No.

IN THE

Supreme Court of the United States

LEIDOS, INC.,

Petitioner,

v.

INDIANA PUBLIC RETIREMENT SYSTEM, INDIANA STATE TEACHERS' RETIREMENT FUND, AND INDIANA PUBLIC EMPLOYEES' RETIREMENT FUND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 10(b) of the Securities Exchange Act of 1934 and its accompanying Rule 10b–5, an omission may be fraudulent only if the omitted information is necessary to make an affirmative statement "not misleading." Thus, "companies can control what they have to disclose . . . by controlling what they say to the market." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 (2011). In the decision below, however, the Second Circuit held that a company can be liable for securities fraud merely for omitting information required by a Securities and Exchange Commission ("SEC") regulation, even if those disclosures are not necessary to make affirmative statements not misleading.

The question presented is:

Whether the Second Circuit erred in holding—in direct conflict with the decisions of the Third and Ninth Circuits—that Item 303 of SEC Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5.

PARTIES TO THE PROCEEDING

In addition to Leidos, Inc. (formerly known as SAIC, Inc.), Kenneth C. Dahlberg, Walter P. Havenstein, Mark W. Sopp, Deborah H. Alderson, and Gerard Denault were initially named defendants in the district court, but all claims against them were dismissed, and dismissal of those claims has been affirmed on appeal.

Respondents, lead plaintiffs in the district and circuit courts, are the Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund.

RULE 29.6 STATEMENT

Petitioner Leidos, Inc. ("Leidos") was named SAIC, Inc. when this litigation was filed. Petitioner continued to do business as SAIC until September 2013, when it changed its name to Leidos and spun off a separate, publicly traded company under its former name. Although the corporation currently doing business as SAIC is not a party to this litigation, Petitioner is referred to herein as "the Company" or "SAIC" to ensure consistency with the briefing and decisions below. Leidos is a publicly held corporation, and no publicly held company holds 10% or more of Leidos' stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–26a) is reported at 818 F.3d 85. The opinions of the district court granting in part and denying in part Defendant's motion to dismiss, granting Defendant's motion for reconsideration, and denying Plaintiffs' post-judgment motion for relief are unreported and attached at App. 27a–87a.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2016. A timely petition for rehearing was denied on August 2, 2016. App. 88a–89a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Securities and Exchange Commission Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5, and Securities and Exchange Commission Regulation S-K, Item 303, 17 C.F.R. § 229.303, are reproduced in the Appendix, *infra*, at 90a–108a.

STATEMENT OF THE CASE

This case presents a deep split of authority with respect to one of the most important—and frequently invoked—provisions of the federal securities laws. The Second and Ninth Circuits, which see more federal securities cases than the rest of the circuits combined, are in open disagreement regarding whether Item 303 of Securities and Exchange Commission ("SEC") Regulation S-K ("Item 303") creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b–5 (hereinafter referred to collectively as "Section 10(b)"). The Second Circuit answered that question in the affirmative and, in so doing, recognized that its "conclusion is at odds with the Ninth Circuit." Both circuits claim to find support for their positions in a Third Circuit opinion; but that opinion, authored by then-Circuit-Judge Alito, explicitly held that Item 303 does not "impose[] an affirmative duty of disclosure . . . that could give rise to a claim under Rule 10b–5." *Oran v. Stafford*, 226 F.3d 275, 286 n.6 (3d Cir. 2000). Thus, the Second Circuit's holding has created a 2-1 division of authority, and it is also inconsistent with views expressed within the Sixth and Eleventh Circuits.

As a result of this split, SAIC faces potential liability for an alleged Section 10(b) violation that it would not be facing had this suit been filed in a different jurisdiction. This inconsistency is already fueling forum shopping in Section 10(b) litigation. This Court should right the ship that the Second Circuit has taken off course.

Certiorari should be granted not only to resolve a circuit split on an important and recurring question of federal law, but also to clarify the scope of the duty to disclose under Section 10(b). This Court has held that Section 10(b) and Rule 10b–5 do "not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). And "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b–5." *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (internal quotation marks omitted).

Since the enactment of Section 10(b) in 1934 and the promulgation of Rule 10b–5 eight years later, this Court has recognized *only two* situations giving rise to an affirmative duty to disclose. *First*, when a corporate insider possesses material nonpublic information, the insider must disclose the information or abstain from trading in the company's shares. *See Dirks v. SEC*, 463 U.S. 646, 654 (1983); *Chiarella v. United States*, 445 U.S. 222, 230 (1980). *Second*, under the plain terms of Rule 10b–5, when an issuer voluntarily speaks, it has a duty to disclose "material fact[s] necessary to make . . . statements made . . . not misleading." 17 C.F.R. § 240.10b–5(b). From this latter rule it necessarily follows that "companies can control what they have to disclose . . . by controlling what they say to the market." *Matrixx*, 563 U.S. at 45.

The Second Circuit dramatically expanded the scope of omissions liability under Section 10(b). It holds that issuers may be liable for federal securities fraud by omitting information required to be disclosed by SEC regulations, even if that information is not necessary to make affirmative disclosures not misleading. The Second Circuit now imposes liability for violating the disclosure requirements of Item 303, requirements that are, according to the SEC, "intentionally general" and "inapposite" to *Basic*'s test for materiality under Section 10(b). This rule undermines the principles espoused by this Court in *Basic* and *Matrixx*, conflicts with the decisions of this Court cautioning against further judicial expansion of

Section 10(b) liability, and directly departs from the holdings of the Third and Ninth Circuits.

This Court's review is necessary to resolve an acknowledged circuit split and to clarify the circumstances under which there exists a duty to disclose that is actionable under Section 10(b). In doing so, this Court can establish a uniform standard and ensure the fair and consistent application of the federal securities laws throughout the nation.

A. Factual And Procedural Background

1. SAIC is a leading applied technology company that provides scientific, engineering, systems integration, and technical services in the defense, national security, energy, environmental, and health care sectors. The facts giving rise to this lawsuit concern SAIC's contract with the City of New York (the "City"), entered into in 2001, to develop and implement an automated time, attendance, and workforce management solution for City agencies. Def. C.A. Br. 5. The project, known as "CityTime," was completed in 2011. *Id.* As of October 2011, CityTime supported more than 163,000 City employees and nearly 70 City departments. *Id.* It has been hailed by City officials, including former Mayor Bloomberg, as "a great success." *Id.*

While the project was under way, two SAIC employees, project manager Gerard Denault and chief systems engineer Carl Bell, in conjunction with CityTime's primary subcontractor and consultants to the City of New York, formulated an elaborate kickback scheme under which the subcontractor paid kickbacks to Denault and Bell for each hour it billed to the project, resulting in overcharges. App. 5a. The scheme's participants went to great lengths to conceal all aspects of the conduct from both the City and

SAIC, laundering illicit payments through a complex system of U.S. and international shell companies and bank accounts, and silencing SAIC employees through intimidation and threats. Def. C.A. Br. 6. SAIC and its management remained wholly unaware of the improper activity.

Federal and local investigators uncovered the scheme and, in December 2010, prosecutors announced the filing of a criminal complaint against four (non-SAIC) consultants to the City's Office of Payroll Administration. App. 5a. SAIC eventually learned of improper billing by Denault on the CityTime project and subsequently terminated him (in May 2011), and offered to reimburse the City for all time he billed to the project. App. 6a. Denault and Bell were both charged by federal prosecutors, including federal honest services charges for defrauding SAIC. Bell's guilty plea was announced in June 2011, and Denault was convicted, after a trial, in November 2013. *Id.*

The City formally demanded repayment from SAIC on June 29, 2011, which SAIC timely disclosed two days later in a filing with the SEC. Def. C.A. Br. 10. In March 2012, SAIC announced that it had entered into a deferred prosecution agreement ("DPA") with the U.S. Attorney's Office. App. 8a. Under the DPA, SAIC agreed to pay more than $500 million in fines and forfeitures, accepted responsibility for Denault and Bell's conduct, and submitted to the supervision of a corporate monitor for three years. *Id.*

2. Plaintiffs, Respondents here, initiated this lawsuit for securities fraud in 2012. They asserted claims against SAIC and several of its officers and directors for violations of Sections 10(b) and 20(a) of

the Exchange Act. In sum and substance, Plaintiffs claimed that certain SAIC statements, including SEC filings, contained false statements and omissions pertaining to CityTime.

