UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BARCLAYS BANK PLC SECURITIES LITIGATION	:	Master File No. 1:09-cv-01989-PAC
	:	ECF Case
This Document Relates to: All Actions	:	

THE UNDERWRITER DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT[1]

The Underwriters established through undisputed documentary evidence and unrebutted declarations that they are entitled to summary judgment on the due diligence defense in Section 11 because they reasonably relied on expertised materials and conducted a reasonable investigation into the non-expertised portions of the Offering Materials for the Series 5 Offering. In his Opposition ("Opp."), Plaintiff desperately attempts to avoid this conclusion by relying on conclusory statements that are unsupported by the record and ignoring the undisputed facts, applicable case law and SEC regulatory guidance.

First, Plaintiff argues that the Underwriters failed to "reasonably investigate and resolve" five purported "red flags." (Opp. at 9-18.) But as conclusively demonstrated in the Opening Memorandum, Plaintiff's attempt to manufacture "red flags" falls short. (UW Br. at 19-25.) As an initial matter, the "red flags" articulated by Plaintiff are not actually "red flags" under any definition, including the one put forth by his own expert. Under that definition, for information encountered during due diligence to constitute a "red flag" it must be (i) "inconsistent with the underwriters' understanding of the issuer's businesses, executives, operations, accounting or finances"; or (ii) "potentially indicative of wrongdoing." (Brown Declaration, Ex. 7 at 9.) Tellingly, Plaintiff does not even refer to his expert's definition of "red flags" – or any other definition – in the Opposition, let alone try to meet it. Instead, in a contrived litigation exercise, Plaintiff works backwards from the Offering Materials, identifying information he believes should have been disclosed and, without support, labelling that information a "red flag" that required further investigation. None of the "red flags" identified in Plaintiff's *post hoc*, conclusory and speculative analysis satisfies Plaintiff's own test, as the undisputed record shows

[1] All capitalized terms shall have the same meanings ascribed to them in the Underwriter Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment (the "Opening Memorandum" or "UW Br.").

that they were consistent with the Underwriters' understanding of Barclays' business and not indicative of wrongdoing. Accordingly, they are insufficient to create a genuine dispute of material fact as to the sufficiency of the Underwriters' due diligence investigation.

In any event, Plaintiff's contention that the Underwriters failed to investigate the supposed "red flags" is incorrect. (*See* UW Br. at 19-25.) The undisputed factual record demonstrates that the Underwriters fully addressed each of these issues as a part of their transaction-specific due diligence. For example, Plaintiff argues that the Underwriters should have investigated a decrease in first quarter 2008 profits before tax identified by PwC in its comfort letter, *but the Underwriters actually did this*, including by holding a due diligence call with Barclays on April 8, 2008 specifically to address it. (*See* UW 56.1 ¶¶ 41-42.) The Opposition cursorily asserts that further investigation was required. But Plaintiff does not – and cannot – identify any information that the Underwriters did not possess that was required for their due diligence investigation to be sufficient. Rather, Plaintiff argues – against a mountain of unrebutted evidence to the contrary – that because the Offering Materials did not include certain disclosures it must be that the Underwriters did not conduct an adequate investigation. Taken to its logical conclusion, Plaintiff's Opposition boils down to the untenable contention that – no matter the investigation performed – a "red flag" can never be sufficiently investigated unless the relevant disclosures are altered as a result of the investigation. As the Underwriters established, this approach eviscerates the statutory due diligence defense and should be rejected.

Second, recognizing that the purported "red flags" fail to create a genuine dispute of material fact and that he has a limited evidentiary record after failing to depose all but one of the Underwriters, Plaintiff attempts to identify additional purported due diligence deficiencies. For example, Plaintiff argues that the Underwriters failed to review internal and non-public

information. But this contention ignores that the Underwriters asked for, and received, non-public information through the work of PwC and its due diligence calls with Barclays' management. The record makes clear that the Underwriters actually had access to non-public information and Plaintiff fails to identify any additional material non-public information that the Underwriters were required, but failed, to consider.

