶29, 313 (Lucas stating that Barclays announces interim financial results where they are "materially different" from year-end figures). Moreover, Defendants cite two cases that post-date *Litwin* and *Panther Partners*, but each is distinguishable. In *Stadnick v. Vivint Solar, Inc.*, 2015 WL 8492757, at *12-13 (S.D.N.Y. Dec. 10, 2015), the plaintiff alleged an Item 303 violation but failed to allege the existence of a trend that was likely to impact the company's revenues, while the plaintiff in *In re Lone Pine Resources, Inc.*, 2014 WL 1259653, at *4-5 (S.D.N.Y. Mar. 27, 2014), pled no facts indicating that the allegedly undisclosed trend had any quantitative or qualitative impact on the company's operations or financial condition. Here, by contrast, Defendants have conceded that during 1Q08 its financial condition was being impacted by a "market dislocation." D. Br. at 20 n.12.

Similarly, in 2007, Barclays recorded just £111 million in writedowns on its £4.916 billion Alt-A portfolio. ¶168. Thus, these portfolios accounted for just 14% of the £1.635 billion in credit market writedowns Barclays recorded during 2007. ¶116.

Despite the comparatively small subprime and Alt-A writedowns, which were not itemized in the 2007 20-F, Barclays executives internally recognized prior to the Offering that Barclays was poised to suffer huge losses on these positions. Although originally intending to securitize and sell these assets to investors, after the markets froze in mid-2007 Barclays was forced to hold them on its balance sheet. ¶¶137-202. By late 2007, Barclays' originator, EquiFirst, was still originating subprime mortgages, but Barclays decided to transfer these new loans from its trading book to its banking book and changed the manner in which it accounted for them to avoid recording mark-to-market losses. ¶¶146-162.[7] Barclays also fired the personnel responsible for managing the subprime and Alt-A portfolios, and for months, the remaining personnel refused to take responsibility for them (as that would have required them to inherit the losses associated with those positions). ¶¶190-202. As a result, for several months during the subprime crisis, there were ***no*** traders responsible for valuing or risk-managing Barclays' subprime and Alt-A positions. *Id*. By early 2008, the quality of Barclays' subprime whole loans had deteriorated so dramatically that Barclays executives determined to shutter EquiFirst and exit the subprime mortgage business altogether. ¶¶177-181.

b. Barclays' Subprime and Alt-A Portfolios Deteriorated Dramatically In 1Q08

Unbeknownst to investors, Barclays wrote down its whole loans sharply in 1Q08 to reflect their actual market value. Indeed, in the three months preceding the Offering, Barclays wrote down over ***£446 million*** in whole loans – nearly quadrupling those it recorded in all of

[7] Notably, Barclays continued to inform investors that these assets were all on its trading book. ¶227.

2007 – due to a significant deterioration in the credit quality of the loans. ¶¶167, 169-70, 315-16.[8] Likewise, by the end of 1Q08, Barclays had written down its Alt-A positions by ***£675 million*** – more than ***six times*** the total writedowns recorded on Barclays' Alt-A positions in all of 2007. ¶¶168, 171, 308, 314, 317. In fact, by March 25, 2008, Barclays was forecasting quarterly impairments and losses of nearly £1.8 billion on its credit-market positions – more than the net losses it recorded for ***all*** of 2007. ¶307; Ex. 228 82(a). Ultimately, Barclays recorded ***£2.1 billion*** in gross credit market writedowns during 1Q08. ¶¶304, 318; Ex. 228 ¶82(d).[9]

c. Barclays Was Obligated to Disclose these Material Adverse Changes to Series 5 Investors

(1) Items 303 and 503

Item 303 required Barclays to disclose "known trends" that were "reasonably likely to have a material effect" on its financial condition. Here, the deterioration in the broader credit markets and, in particular, Barclays' subprime and Alt-A portfolios, resulted in ***over £2 billion*** in writedowns during 1Q08. ¶¶ 304, 318. These writedowns were reasonably likely to – and did – materially impact Barclays' financial condition, as they dwarfed the writedowns taken on Barclays' subprime and Alt-A portfolios in 2007. ¶¶167-168. Accordingly, disclosure of this "downward trend" and "its likely impact on [Barclays' subprime and Alt-A] real estate investments" was required under Item 303. *Litwin*, 634 F.3d at 712. For largely the same reasons, the deteriorating quality and value of Barclays' credit market positions was one of the

[8] The deterioration in Barclays' EquiFirst loans was so severe that members of Barclays' internal valuation team, known as the Product Control Group, believed that some of the EquiFirst loans had been fraudulently underwritten. ¶155; *see also* ¶154 (testifying that it is "unbelievable" that Barclays employees would characterize the EquiFirst subprime originations as "high quality").

[9] Defendants expend significant effort arguing that Barclays' valuations of its subprime and Alt-A assets as of December 31, 2007, as disclosed in the Form 20-F, were proper. D. Br. at 12-13. Plaintiff, however, did not undertake to prove the "correct" valuations of these assets in discovery and thus Defendants' arguments in this regard are misdirected. To be sure, Plaintiff has adduced ample record evidence calling into question the rigorousness and reliability of Barclays' valuation process. *See* ¶¶137-202, 390-96. The flaws in this process contributed to the massive (and undisclosed) writedowns that Barclays was required to take in 1Q08.

most significant risks facing investors in the Offering, thus compelling disclosure under Item 503. *Deutsche Bank*, 2016 WL 4083429, at *27 (facts supporting Item 303 violation also support Item 503 violation).