SAIC moved to dismiss for failure to state a claim. The district court agreed with SAIC that, with respect to the vast majority of the claims, Plaintiffs failed to adequately plead the scienter and false statement or omission elements of a Section 10(b) claim. App. 51a. The court initially declined to dismiss a subset of claims based on alleged deficiencies in SAIC's annual report on Form 10-K, filed on March 25, 2011 (the "March 2011 10-K"). App. 71a. These claims asserted that the March 2011 10-K, which did not contain a discussion of the CityTime project, failed to comply with Generally Accepted Accounting Principles ("GAAP") and omitted disclosures required by Item 303. *Id.* But upon reconsideration, the court found that the GAAP and Item 303 claims were insufficiently pled under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). App. 48a. It dismissed the complaint in its entirety and later denied Plaintiffs' motion seeking leave to file another amended complaint. App. 35a–36a. Plaintiffs appealed.

B. The Second Circuit's Holding Entrenched A Deep And Expressed Circuit Split

On appeal, the Second Circuit reversed in part, holding that Plaintiffs adequately alleged that SAIC failed to make required disclosures under Item 303 in its March 2011 10-K.[1] App. 2a. Item 303 requires

[1] The court also reinstated Plaintiffs' claims based on SAIC's purported failure to disclose a "loss contingency" in accordance with GAAP. App. 14a–16a, 26a.

that certain public filings, including a company's quarterly and annual reports, contain a discussion and analysis of the company's financial condition and results of operations. 17 C.F.R. § 229.303(a). This section is commonly referred to as "Management's Discussion & Analysis," or simply "MD&A." Relevant here, the regulation requires management to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." *Id.* § 229.303(a)(3)(ii).

Central to this petition, the Second Circuit held that omitting statements purportedly required under Item 303 could give rise to securities fraud liability under Section 10(b). App. 17a. The Second Circuit's holding rested on the application of *Stratte-McClure v. Morgan Stanley*, decided just months earlier, which held that "a failure to make a required Item 303 disclosure . . . is indeed an omission that can serve as the basis for a Section 10(b) securities fraud claim." 776 F.3d 94, 100 (2d. Cir. 2015). In that case, the court expressly acknowledged that its Item 303 holding created a circuit split. *Id.* at 103 ("[O]ur conclusion is at odds with the Ninth Circuit's recent opinion in *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046 (9th Cir. 2014).").

The Second Circuit's expressed disagreement with the Ninth's Circuit's *NVIDIA* decision was two-fold. *First*, in its view, *NVIDIA* rested on a misguided interpretation of a Third Circuit opinion, *Oran v. Stafford*, 226 F.3d 275. In the Second Circuit's view, *Oran*, which *rejected* an attempt to assert a Section 10(b) claim predicated on an alleged violation of Item 303, "actually suggested, without deciding, that in certain instances a violation of Item 303 *could* give rise to a material 10b–5 omission." *Stratte-McClure*, 776 F.3d at 103. *Second*, unlike the Ninth Circuit, the Second Circuit thought it both relevant and persuasive that a number of prior decisions, including two of its own, held that Item 303 omissions were actionable under Sections 11 and 12 of the Securities Act of 1933 (the "Securities Act"). *Id.* at 104 (discussing *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 116 (2d Cir. 2012), and *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715–16 (2d Cir. 2011)).

Applying *Stratte-McClure*, the Second Circuit reinstated Plaintiffs' Section 10(b) claim based on purported Item 303 omissions in the March 2011 10-K. App. 23a. SAIC petitioned for panel rehearing and rehearing en banc. That petition was denied on August 2, 2016. App. 88a–89a.

REASONS FOR GRANTING THE PETITION

The Second Circuit holds that a "duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 102 (2d Cir. 2015). One such regulation is Item 303. According to the Second Circuit, issuers may be liable for federal securities fraud merely by omitting certain information required for disclosure by Item 303, even if those omissions do not make any affirmative statements misleading. *Id.* at 100; App. 17a. This conclusion has resulted in a clear and acknowledged 2-1 circuit split, is at odds with several decisions of this Court, and undermines clearly expressed Congressional intent.

First, the Second Circuit's Item 303 holdings directly conflict with the decisions of the Third and

Ninth Circuits, which hold that Item 303 does not create a duty to disclose for purposes of Section 10(b). Its stance is also inconsistent with positions expressed within the Sixth and Eleventh Circuits. In addition, the Second Circuit's holdings directly contravene this Court's express guidance regarding disclosure duties under Section 10(b).

Second, the Second Circuit's minority view expands the right of private litigants to bring federal securities fraud claims far beyond the scope this Court has authorized, and in direct opposition to Congress's intent to curb the expansion of Section 10(b) liability, as manifested in the PSLRA. This unnecessary and unjustified enlargement of Section 10(b) liability will impose significant litigation, discovery, and disclosure costs on issuers and will negatively affect the quality of information available to the securities markets.

The clashing approaches among the federal courts of appeals powerfully demonstrate the need for a uniform rule on whether plaintiffs may assert Section 10(b) claims based on omissions that are not necessary to make affirmative statements not misleading. This is a question of critical importance given the sheer volume of securities litigation in the United States,[2] particularly in the Second and Ninth Circuits, which see more federal securities cases than the rest of the circuits combined.[3] The Second

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[2] According to the most recent statistics, there were 189 federal securities fraud class action claims filed in 2015 alone. *See* Cornerstone Research, *Securities Class Action Filings: 2015 Year in Review*, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2015-Year-in-Review.

[3] *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*,

Circuit's decisions have spurred a proliferation of Section 10(b) claims predicated on Item 303 omissions—twenty-one new cases alleging Item 303 violations have been filed since October 2014 in the Second Circuit, as compared to just five in the Ninth Circuit. The stark disagreement among the circuits on an issue of central importance to private securities litigation is fueling untoward forum shopping and producing inconsistent results under what should be uniform federal securities laws.

I. CERTIORARI IS NECESSARY TO RESOLVE A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF FEDERAL SECURITIES LAW AND TO CLARIFY THE SCOPE OF AN ISSUER'S DUTY TO DISCLOSE

The Second Circuit holds that a company's omission of disclosures required by Item 303 can subject it to Section 10(b) liability. That holding places the Second Circuit alone among the federal courts of appeals in its treatment of the relationship between Item 303 and Section 10(b): two other courts of appeals (the Third and Ninth Circuits) have held that Item 303 *does not* create an independent duty to disclose for purposes of Section 10(b), and opinions within at least two more (the Sixth and Eleventh Circuits) have expressed views inconsistent with the Second Circuit's position. Moreover, the Second Circuit's Item 303 holdings contravene *Matrixx* and significantly expand the circumstances under which omissions liability can arise under Section 10(b). Review by this Court is necessary to resolve a question

NERA Economic Consulting, at 9 (Jan. 25, 2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

that has deeply divided the circuit courts of appeals and to clarify the circumstances under which a duty to disclose arises for purposes of Section 10(b).

A. The Second Circuit's Holdings Deeply Conflict With The Decisions Of Other Federal Courts Of Appeals

1. The Second Circuit stands alone among the federal courts of appeals in holding that Item 303 creates an actionable duty to disclose for purposes of Section 10(b). The Third and the Ninth Circuits have held just the opposite. And the Sixth and Eleventh Circuits have suggested, without deciding, that Item 303 cannot serve as the basis for a claim under Section 10(b).