Plaintiff next argues that the Underwriters unreasonably relied on certifications from Barclays' management, Barclays' counsel and Underwriters' counsel as part of the due diligence investigation because (i) the Underwriters were not permitted to rely on those parties and (ii) the certifications were dated as of the closing, April 11, 2008, rather than the date the Offering Materials were filed with the SEC, April 8, 2008. Plaintiff ignores relevant regulatory guidance that permits reliance on individuals with knowledge and illogically asks the Court to believe – contrary to the undisputed record – that the Underwriters were unaware of the contents of these certifications, or even that they would receive them. As the Underwriters established, their reliance on these certifications as one part of their due diligence investigation was reasonable.

Finally, Plaintiff claims that the Underwriters offer no evidence of their reservoir of knowledge regarding Barclays solely because they "substantially limited any discovery pertaining to the Series 2, 3, and 4 Offerings." (Opp. at 24.) This is simply not true. Plaintiff conveniently ignores that the Underwriters produced documents from the Series 2, 3 and 4 Offerings that related to due diligence for the Series 5 Offering.

ARGUMENT

A. Plaintiff Fails to Identify Any "Red Flags" That Undermine the Sufficiency of the Underwriters' Conduct and Beliefs

1. Plaintiff's Purported Red Flags are Not Red Flags Under Any Definition

Plaintiff's primary argument is that the Underwriters failed to reasonably investigate and

resolve five issues that Plaintiff labels "red flags." (Opp. at 9-18.) Yet, as conclusively established in the Underwriters' Opening Memorandum, they are not "red flags" at all. (UW Br. at 19-25.) Plaintiff fails to address, let alone refute, the Underwriters' showing that these issues do not satisfy any definition of "red flags," including the definition provided by Plaintiff's own expert.[2] It is easy to understand why Plaintiff avoids his own expert's definition, because it requires "red flags" to be (i) "inconsistent with the underwriters' understanding of the issuer's businesses, executives, operations, accounting or finances"; or (ii) "potentially indicative of wrongdoing." (Brown Declaration, Ex. 7 at 9.) As demonstrated in the Opening Memorandum, Plaintiff's purported "red flags" do not come close to meeting this test. (UW Br. at 19-25.) For example, two of Plaintiff's purported "red flags" – comments made on the April 3, 2008 due diligence call and the Citi research report – relate to Barclays' anticipated writedowns for the first three months of 2008. Plaintiff does not, and cannot, point to any evidence that a writedown is indicative of wrongdoing, particularly during a turbulent period in the markets. And the undisputed record shows that these writedowns were not inconsistent with the Underwriters' understanding of Barclays business. (*See* UW 56.1 ¶¶ 145-173.)

In reality, Plaintiff's supposed "red flags" are the result of litigation-driven, hindsight-based efforts to identify alleged deficiencies in the Offering Materials and transform them into due diligence failures by speculating that these purported deficiencies must be the result of due diligence failures. As the Underwriters established, this position conflates the legal question of the adequacy of the disclosures with the reasonableness of the Underwriters' due diligence investigation. The *reductio ad absurdum* of Plaintiff's position is that, once identified, no "red

[2] Plaintiff tries to distinguish case law discussing the definition of a "red flag," stating that the Underwriters relied on cases where courts looked for "red flags" to undermine reliance on audited financial statements. (Opp. at 9.) But the Underwriters did not rely on these cases to assess the existence of red flags. Rather, as Plaintiff conspicuously ignores, *the Underwriters relied on the definition of "red flags" set forth by his own expert*. (*See* UW Br. at 20 n. 9.)

flag" can be sufficiently investigated unless the disclosures in the Offering Materials are changed. This is not the law. The Underwriters are only required to show that after a reasonable investigation, they had reasonable grounds to believe and did believe that the statements in the Offering Materials were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading. 15 U.S.C. § 77k(b)(3)(C). Based on the undisputed record, the Underwriters have made that showing here.[3]

2. The Underwriters Investigated Plaintiff's Purported Red Flags

Compounding Plaintiff's failure even to attempt to meet his own expert's definition of a "red flag," the Opposition contends *ipse dixit* that the supposed "red flags" were not investigated and resolved. This false contention is belied by the undisputed record. (UW Br. at 19-25.)