Defendants contend that no disclosure was required under Item 303 because Barclays' net credit market writedown of £1 billion was "in line" with the net writedowns recorded in 4Q07. D. Br. at 19. Defendants' contention fails, however, as it improperly focuses on an aggregation of writedowns and profits, thereby ignoring Barclays' exponentially increasing gross writedowns on its subprime and Alt-A assets. *See Litwin*, 634 F.3d at 719 (companies cannot "aggregate negative and positive effects" to "avoid disclosure of a particular material negative event" under Item 303); *Schuh v. HCA Holdings, Inc.*, 947 F. Supp. 2d 882, 892-93 (M.D. Tenn. 2013) (finding Item 303 violation based on defendants' omission that certain "high margin components of Medicare" were "declining," even though overall "Medicare revenue growth may have actually increased during the first quarter of 2011").[10] As noted above, Barclays' 1Q08 whole loan and Alt-A writedowns were four and six times, respectively, greater than the writedowns that it had recorded on those positions in all of 2007, requiring disclosure under Item 303.

Defendants also argue that no Item 303 disclosure was warranted because: (i) the market "trend" was known to investors, as "1Q08 conditions were a continuation of well-publicized market dislocation," D. Br. at 20 n.12; and (ii) the Offering Documents stated that "concern about weakening economic conditions" may lead to a "more cautious approach to credit assessment, pricing and ongoing control in the financial industry." *Id.* at 17. These arguments fail because even if the credit market trends and "weakening economic conditions" were known

[10] For this same reason, Barclays' May 15, 2008 earnings release did not cure Defendants' Item 303 violation, *see* D. Br. at 27, as it disclosed only the £1 billion net loss and did not discuss the deterioration or gross writedowns in Barclays' subprime whole loans and Alt-A positions. *See Citiline Holdings, Inc. v. iStar Fin. Inc.*, 701 F. Supp. 2d 506, 514 (S.D.N.Y. 2010) (disclosure of "isolated data points" not sufficient to disclose "trend of deteriorating performance"); *infra* at III.C.5.

to investors, Item 303 required Barclays to disclose "the manner in which" these trends "might reasonably be expected to have a material impact on" (and, in fact, were already impacting) its financial condition. *Panther Partners*, 681 F.3d at 121-22; *Litwin*, 634 F.3d at 719.[11]

In sum, the Offering Documents failed to disclose, pursuant to Items 303 and 503, the manner in which weakening economic conditions were likely to impact, and in fact had impacted, Barclays' at-risk asset classes – i.e., the worsening subprime crisis in 1Q08 negatively impacted Barclays' subprime and Alt-A assets, leading to over ***£2 billion*** in gross writedowns. ¶¶304, 318.[12] Accordingly, summary judgment must be denied. *Litwin*, 634 F.3d at 718-19.

(2) <u>IAS 10 and AU 560</u>

In addition to Items 303 and 503, IAS 10 and AU 560 separately obligated Barclays to disclose material events that occurred "subsequent to the balance sheet date," including "a decline in fair value of investments between the end of the reporting period and the date when the financial statements are authorized for issue." *See* Ex. 228 ¶¶52-59. Thus, for material events occurring after December 31, 2007 but before the Offering, Barclays had a duty to disclose both "the nature of the event" and "an estimate of its financial effect." *Id.* ¶53.

For the reasons discussed above, the rapid deterioration in Barclays' subprime and Alt-A portfolios, and the writedowns recorded on those positions, were material subsequent events

[11] Defendants' generic warning that 2008 could be "extremely challenging," D. Br.at 17, cannot cure the alleged misstatements and omissions because (1) it was located outside the Offering Documents, *see Citiline*, 701 F. Supp. 2d at 515 (refusing to find that statements "which were not incorporated into the registration statement" were "sufficient to render the omissions in [the] registration statement immaterial as a matter of law"); *Kronfield v. Trans World Airlines, Inc.*, 832 F.2d 726, 736 (2d Cir. 1987) (rejecting argument that stockholders are assumed to know public information outside prospectus); *N.J. Carpenters Health Fund v. RBS Grp., PLC*, 709 F.3d 109, 127 (2d Cir. 2013) (Section 11 "case law does not support the sweeping proposition that an issuer of securities is never required to disclose publicly available information.'" (citing *Litwin*, 634 F.3d at 718)), and (2) it warned of matters that had already come to pass. *See Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 130 (2d Cir. 2011) ("cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired").

[12] Even under Defendants' superseded "extreme departure" standard, Barclays' 1Q08 whole loan writedowns (a ***384%*** increase over its 2007 writedowns) and Alt-A writedowns (a ***608% increase*** over its 2007 writedowns) should have been disclosed to Series 5 investors. *See Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1210 (1st Cir. 1996) (finding 154% increase in operating loss to be "extreme departure" warranting interim disclosure under Section 11).

required to be disclosed in the Offering Documents under IAS 10 and AU 560. *See supra* III.B.2. Barclays also was required to disclose the portfolio deterioration and associated writedowns because the writedowns greatly exceeded the £200 million and £250 million thresholds for materiality established by Barclays and PwC, respectively. ¶¶295-96; Ex. 228 ¶66(a).[13] Additionally, these writedowns, which exceeded £2 billion, were no doubt required to be disclosed given that the only material subsequent event disclosed in the 2007 20-F totaled just £373 million. *See* ¶136; Ex. 228 ¶66; *Ho v. Duoyuan Glob. Water, Inc.*, 887 F. Supp. 2d 547, 570 (S.D.N.Y. 2012) (recognizing Section 11 claim for violation of GAAP).

3. **<u>The Offering Documents Were Rendered Materially Misleading By Omitting The Adverse Trends Concerning Barclays' Capital Position</u>**

Defendants assert that, as a matter of law, they had no duty to disclose the deterioration in Barclays' capital ratios or its communications with the FSA. D. Br. at 20-22. They are wrong.