In *Stratte-McClure*, the Second Circuit expressly acknowledged its split with the Ninth Circuit on the Item 303 issue, stating: "[O]ur conclusion is at odds with the Ninth Circuit's recent opinion in *In re NVIDIA Corp. Securities Litigation*." 776 F.3d at 103.

In *NVIDIA*, decided just three months before *Stratte-McClure*, the Ninth Circuit held that "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b–5." 768 F.3d 1046, 1056 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2349 (2015). The court began by examining the fundamental principles set forth by this Court in *Basic* and *Matrixx*: Section 10(b) and Rule 10b–5 do not create an affirmative duty to disclose, and disclosure is required only when necessary "'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Id.* at 1054 (alteration in original) (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011)). The court then rejected plaintiff's contention that Item 303 creates a duty to disclose and held that such a duty "must be separately shown according to the principles set forth . . . in *Basic* and *Matrixx Initiatives*." *Id.* at 1056.

The Ninth Circuit's holding rested in large part on the Third Circuit's decision in *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000). *Oran* was the first court of appeals case to address directly whether Item 303 creates a duty to disclose for purposes of Section 10(b). In that case, plaintiffs alleged that defendant was aware of a trend or uncertainty relating to its products—a potential link between defendant's drugs and a serious heart condition—that it was required to disclose under Item 303. *Id.* at 287. Plaintiffs contended that defendant's failure to make a required Item 303 disclosure was actionable under Section 10(b).

The Third Circuit, in an opinion authored by then-Circuit-Judge Alito, rejected this argument. The court quickly dismissed the contention that Item 303 creates an independent cause of action. 226 F.3d at 287. It then considered whether Item 303 "imposes an affirmative duty of disclosure . . . that, if violated, would constitute a material omission under Rule 10b–5." *Id.* *Oran* observed that "a duty to disclose may arise when there is insider trading, a statute requiring disclosure, or an inaccurate, incomplete or misleading prior disclosure." *Id.* at 285–86. Notwithstanding this observation, the Third Circuit then "reject[ed] [the] claim that SEC Regulation S-K, Item 303(a) impose[s] an affirmative duty of disclosure on [companies] that could give rise to a claim under Rule 10b–5." *Id.* at 286 n.6; *id.* at 287–88.

The primary basis for the court's conclusion was that Item 303's "disclosure obligations extend considerably beyond those required by Rule 10b–5."

226 F.3d at 288. Item 303 "mandates disclosure of specified forward-looking formation, and [provid]es its own standard for disclosure—*i.e.*, reasonably likely to have a material effect." Management's Discussion & Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, Exchange Act Release No. 26831, Investment Company Act Release No. 16961, 43 SEC Docket 1330, 1989 WL 1092885, at *6 n.27 (hereinafter "SEC Guidance"). In the Third Circuit's view, this standard would likely mandate the disclosure of information that would not be considered "material" under the test set forth in *Basic*. *Oran*, 226 F.3d at 288. In *Basic*, this Court recognized that silence is not usually misleading under Section 10(b) and Rule 10b–5, and therefore a plaintiff must do more than show an incomplete statement—he or she must demonstrate the omission of a *material* fact. 485 U.S. 224, 238 (1988). And, when information pertains to "contingent or speculative" events (i.e., forward-looking information), materiality "depend[s] at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Id.* (internal quotation marks omitted).

Oran recognized the critical distinction between Item 303's standard for the disclosure of forward-looking information and *Basic*'s "probability/ magnitude" test. *Oran*, 226 F.3d at 288. The court noted that the SEC itself had admonished that *Basic*'s test "is inapposite to Item 303 disclosure." *Id.* (quoting SEC Guidance, 1989 WL 1092885, at *6 n.27). Thus, because Item 303 requires disclosure of significantly more information than Section 10(b), plaintiffs bringing claims under Section 10(b) cannot simply point to "a violation of SK-303's reporting requirements"—they must "'separately show[]'" the existence of a duty to disclose. *Id.* (quoting *Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 608 (N.D. Cal. 1991)).

Oran's reasoning was expressly adopted by the Ninth Circuit in *NVIDIA*, which similarly concluded that "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b–5." 768 F.3d at 1056.

2. The Ninth Circuit also rejected plaintiffs' reliance on two Second Circuit cases holding that Item 303 is actionable under Sections 11 and 12 of the Securities Act. *See* 768 F.3d at 1055–56 (citing *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012); *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715–16 (2d Cir. 2011)). The Second Circuit, in contrast, found these cases persuasive with respect to its Section 10(b) and Rule 10b–5 analysis. *Stratte-McClure*, 776 F.3d at 101–02, 104. The *Stratte-McClure* court reasoned that since "Section 12(a)(2)'s prohibition on omissions is textually identical to that of Rule 10b–5"—both make unlawful the omission of material facts that are necessary in order to make other statements not misleading—it would be anomalous to conclude that Item 303 omissions are actionable under Section 12(a)(2) but not under Section 10(b) and Rule 10b–5. *Id.* at 104.

Stratte-McClure failed to acknowledge, however, that *Panther Partners* and *Litwin* did *not* base their reasoning on Section 12(a)(2), but rather on Section 11, which expressly imposes strict liability for the failure to disclose any information required to be disclosed in a registration statement. *See Litwin*, 634 F.3d at 716 ("The primary issue before us is . . . whether Blackstone's Registration Statement and Prospectus omitted material information that Blackstone was legally required to disclose."); *see also Panther Partners*, 681 F.3d at 120 ("One of the potential bases for liability under §§ 11 and 12(a)(2) is an omission in contravention of an affirmative legal disclosure obligation. . . ."). Indeed, in both cases, the Second Circuit opined that "Section 11 imposes *strict liability* on issuers" for "omit[ing] to state a material fact required to be stated" in a registration statement and "Section 12(a)(2) imposes similar circumstances for misstatements and omissions in a prospectus." *Panther Partners*, 681 F.3d at 120 (emphasis added); *see also Litwin*, 634 F.3d at 715.

The distinction between Section 10(b) and Section 11 is crucial, however, as the Ninth Circuit observed. Under Section 11, "liability arises from 'an omission in contravention of an affirmative legal disclosure obligation.'" *NVIDIA*, 768 F.3d at 1055–56 (quoting *Panther Partners*, 681 F.3d at 120). But there is "no such requirement under Section 10(b) or Rule 10b–5." *Id.* at 1056. Under Section 10(b), "material information need not be disclosed unless omission of that information would cause other information that is disclosed to be misleading." *Id.* (citing *Matrixx*, 563 U.S. at 43).

Notably, the Securities Exchange Act of 1934, which contains Section 10(b), was passed only a year after the Securities Act of 1933, which contains Section 11. The absence in Section 10(b) of language imposing affirmative legal disclosure obligations—which was expressly included in Section 11—strongly suggests that Congress did not intend to impose disclosure liability under Section 10(b) for omissions based on regulatory disclosure obligations. *See generally W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991) (applying rule that different text in statutes on same subject matter suggests difference in Congressional intent). If Congress wanted to impose Section 10(b) liability for failing to disclose information required to be stated in SEC filings, it could have easily (and expressly) done so, just as it had done the year before. The Second Circuit's heavy reliance on *Panther Partners* and *Litwin*—two decisions unquestionably premised on Section 11—was a critical error in a case involving Section 10(b).