Indeed, the Opposition ignores the work done by the Underwriters, instead choosing to theorize about what could have been discovered and to speculate that such information was not known by the Underwriters merely because the disclosures did not change. For example, the Underwriters scheduled a financial due diligence call with Barclays' management in order to specifically diligence three of Plaintiff's purported red flags: (i) comments made by Barclays' management regarding 2008 writedowns, (ii) the Citi research report concerning Barclays' 2008 writedowns and (iii) Barclays' 2008 interim financials, including the decline in profit before tax as compared to 2007. The undisputed record establishes that this call occurred, that specific

[3] Plaintiff's "red flags" should also be rejected because they are the result of Plaintiff misconstruing the record. For example, Plaintiff claims that it was a "red flag" that the FSA "urgently demanded" that Barclays increase its equity tier one ratio to 5.25% by year-end 2008. (Opp. at 1, 13-14.) But the record is devoid of any evidence that any such "urgent demand" was made. The internal Barclays documents to which Plaintiff refers make clear that this 5.25% equity tier one ratio was Barclays' own internal target and any discussions with the FSA were about the appropriate target ratios that Barclays should be seeking to achieve over the ensuing year, by the end of 2008. (*See* Brown Ex. 25 (March 20, 2008 Board of Directors minutes noting that "[t]he Group's Capital Management Plan had been shared with the FSA and discussions were continuing as to the appropriate target ratios that the Group should be seeking to achieve. The indications were that the FSA would wish the Group to achieve its own target equity ratio before the end of 2008.").)

questions were prepared in advance of the call and that the Underwriters were satisfied with Barclays' responses. (*See* UW 56.1 ¶¶ 41-42; McSpadden Ex. 25.) Incapable of rebutting this showing, Plaintiff absurdly argues that "there is no evidence in the record showing what happened on this call." (Opp. at 11.) But this ignores uncontroverted testimony from the Underwriters who participated in the call stating that they were satisfied with the responses provided by Barclays' management, which of course constitutes evidence in support of the Underwriters' Motion. *See Scott v. Coughlin*, 344 F.3d 282, 289 (2d Cir. 2003) ("[S]worn statements are more than mere conclusory allegations subject to disregard, they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion.") (citation omitted).[4]

Similarly, while Plaintiff speculates about what the Underwriters could have discovered, he has not adduced any evidence that the Underwriters did not possess all material information necessary to perform adequate due diligence. Indeed, his bare assertion that the Underwriters did not know information is based solely on his contention that the Offering Materials should have made additional disclosures – and not on concrete evidence showing that the Underwriters failed to consider actual "red flags." (UW Br. at 19-25.) Such conjecture cannot create a genuine dispute of a material fact.[5] *See Jackson v. Kaufman*, No. 13 CIV. 6544 (PAC) (DF), 2015 WL 5521432, at *5 (S.D.N.Y. Sept. 18, 2015); *Ford v. Consol. Edison Co. of N.Y.*, No. 03 CIV. 9587

[4] Plaintiff also misleadingly discounts the April 3, 2008 business due diligence call because "non-underwriters were also invited" and "no references to the Series 5 Offering were even permitted." (Opp. at 6.) But Plaintiff fails to show any impact this had on the Underwriters' ability to learn about Barclays' business. The undisputed record shows that Citi asked questions in connection with its work on the Series 5 Offering, and the mere fact that the Offering was not mentioned by name does not alter the diligence performed. (*See* UW 56.1 ¶ 65; *see also* McSpadden Ex. 22.)

[5] This point is underscored by Plaintiff's specious suggestion that the Underwriters should have requested and reviewed immaterial documents such as investor presentations from China or drawn conclusions from differences in the *manner* in which certain asset positions were recorded in different documents. (UW Br. at 22-23.)

(PAC), 2006 WL 538116, at *9 (S.D.N.Y. Mar. 3, 2006), *aff'd*, 225 F. App'x 19 (2d Cir. 2007).[6]

B. Plaintiff's Remaining Arguments Fail to Undermine the Reasonableness of the Underwriters' Due Diligence Investigation

1. The Underwriters Received and Considered Non-Public Information

Plaintiff argues that the "Underwriters made no meaningful effort to review any Barclays' internal financial information." (Opp. at 19.) But the undisputed record clearly demonstrates that the Underwriters received and considered internal financial information from Barclays, including during the due diligence calls as well as through the work performed by PwC. (*See* UW 56.1 ¶¶ 35-46; 207-237.) For example, as discussed above, the Underwriters arranged the financial due diligence call with Barclays' management specifically to discuss internal financial information about the Company's financial performance for the first three months of 2008, including anticipated writedowns. (UW 56.1 ¶¶ 41-42.)