As an initial matter, Defendants improperly reframe Plaintiff's allegations as based on the omission of the "risk of Barclays raising more equity capital." *See, e.g.,* D. Br. at 21. What Plaintiff actually contends is that the Offering Documents failed to disclose a material decline in Barclays' capital ratios during 1Q08, thereby materially overstating its capital position and materially understating its need for capital in a rapidly deteriorating financial market. *See, e.g.*, ECF No. 142 at 11; Ex. 226 at 15-16. Indeed, by the time of the Offering, and unbeknownst to Series 5 investors, Barclays' capital ratios and equity "cushion" had declined materially from the levels disclosed in the Offering Documents, thereby rendering the Series 5 shares a riskier

[13] Defendants assert that PwC U.S. "performed [a] subsequent events review" and did "not identif[y] any subsequent events material to [Barclays Capital]." D. Br. at 11. Yet, Defendants provide no evidence of what this "review" entailed. *Id*. In fact, record evidence indicates that PwC's "review" consisted only of "enquiries with senior management" not the review of any financial information. ¶297. In any event, PwC's finding is disputed by Plaintiff's expert, D. Paul Regan, thereby creating a triable issue of fact. *See* Ex. 228 ¶52-73.

investment than the Offering Documents disclosed. ¶¶321-72.[14] For example, between year-end 2007 and the Offering date, Barclays' Equity Tier 1 Ratio fell almost 15% from 5.1% to 4.34%. ¶321.[15]

Defendants' contention that disclosure of this capital deterioration was not required because "Barclays' capital ratios were well above the regulatory minimum before the Offering," D. Br. at 20, is factually inaccurate. By March 20, 2008, Barclays knew that the FSA was requiring the Company to "achieve its own target equity ratio [of 5.25%] before the end of 2008." ¶367.[16] The FSA's directive established a new *de facto* regulatory minimum, *see, e.g.*, ¶370; Ex. 233 ¶¶25-26, which Barclays did ***not*** meet at the time of the Offering, as its Equity Tier 1 ratio had fallen to 4.34% by March 31, 2008. ¶321. A factual dispute exists as to whether this new regulatory minimum and Barclays' severely deteriorated capital position, which fell below the FSA's mandate, should have been disclosed to Series 5 investors.[17]

In any event, even assuming that Barclays' ratios remained at levels above the regulatory minimum, this fact has little bearing on Plaintiff's claims, which are premised on Defendants'

[14] If, as Defendants suggest, "raising more equity capital would have made the Series 5 ADS . . . a safer investment," D. Br. at 21, then the undisclosed deterioration in Barclays' Equity Tier 1 "cushion" during the first quarter of 2008 necessarily made the Series 5 ADS a ***riskier investment*** than investors were led to believe, which raises a factual issue as to the materiality of the alleged omissions.

[15] This decline was precipitated in part by the undisclosed credit market losses described above, and by a dramatic increase in the Company's RWAs resulting from the credit market crisis. *E.g.,* ¶321; *see also* Ex. 229 ¶¶39 and 27 (because RWAs are used as the denominator in calculating a bank's capital ratios, rising RWAs lead to lower capital ratios). As a result, prior to the Series 5 Offering, Barclays had acknowledged internally that it was presently unable to meet its year-end 2008 RWA target, *see, e.g.*, ¶¶326-31.

[16] Also by this date, Defendants knew that FSA Chairman McCarthy, viewed Barclays' declining Equity Tier 1 ratio as "alarming" and "a matter of urgency." ¶348. In response, the Board was informed that because the FSA's "focus has moved . . . to the equity tier 1 ratio," Barclays was "developing plans which seek to achieve our target equity tier 1 ratio of 5.25% by the 31 December 2008." *Id.*

[17] *RBS*, 709 F.3d at 127, which Defendants rely upon to argue that Barclays had no obligation to disclose the FSA's mandate, is wholly inapposite because there RBS had already (i) initiated the capital raise at issue ***before*** the FSA required it to occur; and (ii) disclosed to investors that the FSA had "encouraged" it to raise additional capital. Here, Barclays never informed investors that the FSA had encouraged it to raise additional capital in order to meet its internal targets. Furthermore, unlike the Section 10(b) claims premised on RBS's misstatements, Plaintiff's claims rest upon Defendants' affirmative obligation under applicable accounting principles and SEC regulations to disclose risks and trends concerning its capital position.

violations of Item 303, Item 503, and IAS 10. The deterioration of Barclays' capital position, together with the sharp increase in Barclays' RWAs and the need to raise additional capital in order to achieve the 5.25% Equity Tier 1 Ratio requirement imposed by the FSA, were adverse trends, demands and events that were known to management, and were reasonably likely to result in costly capital raises and/or sales of RWAs, which would impact the Company's financial condition. Similarly, Barclays' rapidly deteriorating Equity Tier 1 "cushion" and fragile capital position, and the FSA's mandate to raise capital, were some of the most significant factors that rendered the Series 5 Offering risky. Whether Defendants were obligated to disclose these trends, events and risks pursuant to Items 303 and 503, and IAS 10 is a question for the jury. *See Surebeam*, 2005 WL 5036360, at *13; *Adams Golf*, 618 F. Supp. 2d at 348-49.[18]

Finally, notwithstanding the fact that the Offering Documents disclosed the possibility of ***potential*** future capital raises, *see* D. Br. at 21, this disclosure cannot insulate Defendants from liability because the need for additional capital had already materialized with the Company's inability to meet the FSA-imposed Equity Tier 1 ratio, as well as its deteriorating capital position. *See Panther Partners*, 681 F.3d at 121-22 ("generic cautionary language . . . d[oes] not fulfill [the issuer's] duty to inform the investing public of [1] the particular, factually-based uncertainties of which it [is] aware" ***and*** "[2] whether, and to what extent, the particular known trend, event, or uncertainly might have been reasonably expected to materially affect [the issuer's] future revenues" (quoting *Litwin*, 634 F.3d at 718)).[19] Indeed, by the time of the

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[18] Because Plaintiff's claims arise from Defendants' affirmative duty to disclose Barclays' deteriorating capital position, *Solow v. Citigroup, Inc.*, 507 F. App'x 81, 82 (2d Cir. 2013), a Section 10(b) case, is distinguishable. There, the plaintiffs alleged that Citigroup had falsely represented that it was "well-capitalized," but the Second Circuit found that Citigroup was, in fact, well capitalized under "the regulatory definition of the term." *Id.*

[19] Similarly, Varley's February 2008 statement that the Company's equity ratio had fallen below its internal 5.25% target to 5.1% cannot absolve Defendants from liability because it was not incorporated into the Offering Documents, and because he did not disclose to investors that: (i) that Barclays' ratio had fallen to just 4.34% by the time of the Offering; and (ii) the FSA required Barclays to meet its internal target of 5.25% by year-end. *See Citiline Holdings*, 701 F. Supp. 2d at 515 (refusing to find that statements "which were not incorporated into the

Offering, and in an effort to counteract the negative impact that Barclays' credit market positions were having on its capital levels and RWAs, Barclays executives were exploring additional capital raises beyond the Offering. ¶¶368, 362. This "need for capital" was something that Barclays' own expert, Kleidon, recognized "was hidden in the April offering documents." Ex. 3 at 189:21-25.