3. The Second Circuit's holding is also inconsistent with positions taken by the Sixth and Eleventh Circuits. In *In re Sofamor Danek Grp., Inc.*, the Sixth Circuit considered "plaintiffs['] suggest[ion] . . . that defendants' disclosure duty under the Rule 10b–5 claim may stem from Item 303." 123 F.3d 394, 403 (6th Cir. 1997) (citation omitted). "Perhaps so," the court stated, "but . . . we do not find the argument persuasive." *Id.* And in *Thompson v. RelationServe Media, Inc.*, the Eleventh Circuit considered whether a violation of Item 303 of Regulation *S-B*—a regulation "materially identical" to Item 303 of Regulation S-K—could be actionable under Section 10(b) and Rule 10b–5. 610 F.3d 628, 682 n.78 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part). The concurring opinion, arguing that sanctions should be imposed for the plaintiff's "laughable" Section 10(b) claim, noted that "[t]he assumption that Item 303 of Regulation S-B would impose an actionable duty to speak under Rule 10b–5 is generous." *Id.* at 680, 682 n.78.

4. The present circuit split has led and will continue to lead to vastly disparate outcomes in the lower courts. Indeed, the split has already sown deep confusion among the district courts. *Compare Ash v. PowerSecure Int'l, Inc.*, No. 14-cv-92, 2015 WL 5444741, at *10–11 (E.D.N.C. Sept. 15, 2015) ("This court finds *Oran*'s reasoning, and *NVIDIA*'s interpretation of *Oran*, persuasive."), *with Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 94 F. Supp. 3d 1035, 1047 (D. Minn. 2015) ("The Second Circuit's reasoning is persuasive and consistent with this Court's reading of *Oran*.").

Further, the split has and will encourage forum shopping, as plaintiffs will assert questionable Item 303/Section 10(b) claims in the Second Circuit—but not the Third and Ninth Circuits—to take advantage of a favorable legal standard. This problem is exacerbated in the securities context given the liberal nature of the Exchange Act's venue provision that allows suits to be brought "in the district wherein any act or transaction constituting the violation occurred," or "in the district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a); *see also Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985).

Indeed, since *NVIDIA* and *Stratte-McClure* were decided, the difference in the number of Section 10(b) complaints asserting violations of Item 303 in the Second and Ninth Circuits is striking. From October 2, 2014—when *NVIDIA* was decided—to the present, only five complaints based in part on Item 303 have been filed in the Ninth Circuit, while *twenty-one* have been filed in the Second Circuit. The circuit split has resulted in more than *four times* as many Item 303 securities fraud complaints being filed within the

Second Circuit as compared to the Ninth Circuit. This Court can and should create a uniform interpretation of this point of law in order to end forum shopping and the divergent application of federal securities laws.[4]

B. The Second Circuit's Duty To Disclose Rule Contradicts This Court's Precedents

This Court should grant certiorari not only to resolve a division of authority on an important and recurring question of federal securities law, but also to clarify the circumstances under which Section 10(b) imposes an actionable duty to disclose.

Just over five years ago, this Court reaffirmed that "[Section] 10(b) and Rule 10b–5 do not create an affirmative duty to disclose any and all material information." *Matrixx*, 563 U.S. at 44. This Court's cases establish that "an affirmative duty to disclose" may arise under *only two* circumstances: (1) where confidential information is used in violation of a relationship of trust and confidence (e.g., a fiduciary relationship), *see, e.g.*, *Chiarella*, 445 U.S. 222, 230; and (2) when statements would be rendered misleading in the absence of the omitted information, *see* 17 C.F.R. § 240.10b–5(b); *Matrixx*, 563 U.S. at 44. In the latter situation, which concerns a party's affirmative statements, an important corollary provides that "companies can control what they have to disclose under these provisions by controlling what they say to the market." *Matrixx*, 563 U.S. at 45. The circuit courts of appeals have consistently adhered to

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[4] The parties in *Stratte-McClure* did not petition this Court for review. Plaintiffs in *NVIDIA* did so, and their petition was denied. *See* 135 S. Ct. 2349 (2015). Importantly, however, *this case* demonstrates that the question presented is mature and will continue to be a recurring issue in federal securities law that warrants urgent resolution by this Court.

this principle. *See, e.g.*, *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 174 (3d Cir. 2014); *Miss. Pub. Emps. Ret. Sys. v. Bost. Sci. Corp.*, 649 F.3d 5, 29 (1st Cir. 2011); *Minneapolis Firefighters' Relief Ass'n v. MEMC Elec. Materials, Inc.*, 641 F.3d 1023, 1029 (8th Cir. 2011).

In *Stratte-McClure*, the Second Circuit correctly recognized that omissions are actionable only if there is a duty to speak. 776 F.3d at 101. In its view, however, *three* circumstances may give rise to that duty. *Id.* The first two—trading on inside information and correcting otherwise misleading statements—have long been approved by this Court and are not at issue here. But the third circumstance—when a statute or *regulation* mandates disclosure—has no basis in this Court's precedents. To be clear, this Court has never held that an SEC regulation creates a duty to disclose that is actionable under Section 10(b). To the contrary, such a duty undermines this Court's holding, articulated in *Matrixx*, that an issuer has the ability to control what it says to the market for purposes of liability under Section 10(b). That bedrock principle of federal securities law has shaped the expectations and behavior of public companies and their legal and other disclosure advisors. Contrary to this Court's position and settled expectations in the securities markets, the Second Circuit holds that mere silence (or a non-misleading omission) can subject an issuer to securities fraud liability.

The Second Circuit maintained that it and its "sister circuits have long recognized that a duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak." *Stratte-McClure*, 776 F.3d at 102 (citing *Gallagher v.*

Abbott Labs., 269 F.3d 806, 808 (7th Cir. 2001); *Oran*, 226 F.3d at 285–86; *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992), *Backman v. Polaroid Corp.*, 910 F.2d 10, 20 (1st Cir. 1990) (en banc)). That is spectacularly wrong. Even a cursory analysis of those authorities reveals that while this proposition is occasionally referenced in the legal standards section of opinions, not one of those courts has found Section 10(b) liability based on a failure to disclose information required to be disclosed by a statute or regulation. *See, e.g.*, *Gallagher*, 269 F.3d at 810 (finding no Section 10(b) liability); *Oran*, 226 F.3d at 285–88 & n.6 (rejecting argument that Item 303 imposes affirmative duty to disclose); *Glazer*, 964 F.2d at 157 (reciting proposition, but no discussion of statutes or regulations bearing on case); *Backman*, 910 F.2d at 15–17 (similar).

Even more importantly, the proposition that statutes or regulations can create omissions liability under Section 10(b) arises from a *single sentence* found in a First Circuit opinion *rejecting* an expansion of disclosure duties. *See Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 27 (1st Cir. 1987). In *Roeder*, the First Circuit affirmed the dismissal of a Section 10(b) complaint, concluding that plaintiff failed to establish that defendant had a duty to disclose the company's illegal kickback payments. *Id.* at 28. Plaintiff "claim[ed] that a corporation has an affirmative duty to disclose all material information even if there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosures." *Id.* at 27. The court disagreed, noting "[t]he prevailing view . . . is that there is no such affirmative duty of disclosure." *Id.*

In rejecting plaintiff's argument that a corporation has a duty to disclose all material information "even if there is . . . no statute or regulation requiring disclosure," the First Circuit plainly did not hold that statutes and regulations requiring disclosure in fact impose such an affirmative duty. Notably, the authorities cited by *Roeder* reference affirmative duties to disclose arising from insider trading and correcting misleading statements, but nowhere suggest that statutes and regulations themselves give rise to such duties. *See Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3d Cir. 1982) ("[T]he plaintiffs have not called our attention to any case . . . which imposed any duty of disclosure under the Federal Securities Laws on a corporation which is not trading in its own stock and which has not made a public statement. We decline to do so on the facts of this case."); *Schlanger v. Four-Phase Sys. Inc.*, 582 F. Supp. 128, 133 (S.D.N.Y. 1984) ("While the federal securities laws do *not* impose a general duty upon an issuer to disclose material facts or new developments when it is *not* trading in its own securities, it does have a duty to make certain that any statement it does issue is truthful and complete, and does not materially misrepresent the facts existing at the time of the announcement.") (emphases in original); *Warner Commc'ns, Inc. v. Murdoch*, 581 F. Supp. 1482, 1489 n.12 (D. Del. 1984); *Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395, 409 (N.D. Ill. 1984).