Plaintiff then pivots and argues that the unrebutted declarations submitted by the Underwriters do not provide sufficient evidence of their satisfaction with the information learned on the diligence calls. But this argument runs contrary to settled jurisprudence in the Second Circuit that sworn statements are evidence to be considered on summary judgment. *Scott*, 344 F.3d at 289. Plaintiff also misleadingly argues that the non-Citi Underwriters expressed satisfaction with the due diligence calls, "regardless of whether they actually participated in the calls." (Opp. at 20.) This is demonstrably false. Only those Underwriters who participated in a given call declared that they were satisfied with the responses they heard on such call. (*See, e.g.,*

[6] In this same vein, Plaintiff's purported "Statement of Facts," is less a recitation of the undisputed record and more a collection of sweeping misrepresentations and conjecture. For example, Plaintiff compares the schedule for the Series 5 Offering to the Series 4 Offering and concludes that the Underwriters "had already decided not to conduct additional due diligence specific to the Series 5 Offering." (Opp. at 5.) But, this rank speculation cloaked as "fact" is belied by the undisputed facts set forth in the Opening Memorandum. (UW 56.1 ¶¶ 23-46.) Plaintiff's purported "Additional Statement of Undisputed Facts," (Plaintiff SOF ¶¶ 238-453), suffers from the same infirmities. (*See* The Underwriter Defendants' Local Rule 56.1 Response to Plaintiff's Additional Statement of Undisputed Facts.)

Slyz Decl. ¶¶ 14-15; *see also* UW 56.1 ¶¶ 35, 37, 39, 41, 43, 45.)[7]

Plaintiff also attempts to distract the Court by arguing that the Underwriters made a "misrepresentation of fact" by claiming that PwC audited Barclays' 2008 interim financials. (Opp. at 21.) Plaintiff is wrong. The very portion of the Opening Memorandum cited by Plaintiff makes it clear that the Underwriters made no such misrepresentation – PwC did not audit Barclays' 2008 interim financials and the Underwriters do not claim that they did. (*See* UW 56.1 ¶¶ 11-14; 23-26.) Plaintiff also points to an e-mail circulated three weeks after the Series 5 Offering noting that PwC may have given comfort for certain items that it should not have. (Opp. at 22.) This post-Offering discussion is immaterial and, if anything, demonstrates that PwC gave more comfort than was required under applicable standards.

2. The Underwriters Reasonably Relied on Certifications

Plaintiff next contends that the Underwriters "admit" their due diligence investigation relied on "Barclays' own 'examin[ation]' of the Offering Materials, and management's certification the materials were accurate and complete." (Opp. at 22.) But the SEC has specifically stated that "[r]easonable reliance on officers, employees, and others whose duties should have given them knowledge of particular facts (in the light of the functions and responsibilities of the particular person with respect to the issuer and the filing)" is a relevant circumstance in determining whether a person conducted a reasonable investigation. 17 C.F.R. § 230.176; *see also* SEC Release 33-6499, at *6. Accordingly, the Underwriters' reasonable reliance, in accordance with industry custom and practice, on management certifications as *one part* of their reasonable due diligence investigation was perfectly appropriate as a matter of law.

[7] Plaintiff's contention that the non-Citi Underwriters did not perform any substantive investigation and relied solely upon Citi, (Opp. at 3), is contradicted by their participation in these calls as well as their unrebutted declarations. (*See* UW 56.1 at ¶¶ 74-75, 84-85, 96-97, 108-109, 120-121, 130-131, 139-140.) Regardless, the non-Citi Underwriters were entitled to rely on Citi as the lead Underwriter. *See* SEC Release 33-5275, at *6 ("[P]articipating underwriter[s] need not duplicate the investigation made by the manag[ing underwriters].").