4. **Defendants Cannot Show That the Misstatements and Omissions were Immaterial as a Matter of Law**

"[T]he determination [of materiality] requires delicate assessments of the inferences a reasonable shareholder would draw from a given set of facts and the significance of those inferences to him," which "are peculiarly ones for the trier of fact." *TSC Indus.*, 426 U.S. at 450.[20] The assessment of materiality is a "fact-specific, context-specific inquiry." *Freidus*, 734 F.3d at 140. Accordingly, summary judgment can only be granted "if the established omissions are so obviously unimportant to an investor, that reasonable minds cannot differ on the question of materiality." *TSC Indus.*, 426 U.S. at 450. In the context of "a quickly deteriorating credit market . . . the particulars about a firm's exposure to that market could assume a level of importance, and hence materiality, that may not have been the case in less economically stressful times." *Freidus*, 734 F.3d at 140.

Here, there is a wealth of record evidence – including Barclays' internal communications – indicating that, due to the "quickly deteriorating" nature of the credit markets at the time of the Offering, investors were ***intensely focused*** on, *inter alia*, banks' exposures to subprime and Alt-A assets and monoline insurers, and the impact those exposures were having on banks' capital positions. *Id.*; *see also* ¶¶203-33, 262-94, 401-04. In this context, Defendants have not

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registration statement" were "sufficient to render the omissions in [the] registration statement immaterial as a matter of law").

[20] The Supreme Court has recognized in an analogous context that "the jury's unique competence in applying the reasonable man standard is thought ordinarily to ***preclude summary judgment*** in negligence cases." *Id.* at n.12.

proven, as a matter of law, that the following "particulars" about Barclays' exposures were unimportant to the reasonable investor:

- Barclays held more than £22 billion in additional undisclosed credit market positions (¶244);
- £21 billion of these undisclosed positions were insured by high-risk monoline insurers, meaning that the Company's true exposure to monoline insurers was exponentially greater than the £1.335 billion it disclosed in the 2007 20-F (¶¶240, 248, 256);
- Barclays held ***twice*** as many subprime ABS CDO positions as it disclosed to investors, nearly ***three times*** as many leveraged loan positions, and £2.4 billion in additional CRE positions (¶244);
- In the quarter preceding the Offering, the credit quality of Barclays' subprime and Alt-A portfolios deteriorated dramatically and were written down internally by amounts that greatly exceeded previous writedowns (¶¶295-320, 405);
- Barclays' subprime whole loans had deteriorated so dramatically that the Company was internally exploring ways to alter the accounting treatment of these loans to avoid recording losses (¶¶146-76); and
- At the same time Barclays' subprime and Alt-A exposures were declining in value, its capital position had similarly deteriorated, leading to intervention by the FSA, which demanded that the Company raise additional capital in 2008 (¶¶321-72).

In arguing that their misstatements and omissions were immaterial as a matter of law, Defendants improperly attempt to divorce their misstatements and omissions from the context in which they were made – the credit crisis. *See Freidus*, 734 F.3d at 140. Indeed, the Offering Documents were published in the midst of the largest financial crisis since the Great Depression, which was precipitated by banks' exposures to the ***exact same assets*** and capital concerns that the Offering Documents misstated and omitted. ¶¶203-14, 401-04.

In any event, Defendants' materiality arguments fail for other reasons. For instance, Defendants contend that the Series 5 securities were "debt-like" and that "the primary concern of a debt holder is actual cash flow" rather than the subjects of the misstatements and omissions. D. Br. at 23-24. Yet Defendants cite ***no*** evidence establishing that the Series 5 securities behaved more like debt securities than equity securities, nor have they even attempted to establish that Series 5 investors' primary concern was cash flow or that the alleged misstatements and omissions had no impact on Barclays' cash flows. Moreover, the facts, trends and risks that the Offering Documents misstated and omitted implicated Barclays' cash flow, as the Company incurred billions in writedowns and costly capital raises throughout 2008. ¶¶107, 109-10, 295-320, 405, 407, 410-11, 445-49, 476-77, 479-83. Indeed, Barclays' hidden exposures ultimately created the threat of nationalization – a risk that Barclays was only able to stave off by paying Qatari investors secret kickbacks of up to $3 billion in exchange for their participation in a capital raise. ¶¶479-83.

Defendants again argue that Mr. Askelson's testimony concerning potential future writedowns "reflects the immateriality of the alleged misrepresentations." D. Br. at 24. Defendants raised this argument at class certification and the Court rightly rejected it. ECF No. 165. Setting aside the fact that this case is not just about writedowns, as discussed in detail above, and that Defendants continue to mischaracterize Mr. Askelson's testimony (¶12), materiality is assessed from the standpoint of a reasonable investor, and "***[i]n no event*** will the individual circumstances of particular class members bear on the inquiry." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191, 185 L. Ed. 2d 308 (2013); *see also Vivendi*, 838 F.3d at 250 ("Whether a misrepresentation is material is judged according to an objective standard that turns on the significance of an omitted or misrepresented fact to a reasonable investor.").[21]

Finally, Defendants' suggestion that summary judgment is warranted because "there was