Moreover, *Roeder*'s reference to "statute[s] or regulation[s] requiring disclosure" stems from its *disapproval* of *Issen v. GSC Enterprises, Inc.*, 538 F. Supp. 745 (N.D. Ill. 1982), cited by plaintiff for the proposition "that all material information had to be disclosed in annual reports 'notwithstanding the absence of an explicit statutory or regulatory duty to do so.'" *Roeder*, 814 F.2d at 27 n.2 (quoting *Issen*, 538 F. Supp. at 750). The First Circuit flatly rejected that proposition. It is illogical to suggest that, in dismissing an attempt to expand the Section 10(b) duty to disclose, the First Circuit actually broadened the scope of the duty. This underlying proposition therefore has no support in *Roeder* or any other supporting case law.

Nevertheless, subsequent cases, including *Stratte-McClure*, have apparently misconstrued *Roeder*'s passing reference to "statutes and regulations" to create an entirely new third circumstance giving rise to a duty to disclose. This faulty premise provided the core of the Second Circuit's reasoning in *Stratte-McClure*, and accordingly laid the groundwork for the opinion below. The Second Circuit's erroneous conclusion that a company cannot control what it has to disclose by limiting its affirmative disclosures in the first instance upends a fundamental tenet of federal securities law and should not be allowed to stand.

II. THE SECOND CIRCUIT'S DECISIONS PRESENT ISSUES OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

Left undisturbed, the Second Circuit's holdings would upset the securities and financial markets by exposing issuers to potentially massive liability for omitting information that might later be found to be a "trend" or "uncertainty" under Item 303. The potential for liability, coupled with an irreconcilable circuit split, fuels uncertainty that is harmful to both individual investors and the securities markets in general. *See, e.g.,* Hon. Ralph K. Winter, *Paying*

Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L.J. 945, 962 (1993) ("Overbreadth and uncertainty deter beneficial conduct and breed costly litigation."). As this Court has acknowledged, "uncertainty and excessive litigation can have ripple effects" that are damaging to capital formation and market performance. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

1. The Second Circuit's decisions represent an unprecedented expansion of the Section 10(b) implied private right of action that will lead to a significant increase in securities fraud claims. Congressional intent and this Court's precedents strongly counsel against that expansion. In 1995, Congress enacted the PSLRA in response to substantial abuses in private securities litigation. *See, e.g.*, H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). This Court explained, "[i]t is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the [Section] 10(b) private cause of action as then defined but chose to extend it *no further*." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 166 (2008) (emphasis added). Other decisions have likewise recognized that the Section 10(b) implied private right of action should not be expanded further by the courts. In *Central Bank of Denver*, the Court held that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation." 511 U.S. at 177. And in *Stoneridge*, the Court declined to extend Section 10(b) liability to vendors and customers who allegedly assisted a company in issuing fraudulent financial statements. 552 U.S. at 160–61. In reaching these conclusions, this Court admonished that "the § 10(b) private right should not

be extended beyond its present boundaries." *Id.* at 165. Contrary to *Central Bank* and *Stoneridge*, the Second Circuit has now vastly expanded the sweep of private Section 10(b) claims, and this Court should act to protect its carefully-drawn boundaries.

Further, it is well-settled that Item 303, by itself, does not create a private cause of action. *See, e.g.*, *Oran*, 226 F.3d at 287 (collecting cases). Plaintiffs should not be permitted to do an end-run around this established rule merely by repleading their claims as Section 10(b) violations premised on a duty supposedly springing from Item 303. As this Court stated in *Alexander v. Sandoval*, "a private plaintiff may not bring a suit based on a regulation . . . for acts not prohibited by the text of the statute." 532 U.S. 275, 286 (2001) (quoting *Cent. Bank of Denver*, 511 U.S. at 173 (internal brackets omitted)). The right to sue "must come, if at all, from the independent force" of the *actual statute* being invoked. *Id.* at 286. The Second Circuit's holding allows plaintiffs to avoid this principle by recasting Item 303 violations as statutory violations under Section 10(b).

The absence of a private claim under Section 10(b) for violations of Item 303 does not mean that issuers will be free to disregard SEC regulations. Indeed, the SEC's enforcement powers are "not toothless," *Stoneridge*, 552 U.S. at 166, as demonstrated by actions it has taken against companies for violations of Item 303, *see, e.g.*, *In the Matter of Bank of Am. Corp.*, Exchange Act Rel. No. 34-72888, 2014 WL 4101590 (Aug. 21, 2014); *In the Matter of Salant Corp. & Martin F. Tynan*, Exch. Act Rel. No. 34-34046, 51 S.E.C. 1099 (May 12, 1994); *SEC v. Melchior*, No. 90-C-1024J, 1993 WL 89141, at *13 (D. Utah Jan. 14, 1993); *In the Matter of Caterpillar, Inc.*, Exch. Act Rel.

No. 34-30532, 50 S.E.C. 903 (Mar. 31, 1992); *SEC v. Ronson*, No. 83-3030, 1983 WL 1357 (D.N.J. Aug. 15, 1983). And issuers will of course be liable for violations of the Securities Act provisions for which Congress has authorized private actions. *See, e.g.*, *Panther Partners* & *Litwin*, *supra*.

2. Allowing claims predicated on alleged Item 303 violations also encourages fraud-by-hindsight pleading, as Item 303 primarily concerns "soft information" that is easily susceptible to manipulation by plaintiffs' attorneys. Two characteristics of Item 303 give rise to serious concerns that Item 303 will be used as a powerful (and frequently employed) vehicle to assert hindsight Section 10(b) claims, which the PSLRA was intended to weed out.

First, the SEC has vested management with the authority and responsibility to determine what, if anything, must be disclosed under Item 303. According to SEC Guidance, management must make two judgment calls in determining whether disclosure is required under Item 303:

> (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the

> registrant's financial condition or results of operations is not reasonably likely to occur.

SEC Guidance, 1989 WL 1092885, at *6.

As the Guidance makes clear, management may determine, at either step of the analysis, that the circumstances do not require disclosure. For example, management may determine that a single executive's departure from the company is unlikely to have a material effect on the company's financial condition and results of operations. But that assessment may prove wrong when the former executive lures a third of the company's customers to his or her new firm.

Given that Item 303's requirements are "intentionally general," SEC Guidance, 1989 WL 1092885, at *1, management's assessments are easily second-guessed with the benefit of hindsight. As a result, plaintiffs will have little difficulty alleging that an event that *did occur* was in fact *reasonably likely* to occur, notwithstanding the facts available to management at the time of decision-making. This sort of hindsight pleading has long been criticized in the federal securities context. *See, e.g.*, *Ezra Charitable Trust v. Tyco Intern., Inc.*, 466 F.3d 1, 6 (1st Cir. 2006) ("Pleading fraud by hindsight, essentially making general allegations that defendants knew earlier what later turned out badly, is not sufficient.") (citation and internal quotation marks omitted). This "to disclose or not to disclose" dilemma presented by the Item 303 issue simply does not exist under the traditional Section 10(b) framework, because there a company can control what it has to disclose by controlling in the first instance what it says to the market. *Matrixx*, 563 U.S. at 45.

Securities fraud actions premised on Item 303 violations flip this proposition on its head.