Plaintiff argues that the Underwriters were required to investigate and verify the representations made to them by Barclays' management in the certifications by relying on antiquated cases, namely *Escott v. BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) and *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971). (Opp. at 22-23.) Plaintiff ignores that these cases were decided long before the development of shelf registration and the compressed preparation time for due diligence in a shelf takedown of a WKSI.[8] Under this system, the Underwriters are permitted to use "different, but equally thorough" investigative techniques, including the development of a reservoir of knowledge, in order to test and verify assertions made to them by Barclays' management.[9] *See* SEC Release 33-6335, at *11. The undisputed record demonstrates that the Underwriters did so here.[10]

Plaintiff also asserts that the Underwriters could not rely on the certifications because they were dated as of the closings of the Series 5 Offering and the Greenshoe. In Plaintiff's unsupported view, these certifications "could not have provided any information to the Underwriters during their review period." (Opp. at 23.) Plaintiff again is wrong. The record makes clear that Underwriters were aware of the contents of these certifications before the closings and knew that they would be received. (*See* UW 56.1 ¶ 20; McSpadden Ex. 12 at

[8] "[I]ntegrated short form registration statements rely, to the maximum extent possible, on information contained in previously filed Exchange Act reports," which means that "[p]reparation time is reduced sharply, as is the period of time between the issuer's decision to undertake a securities offering and the filing of the registration statement with the Commission." SEC Release 33-6335, at *5.

[9] Plaintiff also argues that the Underwriters were unreasonable for relying on the certifications and opinions provided by Barclays' counsel and Underwriters' counsel. As an initial matter, Underwriters' counsel was hired by the Underwriters in order to assist them with the due diligence investigation. Plaintiff's assertion that the Underwriters cannot rely on their counsel is inconsistent with SEC guidance and industry custom and practice. *See* SEC Release 33-6499, at *6. Regardless, the same reasoning that supports the Underwriters' reasonable reliance on management's certifications as a part of their due diligence investigation applies to counsels' certifications.

[10] Plaintiff's contention that Underwriters' counsel's findings were based, in part, on the Underwriters' representations is intentionally misleading. Counsel's opinion letter actually refers to "discussions with [the Underwriters'] representatives, representatives of [Barclays], its independent accountants and its English legal advisers and United States counsel," and states that the opinion is provided on "the basis of the information that [Linklaters] gained" from all of those discussions. (McSpadden Ex. 37 at UW_Barclays_000011349-1350.)

UW_Barclays_000036155.) Plaintiff cites to no requirement that certifications be dated as of the date the Offering Materials are filed with the SEC, as opposed to the closing, because no such requirement exists. Accordingly, the Underwriters' customary reliance on these certifications as one part of their due diligence investigation was reasonable.

3. The Underwriters Established Their Reservoir of Knowledge

Finally, Plaintiff asserts in conclusory fashion that the Underwriters offer no evidence of the reservoir of knowledge, relying only on the Underwriters' purported limitation of discovery pertaining to the Series 2, 3 and 4 Offerings. (Opp. at 24-25.) Plaintiff again is wrong. The undisputed evidence demonstrates both that they possessed a reservoir of knowledge regarding Barclays from the Series 2, 3 and 4 Offerings, and that the knowledge gained as a part of that reservoir informed the due diligence done for the Series 5 Offering. (*See* UW 56.1 ¶¶ 58-63, 71-73, 80-83, 91-95, 103-107, 116-119, 127-129, 137-138.) Plaintiff merely asserts that he "disputes" these facts, (Plaintiff Counterstatement ¶¶ 83, 151), which does not create a genuine issue of material fact. *See Jackson*, 2015 WL 5521432, at *5; *Ford*, 2006 WL 538116, at *9.

Additionally, Plaintiff's assertion about this alleged discovery limitation is contradicted by his own purportedly undisputed facts, which demonstrates that the Underwriters agreed to produce documents related to the Series 2, 3 and 4 Offerings to the extent they also related to the Series 5 Offering. (Plaintiff SOF ¶¶ 446-449.) To the extent documents relating to the Series 2, 3 and 4 Offerings were relevant to the Series 5 Offering, such as due diligence documents that demonstrate the Underwriters' reservoir of knowledge, the Underwriters have produced those documents to Plaintiff in this litigation.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Opening Memorandum, the Underwriters respectfully request that the Court grant their Motion for Summary Judgment.

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