[21] Defendants also gratuitously mention that Mr. Askelson has received dividend payments on his Series 5 shares. D. Br. at 6. However, evidence concerning Mr. Askelson's dividend payments is irrelevant to his calculation of damages and thus cannot be considered in connection with Defendants' motion. *See Abrams v. Van Kampen Funds, Inc.*, 2005 WL 88973, at *13 (N.D. Ill. Jan. 13, 2005) (granting motion in limine to exclude evidence of dividends paid to class members and stating that "dividends are not relevant to calculating damages" under Section 11).

no statistically significant price reaction" when the misstatements and omissions were corrected, D. Br. at 25, is misplaced for several reasons. *First*, it is merely a transparent attempt by Defendants to shift their negative causation burden onto Plaintiff, as Plaintiff has no obligation to prove loss causation through the analysis of stock price declines. *See infra* III.C.1. *Second*, as discussed herein, this argument rests upon an overly-narrow view of both the alleged misstatements and omissions in this case, and the disclosures that "corrected" those misstatements and omissions. *See supra* III.B; *see infra* III.C.5. Indeed, on at least five dates that generated statistically significant price declines under Kleidon's event study, Plaintiff's expert, Chad Coffman, has identified the disclosure of information that relates to Plaintiff's claims. *See infra* III.C.4 & n.26; Ex. 4 ¶¶77-104.

Third, even if there were no statistically significant price declines, that would not establish immateriality as a matter of law. In *SEC v. Mudd*, upon which Defendants curiously rely, this Court held that the absence of a statistically significant stock price reaction to corrective information is "neither consistent nor inconsistent with" a finding of materiality. 2016 WL 2593980, at *3. In fact, in that case, this Court ***excluded*** the testimony of an expert who used an event study as the basis to opine "that certain disclosures were not material." *Id.* at *7. In so holding, this Court found that the expert's opinion "finds no basis" in his event study because, as the expert admitted, "lack of evidence of materiality [through an event study] ***doesn't necessarily mean immaterial***." *Id.* Thus, here, as in *Mudd*, the absence of a statistically significant return ***does not*** prove the absence of materiality.[22]

[22] For the same reason, the absence of statistical significance cannot prove the absence of causation. *See infra* §III.C.5. Thus, this Court's reasoning in *Mudd* further supports Plaintiff's arguments that (i) Defendants have failed to meet their negative causation burden, *see id.*; and (ii) that Kleidon should be excluded from using the lack of statistical significance as a basis to opine on the absence of causation, *see* ECF No. 175.

C. Defendants Have Not Established Negative Causation as a Matter of Law

1. Plaintiff Has No Burden to Plead or Prove Loss Causation

Under Section 11, "[a]ny decrease in stock value is presumed to be caused by the misrepresentation in the registration statement, and it is the defendant that bears the burden of proving that the price decline was not related to the misrepresentations in the registration statement." *In re Flag Telecom Holdings, Ltd. Sec. Litig*., 411 F. Supp. 2d 377, 383 (S.D.N.Y. 2006). Thus, "plaintiffs have no obligation to plead or prove loss causation in § 11 cases" and "causation is presumed." *Levine v. AtriCure, Inc.*, 508 F. Supp. 2d 268, 273 (S.D.N.Y. 2007).

2. Defendants Have Not Met Their "Heavy" Negative Causation Burden

Negative causation is an affirmative defense under Section 11(e), and in raising this defense, "[t]he defendant bears a ***heavy burden*** of proving that the decline in stock price was caused by factors other than the misstatement(s) in the registration statement." *Police & Fire Ret. Sys. of City of Detroit v. SafeNet, Inc.*, 645 F. Supp. 2d 210, 226 (S.D.N.Y. 2009) (Crotty, J.). "Defendants' heavy burden reflects Congress' desire to allocate the risk of uncertainty to the defendants in these cases." *Flag*, 411 F. Supp. 2d at 383. To prevail on their negative causation defense, Defendants are "required to ***prove*** that no reasonable juror could believe that ***any*** portion of . . . [the] losses w[ere] caused" by Defendants' misrepresentations. *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 234 (5th Cir. 2009).[23] Accordingly, Defendants must prove that something other than their misstatements and omissions caused the Series 5 share price declines from the time of the Offering through the filing of the initial complaint. As detailed below, Defendants have failed to carry this "heavy burden."

[23] Defendants conveniently ignore the foregoing case law, choosing instead to rely on cases analyzing loss causation in the context of claims brought under Section 10(b). *See, e.g.*, D. Br. at 27 n.19 & n.20, 28, 31. Defendants' reliance is misplaced given that Section 10(b) plaintiffs assume the burden of proving loss causation, which is not the case here.

3. Defendants Ignore Certain Misstatements and Omissions

As an initial matter, Defendants' negative causation arguments are premised on the assumption that Plaintiff's claims fall into three "Misrepresentation Theory" categories: "1Q08 Write-downs"; "Need to Raise Capital"; and "Notional Amount of Monoline Insurance." D. Br. 27. As discussed above, however, Plaintiff alleges additional misstatements and omissions. *See supra* §III.B. Because Defendants do not attempt to raise a negative causation defense with respect to these misrepresentations and omissions, their negative causation argument fails.[24]

4. Defendants' Expert Ignores the Vast Majority of Stock Price Declines

Defendants' economic expert, Kleidon, identified 114 days with residual price declines – i.e., declines in the price of the Series 5 ADSs that could not be explained by normal market movements or volatility. However, Kleidon examined the news on only ***7 of these 114 days*** and completely ignored the other 107 days. *See generally* Kleidon Br.[25] Because he improperly disregarded the vast majority of residual declines between the Offering date and the date of the first lawsuit, Kleidon's analysis cannot establish that the declines on these 107 days "represent[] other than the depreciation in value of" the Series 5 shares due to Plaintiff's claims and thus provides no support for Defendants' negative causation defense. *See* 15 U.S.C. § 77k(e).[26]

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[24] For example, while Defendants acknowledge that Plaintiff's claims concern the Offering Documents' omission of Barclays' gross credit market losses, D. Br. at n.28, Defendants fail to discuss these allegations in the context of their purported negative causation defense. This failure is particularly notable given Kleidon's concession that: "That gross versus net losses issue, that specific number did not come out until the 20-F for 2008 which, if I recall correctly, was March 24, 2009." Ex. 3 at 205:25-206:4.