Second, the hindsight problem is exacerbated by the fact that Item 303 concerns the disclosure of "soft information." *See* Denise Voight Crawford & Dean Galaro, *A Rule 10b–5 Private Right of Action for MD&A Violations?*, 43 No. 3 Sec. Reg. L.J. Art. 1 (2015) (observing that "Item 303 concerns disclosures of soft information and is therefore difficult to evaluate" and that "the MD&A disclosure standard is not particularly clear"). In contrast to "'hard' information," which is "'typically historical information or other factual information that is objectively verifiable,'" "'soft' information . . . includes predictions and matters of opinion," and is not susceptible to objective verification. *Sofamor Danek*, 123 F.3d at 401–02 (citation omitted). The concepts at the core of Item 303—"trends" and "uncertainties"—are so malleable that it will take only the slightest bit of creativity to identify a "trend" or "uncertainty" that a company should have disclosed. *See, e.g.*, Ted J. Fiflis, *Soft Information: The SEC's Former Exogenous Zone*, 26 UCLA L. Rev. 95, 95–96 (1978) ("Few regularly recurring problems are more agonizing to corporate managers . . . than those involving securities law disclosure requirements. . . . That courts are quite willing to second-guess disclosure decisions after a plaintiff's attorney artificially focuses the spotlight of attention on the particular failure of disclosure serves to increase the pain."). In short, the nature of Item 303 itself militates in favor of disallowing the type of claim Plaintiffs have pursued in this case.

3. Illustrating the points above, many Section 10(b) claims that have been dismissed for failure to

state a claim might have survived and proceeded to expansive discovery had they simply been recast as omitting "trends" or "uncertainties." For example, *Roeder*, discussed *supra*, dismissed a claim premised on defendant's failure to disclose (until indictment was imminent) that the company was under investigation for paying bribes to obtain subcontracts. 814 F.2d at 28. However, based on the Second Circuit's logic in the opinion below, plaintiffs simply could have rewritten their complaint to allege that defendant's management omitted the "uncertainty" of possible cancellation of government contracts or reputational harm from the ongoing investigation. Stated differently, the Second Circuit's rule will permit plaintiffs to bring securities fraud actions for every conceivable kind of conduct, so long as management is aware of any uncertainty that could be "reasonably likely" to result in a material impact on the company.

This case vividly illustrates this new potential to expand federal securities fraud claims. Here, Plaintiffs allege that SAIC was required to disclose "trends" or "uncertainties" stemming from the government's ongoing investigation consisting, at the time, of subpoenas from federal authorities requesting documents and information from SAIC and two of its employees, none of whom had been identified as targets of the investigation. App. 17a. Plaintiffs allege that the investigation presented potential "reputational risks" that could result in the loss of future business. *Id.* But any civil or criminal investigation could be opportunistically and retroactively characterized as a potential "trend" or "uncertainty" that may cause "reputational risks." Thus, under the Second Circuit's holdings, every company would be *required* to make an apparently extensive Item 303 disclosure when it or one of its employees is the subject of a government investigation, even in circumstances where the government has not indicated that the issuer is a "target" or otherwise has done anything wrong. This runs contrary to the established rule that "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information." *Chiarella*, 445 U.S. at 235.

4. Permitting plaintiffs to bring securities fraud actions premised on Item 303 violations will lead to increased litigation, discovery costs, and exorbitant settlement demands, imposing significant costs on issuers and the securities markets. "[L]itigation under Rule 10b–5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). This concern is magnified here because allowing Section 10(b) claims predicated on Item 303—the requirements of which are "intentionally general," SEC Guidance, 1989 WL 1092885, at *1—will undoubtedly lead defendants "to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank of Denver*, 511 U.S. at 189.

5. Further, compliance with the Second Circuit's rule will have negative impacts on shareholders and the market. Issuers will likely respond to the perceived risk of Section 10(b) liability by inundating investors with a flood of non-material information. This Court has already expressed concern that companies will "'bury the[ir] shareholders in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking.'"

Basic, 485 U.S. at 231 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976)). Subjecting companies to Section 10(b) liability based on purported violations of Item 303 will severely undercut Item 303's intent to promote meaningful disclosure to investors. *See* SEC Guidance, 1989 WL 1092885, at *1. It would thus be inappropriate for courts to embrace a new, capacious vehicle for bringing Section 10(b) claims, when doing so would defeat the very purpose of disclosure regulations.

III. THE QUESTION IS CLEANLY PRESENTED AND RIPE FOR REVIEW

This case presents an appropriate opportunity for this Court to resolve whether Item 303 creates a duty to disclose for purposes of Section 10(b) liability.

First, the question presented is dispositive of whether Plaintiffs have pled a viable Section 10(b) claim predicated on a purported Item 303 omission. Should this Court grant certiorari and rule in favor of SAIC, Plaintiffs' claim will be dismissed as a matter of law. In the securities context, this Court has frequently granted review where, as here, a district court has granted a motion to dismiss and a court of appeals has revived some or all of plaintiffs' others claims. *See, e.g.*, *Matrixx*, 563 U.S. at 27; *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

Second, the question presented has been preserved and is ripe for adjudication. The Second Circuit "passed upon" the question presented in holding that SAIC could be liable under Section 10(b) for a purported Item 303 omission. An issue is "passed upon" when a court of appeals expressly applies the rule of a prior decision to the facts of the case before it. *United States v. Williams*, 504 U.S. 36, 43 & n.4 (1992); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" (alterations in original) (quoting *Williams*, 504 U.S. at 41)). That rule is dispositive here.

It is no bar to a grant of certiorari when a petitioner did not demand that the court of appeals overrule a "squarely applicable, recent circuit precedent," especially when there have been "no intervening developments in the law." *Williams*, 504 U.S. at 44 (internal quotation marks omitted). SAIC was not required to advocate futilely for a panel to overrule a decision issued by a different panel of the same court just four months earlier. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) ("[A] panel of this Court is bound by the decisions of prior panels . . . .") (internal quotation marks omitted); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (petitioner's decision not to develop the question presented in the lower court "reflect[ed] counsel's sound assessment that the argument would be futile," as prior decision of same court with identical facts had reached opposite result). Indeed, this Court has concluded that imposing such a condition to review would be "unreasonable." *Williams*, 504 U.S. at 44.

Plaintiffs are equally misguided in suggesting, as they did at the rehearing stage, that this Court cannot consider the question presented because it was not raised in the district court. Plaintiffs' complaint was severely deficient with respect to multiple elements of their Section 10(b) claims, and SAIC won complete dismissal of *all* claims with prejudice early in the litigation. After Plaintiffs appealed, the Second Circuit decided *Stratte-McClure* four months before

SAIC filed its brief. SAIC had no reason to raise the issue until the case reached the Second Circuit, where it was already squarely foreclosed by *Stratte-McClure*. In any event, the Second Circuit nonetheless proceeded to "pass upon" the question presented.

The opinion below expressly acknowledged that its Item 303 holding was premised on *Stratte-McClure*. App. 16a–17a ("In *Stratte-McClure*, we held that Item 303 imposes an 'affirmative duty to disclose . . . [that] can serve as the basis for a securities fraud claim under Section 10(b)." (alterations in original)). This case, therefore, corresponds precisely to the scenario presented in *Williams*, where this Court concluded there was "no doubt" the question presented had been passed upon in the lower courts. *Williams*, 504 U.S. at 43 & n.4.

The question is cleanly presented and important. Until this Court provides definitive guidance, issuers will be subject to disparate and potentially enormous liability based merely on the forum chosen by plaintiffs' counsel. The open and acknowledged circuit split is already fueling forum shopping and a dramatic increase in Item 303 litigation. Fraud-by-hindsight claims are mounting, in direct contravention of this Court's decisions, and they are introducing significant uncertainty over the scope of public company reporting obligations and disclosure duties. The Court's intervention is needed now to restore uniformity to an extensively litigated and critically important area of federal securities law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 31, 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: October 6, 2015 Decided: March 29, 2016)

Docket No. 14-4140-cv

INDIANA PUBLIC RETIREMENT SYSTEM, Indiana State Teachers' Retirement Fund, Indiana Public Employees' Retirement Fund,

Plaintiffs-Appellants,

City of Westland Police and Fire Retirement System, on Behalf of Itself and All Others Similarly Situated, Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Fund, on Behalf of Themselves and All Others Similarly Situated, IBEW Local Union No. 58 Annuity Fund and the Electrical Workers Pension Trust Fund of IBEW Local Union No. 58,

Plaintiffs,

v.