[25] As discussed in the Kleidon Brief, Kleidon's event study does not support his conclusion that the price declines on these 107 days were unrelated to Defendants' misstatements and omissions solely because they were statistically insignificant. *See also infra* §III.C.5. Kleidon himself concedes that if a price decline is statistically insignificant, "***it is not possible, consistent with the standards of statistics or financial economics, to attribute that price decline to any particular cause***." Ex. 230 ¶9.

[26] Notably, Plaintiff's expert, Chad Coffman, provides examples of several dates on which potentially corrective information was disclosed. *See* Ex. 4 ¶¶44-76. While Kleidon and Defendants assert that the information released on these days was not corrective (*see* D. Br. at 31-32; Ex. 230 ¶¶14, 43, 55-91), this "battle of the experts" is appropriately resolved by the jury. *See Hudson Riverkeeper Fund v. Atlantic Richfield Co.,* 138 F. Supp. 2d 482, 488 (S.D.N.Y. 2001) ("[W]here, as here, there are conflicting expert reports presented, courts are wary of granting summary judgment.") (collecting cases); *In re Celestica Inc. Sec. Litig.*, 2014 WL 4160216, at *13 (S.D.N.Y. Aug.

Accordingly, these declines are "presumed to be caused by the misrepresentation [or omission]" and the "risk of uncertainty" surrounding the cause of the declines is borne by Defendants. *Flag*, 411 F. Supp. 2d at 383.

5. Defendants' Claim that the ADS Prices Demonstrate a Lack of Loss Causation is Meritless

Defendants fail to carry their "heavy burden" of establishing negative causation for the few dates they do address. Defendants claim that when each misstatement or omission was corrected, the Series 5 share price responded in a statistically insignificant manner. D. Br. at 27. However, in support of this claim, Defendants identify only ***three*** potentially corrective disclosures dates – May 15, 2008, June 25, 2008 and August 7, 2008 – to match up with their three "misrepresentation theor[ies]." Defendants fail to explain how these dates were chosen or why they fully corrected their misrepresentations and omissions. *Id.*[27] As discussed below, none of these dates represent the date by which the ***full truth*** about Defendants' misrepresentations and omissions had been revealed or the date the risk they concealed had fully materialized.

"1Q08 Write-downs." Defendants contend that the omissions concerning Barclays' 1Q08 writedown claims were fully corrected on May 15, 2008. D. Br. 27. On this date, the Company announced that it had suffered net losses £1 billion on its risk assets. ¶407. However, this disclosure did not reveal the trend of increasing deterioration of whole loans and resultant gross writedowns – the very information Plaintiff alleges was omitted (*see, e.g.*, Ex. 226 at No.

20, 2014) (same); *Scanner Techs. Corp. v. Icos Vision Sys. Corp., N.V.*, 253 F. Supp. 2d 624, 634 (S.D.N.Y. 2003) (same).

[27] Kleidon also fails to explain how he determined whether information released on a given day was corrective. Instead, he merely states that his "use of the phrase 'corrective information' is based solely on the allegations of the Complaint; it does not reflect any conclusion that any 'corrective information' was disclosed to the market, or that any allegedly undisclosed risk materialized, on any given day." Ex. 230 n.4. Indeed, Kleidon does not appear to have undertaken any analysis of the information released on each of the potential corrective disclosure dates identified by Coffman (*see supra* n.21). Therefore, apart from his fundamentally flawed conclusions regarding the import of a lack of statistical significance, Kleidon has no basis to opine that these dates were fully corrective (*see* Ex. 230 ¶¶51-114).

1; *see also supra* §III.B.2) – and thus was not corrective. Indeed, these omissions materialized through additional subsequent events, including disclosures regarding: (i) potential capital raises (*see, e.g.*, SAC ¶¶217-220; Ex. 4 ¶¶53-56, 57-58, 63-66); (ii) ratings downgrades (*see, e.g.*, Ex. 4 ¶¶59-62, 72-76)[28]; (iii) anticipated writedowns (*see, e.g.*, Ex. 4 ¶¶44-47, 48-52, 67-71, 88-93, 94-99, 100-104) and (iv) the shuttering of EquiFirst on February 17, 2009 (*see, e.g.*, SAC ¶223; Ex.4 ¶22 & n.16). *See also* ¶¶406-78.

"Need to raise capital." Defendants contend that the omissions concerning Barclays' capital were fully corrected on June 25, 2008. D. Br. 27. As *Reuters* reported on June 25, 2008, Barclays announced that it would raise approximately £4.5 billion in capital, with participation by several foreign investors. ¶¶410-11. This announcement did not disclose the full extent of Barclays' capital needs (and therefore was not fully corrective) because investors remained unaware of the significant deterioration in Barclays' Tier 1 Equity ratio and the FSA's 5.25% Tier 1 Equity mandate.[29] Additional corrective information and/or information that represented a materialization of a risk concealed by Defendants' omissions concerning Barclays' capital adequacy, RWAs and financial condition was disclosed on the following dates, among others: July 18, 2008, when Barclays disclosed that only 19% of existing shareholders accepted new shares from the July 17, 2008 offering (Ex. 4 ¶¶86-87); October 10, 2008, when Barclays issued a press release confirming that it was considering looking to investors to raise additional capital (*id.* ¶57); October 31, 2008, when Barclays announced that it would seek to raise another £7.3

[28] Defendants appear to claim that ratings downgrades "are no [sic] corrective disclosures under settled law." D. Br. at 32. Contrary to Defendants' assertion, there is no bright line rule as to what constitutes a corrective disclosure. It can take many forms, including a ratings downgrade. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352, 363-64 (S.D.N.Y. 2009) (noting that a corrective "event could be a credit ratings downgrade"); *In re Dynex Capital, Inc. Sec. Litig.,* 2006 WL 314524, at *11 (S.D.N.Y. Feb. 10, 2006) (concealed risk materialized when ratings agencies downgraded certain bonds).