SAIC, INC., Mark W. Sopp, Walter P. Havenstein,

Defendants-Appellees,

Gerard Denault, Kenneth C. Dahlberg, Deborah H. Alderson,

Defendants.

Before:

LYNCH, LOHIER, and CARNEY, *Circuit Judges*.

Plaintiffs-appellants Indiana Public Retirement System, on behalf of themselves and a class of other similarly situated investors, appeal from an order of the District Court (Batts, *J.*) denying their motions to vacate the judgment and to amend their complaint. Plaintiffs brought a securities fraud suit pursuant to Section 10(b), 15 U.S.C. § 78j(b), and Section 20(a), 15 U.S.C. § 78t(a), of the Securities Exchange Act of 1934 against SAIC, Inc., Walter P. Havenstein, Mark W. Sopp, and others, alleging material misstatements and omissions in SAIC's public filings regarding its exposure to liability for employee fraud in connection with SAIC's contract work for New York City's CityTime project. Because amendment of Plaintiffs' FAS 5 and Item 303 claims based on SAIC's March 2011 Form 10-K would not be futile, we **VACATE** the order denying the postjudgment motion with respect to those claims and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the decision of the District Court with respect to Plaintiffs' other claims.

*   *   *

LOHIER, *Circuit Judge*:

The Indiana Public Retirement System, the Indiana State Teachers' Retirement Fund, and the Indiana State Public Employees' Retirement Fund, on behalf of themselves and a class of other similarly situated investors ("Plaintiffs"), appeal from an order of the United States District Court for the Southern District of New York (Batts, *J.*) denying their motions to vacate the judgment and to amend their complaint. Plaintiffs sued SAIC, Inc.;[1] Walter P. Havenstein, its Chief Executive Officer; Mark W. Sopp, its Chief Financial Officer; and others (collectively, "Defendants") for securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5. Their lawsuit arose from a series of alleged material misstatements and omissions in SAIC's public filings regarding its exposure to liability for employee fraud in connection with SAIC's contract work for New York City's CityTime project. On appeal, we address principally four issues arising from Plaintiffs' motion to file a Proposed Second Amended Complaint ("PSAC"): (1) SAIC's alleged failure to comply with Generally Accepted Accounting Principles ("GAAP") by failing to disclose appropriate loss contingencies associated with the CityTime project, in violation of Financial Accounting Standard No. 5 ("FAS 5"); (2) SAIC's alleged failure to disclose a known trend or uncertainty reasonably expected to have a material impact on its financial condition, in violation of Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii) ("Item 303");[2] (3) SAIC's scienter; and (4) among other remaining issues, SAIC's allegedly misleading state-

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1 SAIC is now known as Leidos Holdings, Inc.

2 Regulation S-K required SAIC's periodic reports to the SEC, including its reports on Forms 10-K and 10-Q, to contain a section devoted to "management's discussion and analysis of the financial condition and results of operations." 17 C.F.R. § 229.303(a)-(b).

ments regarding its commitment to ethics and integrity contained in its 2011 Annual Report to shareholders.

We conclude that the District Court improperly denied Plaintiffs' postjudgment motion to amend their FAS 5 and Item 303 claims based on SAIC's March 2011 Form 10-K. We therefore vacate the District Court's order denying the motion with respect to those claims and remand for further proceedings consistent with this opinion. We affirm the judgment of the District Court with respect to Plaintiffs' remaining claims.

BACKGROUND

We accept as true the facts alleged in the PSAC because Plaintiffs appeal from the denial of leave to amend on the ground of futility. *See In re Advanced Battery Techs., Inc.*, 781 F.3d 638, 641-42 (2d Cir. 2015).

1. Facts

SAIC provided defense, intelligence, homeland security, logistics, and other services primarily to government agencies. In 2000 SAIC became the prime government contractor on a project with New York City to develop and implement an automated timekeeping program known as CityTime for employees of various City agencies. SAIC anticipated that the project, if successful, would attract business from municipalities across the United States with similar timekeeping requirements and would lead to contracts unrelated to timekeeping in the City. As a result, SAIC kept a close eye on the project's progress.

In 2002 SAIC hired Gerard Denault as Deputy Program Manager in charge of the CityTime project. In 2003 Denault enlisted Technodyne, a small, relatively unknown company, to provide staffing services on the project, but the relationship soon gave rise to an elaborate kickback scheme in which Technodyne illegally paid Denault and Carl Bell (SAIC's Chief Systems Engineer) for each hour a Technodyne consultant or subcontractor worked on CityTime. The scheme encouraged Denault and Bell to hire more Technodyne workers than the project required and to inflate billable hours and hourly rates.

Although SAIC initially suffered large losses under the CityTime contract, the contract became profitable in 2006 after Denault negotiated an amendment to the contract that transferred the risk of any cost overruns to the City. As a result of the amendment and the cost overruns associated with the kickback scheme, SAIC billed the City approximately $635 million for CityTime through May 2011, well over the $63 million that the City initially budgeted for the contract.

By late 2010, when the scheme began to unravel, SAIC had removed Denault from the CityTime project, placed him on administrative leave, and hired an outside law firm to conduct an internal investigation of possible fraud with the help of SAIC's internal auditors, who were tasked with reviewing Denault's timekeeping practices. At the same time, then-Mayor Michael Bloomberg announced that he was reevaluating SAIC's role in the CityTime project and reviewing whether to seek recovery of the City's payments to SAIC in connection with that project. On March 9, 2011, SAIC's audit team reported the results of its findings regarding Denault's improper timekeeping practices to SAIC.

Notwithstanding the audit team's findings, SAIC's Form 10-K, filed on March 25, 2011, and certified by Sopp and Havenstein, did not disclose SAIC's potential liability related to the CityTime project. To the contrary, in a separate Annual Report to shareholders that same month, SAIC touted its commitment to high standards of "ethical performance and integrity." Joint App'x 252. By the end of May 2011, though, Denault, Bell, the Technodyne principals, and others were charged in a federal criminal complaint with defrauding the City.[3] The charges, together with the results of the internal investigation from March 2011, prompted SAIC to fire Denault in May 2011 and offer to repay the City the amount he had billed after the 2006 amendment of the CityTime contract—a total of $2.5 million.

Thereafter, in a Form 8-K filed with the SEC on June 2, 2011, SAIC finally disclosed that the United States Attorney's Office for the Southern District of New York (the "Government") and the New York City Department of Investigation ("DOI") were conducting a joint criminal investigation into the CityTime contract. The 8-K further disclosed that SAIC had billed a total of $635 million for the CityTime project, that it had $40 million in outstanding re-

[3] Bell was interviewed about the CityTime project by SAIC's in-house and outside counsel on January 24, 2011, resigned from SAIC that same day, and pleaded guilty in June 2011, while Denault was arrested in May 2011 and was ultimately convicted. The indicted Technodyne principals fled to India.

ceivables, that Denault had been arrested for fraud, and that SAIC had offered to refund the City the $2.5 million that Denault billed as part of the kickback scheme with Technodyne. Finally, the 8-K explained that Mayor Bloomberg had

> indicated that the City intends to pursue the recovery of costs associated with the CityTime program that the City's investigation reveals were improperly charged to the City. The City has not filed any claim against the Company or otherwise requested reimbursement or return of payments previously made to the Company and the Company has not recorded any liabilities relating to this contract other than the approximately $2.5 million it offered to refund. However, there is a reasonable possibility of additional exposure to loss that is not currently estimable if there is an adverse outcome. An adverse outcome of any of these investigations may result in non-payment of amounts owed to the Company, a demand for reimbursement of other amounts previously received by the Company under the contract, claims for additional damages, and/or fines and penalties, which could have a material adverse effect on the Company's consolidated financial position, results of operations and cash flows.