[29] Barclays' 1Q08 earnings release did not disclose its depleted 1Q08 capital levels or the FSA's heightened regulatory minimum. Instead, it stated only that Barclays expected its mid-year Equity Tier 1 ratio to be "slightly lower than the . . . 5.1% reported as at 31st December 2007." ¶408.

billion from foreign investors (SAC ¶218)[30]; December 22, 2008, when Barclays disclosed that it was taking a number of steps to raise additional capital, including selling part of its investment banking division (Ex. 4 ¶63); and January 20, 2009, when discussions resurfaced regarding the possibility that Barclays would be forced to seek a handout from taxpayers (*id.* ¶¶67-70). *See also* ¶¶405-78.

Kleidon's (and Defendants') only response to the additional disclosure dates are that: (1) the information released was not corrective; and (2) the declines are not statistically significant. Ex. 175 ¶¶51-114. Defendants' first argument does nothing to satisfy their "heavy burden" of establishing a negative causation defense, as the issue of whether, or to what extent, a particular disclosure fully disclosed allegedly omitted facts must be resolved by the jury. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 375313, at *4 (S.D.N.Y. Feb. 17, 2005) (whether company's "misstatements were partially disclosed" is "a disputed issue of fact that will be resolved by the jury"); *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.*, 2014 WL 6661918, at *8 (N.D. Ala. Nov. 19, 2014) ("Whether this tumble was due to [ ] corrective disclosures . . . or due to the overall market conditions on that day, is an ultimate question in this action, and properly reserved for a jury to decide.").[31]

Defendants' second argument fares no better, as it rests on a fundamental error of statistics. As explained in the Kleidon Brief, the absence of statistical significance, which is a measure of the size of a decline, is not evidence of the cause of that decline. Ex. 230 ¶¶13-15. Thus, the fact that the residual declines on these dates were not statistically significant says nothing about the cause of the declines, and does not support Defendants' conclusion that the

[30] The Second Circuit cited this October capital raise in sustaining Plaintiff's claims. *See Freidus*, 734 F.3d at 136.

[31] *See also In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1174 (C.D. Cal. 2008) ("It will be the fact-finder's job to determine which losses were proximately caused by Countrywide's misrepresentations and which are due to extrinsic or insufficiently linked forces."); *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 88 (D.D.C. 2008) (jury issue as to whether disclosures corrected earlier misstatements).

declines are unrelated to their misrepresentations and omissions. *See* D. Br. at 27 & n.19; *cf. Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 95 (S.D.N.Y. 2015) ("the failure of an event study to disprove the null hypothesis with respect to an event does not prove that the event had no impact on the stock price"); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 40 (2011) ("[a] lack of statistically significant data does not mean that [there is] no reliable basis for inferring a causal link").[32]

"Notional Amount of Monoline Exposure." Defendants contend that the monoline misstatements and omissions were fully corrected on August 7, 2008. D. Br. 27. On this date, Barclays disclosed its 2008 interim results, along with the notional amount of its monoline exposure. SAC ¶215. Defendants acknowledge that the Series 5 share price ***declined by $0.23*** on August 7, 2008. D. Br. at 27. In an attempt to explain away this decline, Defendants, like their expert, erroneously assume that a lack of statistical significance proves a lack of causation. *See id.* at n.19; *see also* Ex. 175 ¶107. For the reasons explained above, they are simply wrong; as they fail to prove that the $0.23 decline is unrelated to Plaintiff's claims, it is recoverable.

Defendants' claim that the full truth was revealed is undermined by the fact that the following information was not disclosed: (1) Barclays held over £1 billion in additional CDO positions wrapped by bank insurance; and (2) the £21 billion in total notional assets wrapped by monoline insurers was in addition to, and not included in, the credit market positions disclosed in the Offering Documents – i.e., the two figures (and Barclays' bank-insured assets) needed to be added together in order to obtain an accurate representation of the Company's total credit market

[32] As the Court previously found in an analogous context – an event study that was conducted for purposes of disproving materiality – a "lack of evidence of materiality doesn't necessarily mean immaterial." *SEC v. Mudd*, 2016 WL 2593980, at *7.

exposure of nearly £60 billion. *See* Ex. 71 at 35, 40.[33]

6. **Defendants Have Not Disentangled the Price Declines Caused by Their Misrepresentations and Omissions from the Financial Crisis**

Defendants recognize that certain of the declines for which Plaintiff seeks to recover "coincided with 'one of the worst financial crises in the history of the nation.'" D. Br. at 28. However, Defendants have failed to disentangle the purported effect of the financial crisis from that of Defendants' misrepresentations and omissions and therefore cannot carry their burden under Section 11(e). *See Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 593 (S.D.N.Y. 2015) (denying summary judgment where "defendants ultimately failed to disentangle, as was their burden on the affirmative defense, what they say caused the losses from the very subjects of the material misrepresentations at issue").

In addition, the declines related to the financial crisis cannot reasonably be isolated from the declines resulting from Defendants' misrepresentations, as the very conduct that Plaintiff challenges contributed to the economic crisis. *See* SAC ¶¶62-79; *see also Nomura*, 104 F. Supp. 3d at 537 ("it is impossible to disentangle the origination practices that are at the heart of the misrepresentations at issue here from the [housing bubble and resulting collapse]").

7. **Defendants Have Not Shifted to Plaintiff the Burden to Prove Loss Causation**

Due to Kleidon's and Defendants' failure to prove that something other than Defendants' misrepresentations and omissions caused the stock price declines between the time of the Offering through the filing of the initial complaint – as required to establish a negative causation defense – the burden ***does not*** shift to Plaintiff to show that the declines actually resulted from Defendants' misstatements and omissions. *See* D. Br. at 30 (conceding that Plaintiff need only

[33] As Coffman notes, potentially corrective information reflecting "how Barclays' exposure to subprime assets and monoline insurers was impacting the Company's capital" was released on, *inter alia*, August 14, 2008, September 3, 2008 and October 8, 2008. *See* Ex. 231 ¶¶44-56.

provide evidence of loss causation "***if defendants come forward with facts establishing the negative causation defense***"). Thus, because Defendants' failed to establish a negative causation defense, Coffman was not required to "perform an event study" or provide other evidence of loss causation. *Cf.* D. Br. at 31.[34] Indeed, it is Kleidon's event study itself that reveals the evidence of abnormal negative returns, which he then fails to explain.

In any event, even if the Court were to find that Defendants have adduced evidence of negative causation through Kleidon's event study analysis, there is, at the very least, a factual dispute as to whether five of the seven statistically significant stock price declines identified by Kleidon were caused by news that revealed the truth regarding Defendants' alleged misstatements and omissions. *See* D. Br. at n.22; Ex. 4 ¶¶77-104.

D. Defendants' Arguments Regarding Post-August 7, 2008 Purchasers Fail

Defendants claim that they "are entitled to summary judgment against class members who bought Series 5 shares after August 7, 2008, by which time all of the alleged misrepresentations were corrected." D. Br. at 33. They reason that, by August 7, 2008, the alleged misstatements and omissions were no longer material and had been disclosed to investors. *Id.* *First*, as detailed above, the notion that all of the alleged misrepresentations had

[34] The few Section 11 negative causation cases that Defendants cite are readily distinguishable. In *Akerman v. Onyx Communications, Inc.*, the defendant company's stock price ***increased*** after the sole potentially corrective disclosure. 810 F.2d 336, 341-42 (2d Cir. 1987). In *Goldkrantz v. Griffin*, the parties agreed that corrective information was released on a single date and the only disputed issue was whether subsequent stock price declines were related to the defendants' misrepresentation. 1999 WL 191540, at *3 (S.D.N.Y. Apr. 6, 1999). The defendants' expert conducted a substantive review of the news on each relevant date and concluded, based on this review, that the declines following the disclosure were related to specific news items unconnected to the alleged misrepresentation. *Id*. In *Ross v. Warner*, the court determined that the price on the date of suit "exceeded the price paid for all of the plaintiffs' stock up to the filing of suit" and therefore concluded that the plaintiff suffered no damages. 1980 WL 1474, at *9 (S.D.N.Y. Dec. 11, 1980). In *Carpe v. Aquila, Inc.*, the plaintiffs' expert's testimony was excluded and the defendants' expert opined that the defendant company's "share price tracked the industry index . . . closely" and affirmatively concluded that "the decline in stock price ***entirely*** was due to market factors." 2005 WL 1138833, at *8 (W.D. Mo. Mar. 23, 2005). In *In re Fortune System Securities Litigation*, the court held that the plaintiffs could not recover damages for declines that occurred: (i) prior to the earliest release of potentially corrective information; and (ii) after the date of suit. 680 F. Supp. 1360 (N.D. Cal. 1987).

been corrected by August 7, 2008 is unfounded. *See supra* §III.C.5.[35]

Second, because Defendants have failed to prove that the full truth regarding their misrepresentations and omissions was revealed by August 7, 2008, they have not proven that post-August 7 purchasers "knew" of the alleged misrepresentations and omissions. Thus, they have not carried their burden on this affirmative defense. *See* 15 U.S.C. § 77k(a) (defendant must "prove[] that at the time of such acquisition, [purchaser] knew of such untruth or omission"); *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Trust*, 477 F. App'x 809, 813 (2d Cir. 2012) (knowledge defense requires proof of "purchaser's actual knowledge of the specific untruth or omission."); *see also In re Glob. Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 205 (S.D.N.Y. 2003) ("Whether [purchaser] knew of the erroneous statements in the registration statement is a factual issue"). *Third*, because Defendants have not shown that the full truth was revealed by August 7, 2008, they have failed to prove that the disclosures rendered their misstatements and omissions immaterial.[36] The fact that materiality is a quintessential jury question further counsels against granting Defendants' motion. *See supra* §III.B.4.[37]

IV. CONCLUSION

For the foregoing reasons, Plaintiff has demonstrated that there are triable issues of fact concerning each of the issues for which the Barclays Defendants seek summary judgment and, accordingly, the Barclays Defendants' motion for summary judgment should be denied.

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[35] The Second Circuit relied on several post-August 2008 events in holding that the Plaintiff should be permitted to proceed with the claims in the SAC. *See generally Freidus*, 734 F.3d 132. The corrective nature of these events has been borne out in discovery. *See* ¶¶406-78.

[36] Because the full truth was not revealed on August 7, 2008, Defendants' reliance on *Perrigo Co. v. Mylan N.V.*, 2015 WL 9916726, at *16 (S.D.N.Y. Oct. 29, 2015) for the proposition that an "alleged omission is immaterial in light of [a] subsequent public disclosure that was widely disseminated," D. Br. at 35, is misplaced. Moreover, *Perrigo* dealt with claims under Section 14(e), for which there is the equivalent of a "general rule" that a subsequent corrective disclosure curing an omission moots a plaintiff's claim. *See Perrigo*, 2015 WL 9916726, at *16. There is no such rule under Section 11.

[37] Defendants' contention that the omission of the 2007 gross losses from the Offering Documents was "superseded and rendered immaterial by the disclosure of the actual 2008 results in May 2008 and August 2008" ignores the fact that these results ***reported only net losses*** and therefore did not correct the prior omissions. *See* Exs. 39, 71.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 14, 2016, true and correct copies of Plaintiff's Memorandum of Law in Opposition to the Barclays Defendants Motion for Summary Judgment, dated December 14, 2016, along with all documents referenced therein, were served via electronic mail on all counsel of record.

Sharan Nirmul