Joint App'x 254-55.

In addition to filing the 8-K on June 2, 2011, SAIC held a conference call with analysts and investors to discuss SAIC's earnings. During the call, Havenstein referred investors to the 8-K for detailed information about the CityTime project and the ongoing criminal investigation. Similarly, on June 3, 2011, SAIC filed a Form 10-Q that repeated the representations made in the 8- K about the project.

On July 1, 2011, SAIC filed a second 8-K that included a letter from Mayor Bloomberg formally demanding that SAIC reimburse the City in the approximate amount of $600 million. On August 31, 2011, SAIC issued a press release announcing losses for the fiscal period ending July 31, 2011, due in part to the winding down of the CityTime contract and "probable" restitution to the City for wrongful conduct. Joint App'x 260. From June 2, 2011, when SAIC first disclosed the existence of a criminal investigation and the possible magnitude of its reimbursement to the City, to September 1, 2011, the day after it announced the termination of the CityTime contract, SAIC's stock price fell from $17.21 to $12.97 per share.

In March 2012 SAIC entered into a deferred prosecution agreement with the Government and the DOI, pursuant to which SAIC agreed to reimburse the City approximately $500.4 million and to forfeit $40 million in unpaid receivables. SAIC also agreed to cooperate with the Government's investigation of the CityTime fraud and to issue a "Statement of Responsibility" in which it acknowledged that it had defrauded the City through its managerial employees. SAIC admitted, among other things, that it should have supervised Denault's activities, controlled the cost of the project, addressed concerns about its relationship with Technodyne, and properly investigated an early anonymous internal complaint about Denault's relationship with Technodyne on the project.

2. Procedural History

Plaintiffs filed this lawsuit against SAIC and the individual defendants under Section 10(b) and Section 20(a) of the Exchange Act. As relevant here, they claimed that SAIC's March and June 2011 SEC filings on Forms 10-K, 10-Q, and 8-K failed to disclose SAIC's potential liability arising out of the CityTime fraud or known trends or uncertainties associated with the fraud, as required by FAS 5 and Item 303. Plaintiffs also claimed that the March 2011 Form 10-K contained misstatements regarding the efficacy of SAIC's internal controls, that SAIC's 2011 Annual Report contained misleading statements regarding SAIC's commitment to ethics and integrity, and that in its June 2011 conference call, SAIC misrepresented its potential liability for the CityTime project.

By order dated September 30, 2013 (the "September 2013 Order"), the District Court denied Defendants' motions to dismiss Plaintiffs' claims alleging violations of FAS 5 and Item 303 on the March 2011 Form 10-K, but granted Defendants' motions to dismiss with respect to most of Plaintiffs' other claims for failure to state a claim. *In re SAIC, Inc. Sec. Litig. (SAIC I)*, No. 12-CV-1353 (DAB), 2013 WL 5462289, at *16 (S.D.N.Y. Sept. 30, 2013). It granted Plaintiffs leave to amend, within forty-five days, a subset of the dismissed claims, specifically (1) the internal control claim based on the March 2011 Form 10-K and (2) the claims against all of the individual defendants except Denault. *Id.* at 17. Plaintiffs elected to forgo amending their complaint to replead those claims within the forty-five-day window, deciding instead to proceed with the surviving FAS 5 and Item 303 claims relating to SAIC's March 2011 Form 10-K.

SAIC, by contrast, moved the District Court to reconsider its decision not to dismiss Plaintiffs' FAS 5 and Item 303 claims based on the March 2011 Form 10-K. On January 30, 2014, the District Court granted SAIC's motion and immediately entered judgment dismissing Plaintiffs' remaining claims with prejudice (the "January 2014 Order"). *In re SAIC, Inc. Sec. Litig. (SAIC II)*, No. 12-CV-1353 (DAB), 2014 WL 407050, at *1 (S.D.N.Y. Jan. 30, 2014).

On March 4, 2014, Plaintiffs moved to vacate or to obtain relief from the judgment pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure and moved under Rule 15(a) for leave to file a proposed amended complaint in the form of the PSAC. As relevant here, the PSAC alleged the following additional facts: (1) SAIC was aware of the Government's criminal investigation of Denault by the end of December 2010 and had agreed to advance Denault's legal fees in connection with the investigation and any criminal proceeding that emerged; (2) the December 2010 criminal complaint suggested that SAIC had engaged in improper conduct; (3) by December 19, 2010, SAIC had initiated an internal investigation of Denault's timekeeping practices; (4) Mayor Bloomberg announced in a press release (December 16, 2010) and in a *Daily News* article (December 20, 2010) that he was reevaluating SAIC's role in the CityTime project and reviewing all payments the City made with a goal of recovering funds from SAIC; (5) SAIC removed Denault from the CityTime project and placed him on administrative leave on December 21, 2010; (6) the New York State Comptroller's Office and the City Mayor's Office each rejected contract awards to SAIC in December 2010 based partly on the brewing controversy surrounding the CityTime project; (7) SAIC interviewed Bell about the fraud allegations on January 24, 2011, the day Bell resigned from SAIC; (8) on February 10, 2011, the Government and the DOI announced the filing of an indictment in connection with a fraud scheme involving CityTime; (9) Bell was subpoenaed concerning CityTime, and SAIC agreed to advance his legal fees in connection with the criminal matter on February 11, 2011; and (10) SAIC's audit team issued a memorandum regarding Denault's improper timekeeping practices on March 9, 2011.

On September 30, 2014, the District Court denied Plaintiffs' motions for relief from judgment, concluding that any amendment as reflected in the PSAC would be futile.[4] *In re SAIC, Inc. Sec. Litig. (SAIC III)*, No. 12-CV-1353 (DAB), 2014 WL 4953614, at *4 (S.D.N.Y. Sept. 30, 2014).

This appeal followed.

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[4] The District Court also rejected Plaintiffs' arguments that the judgment should be set aside because of the discovery of new evidence adduced in Denault's criminal trial. Because we conclude that the District Court erred in not granting leave to amend, we do not reach this issue.

DISCUSSION

"[A] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)."[5] *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011). Rule 60(b)(6) authorizes a court to grant relief from a final judgment for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6). We have explained that "in view of the provision in [R]ule 15(a) that leave to amend shall be freely given when justice so requires, it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." *Williams*, 659 F.3d at 213 (quotation marks omitted).

Here, the District Court denied leave to amend under Rule 60(b)(6) solely on the ground that amendment (in the form of the PSAC) would be fu-

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5 The District Court analyzed Plaintiffs' motion under Rule 60(b) only, explaining in a footnote that their Rule 59(e) motion was untimely because it "was filed 32 days after entry of Judgment." *SAIC III*, 2014 WL 4953614, at *2 n.5. As an initial matter, the District Court was mistaken when it held that Plaintiffs' Rule 59(e) motion was untimely. Although the judgment was signed on January 31, 2014, it was not entered on the docket until February 4, 2014. Plaintiffs filed their motion 28 days later, on March 4, 2014, and their request to amend the judgment under Rule 59(e) was therefore timely. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

tile,[6] a determination that we review *de novo*. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014). We assess futility as we would a motion to dismiss, determining whether the proposed complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In this case, because the PSAC alleges securities fraud, it must also satisfy the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(1)-(2), and Rule 9(b) of the Federal Rules of Civil Procedure. *ECA, Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009). The PSAC therefore must allege with particularity facts that give rise to "a strong inference" that SAIC acted consciously and recklessly in omitting or misrepresenting financial information. *Id.* at 198.

On appeal, Plaintiffs elected to substantially shorten the class period and affirmatively waived any challenge to the District Court's dismissal of claims arising out of alleged false statements, omissions, or other violations of the securities laws that occurred prior to March 2011. *See* Oral Argument Tr. at 4. We therefore affirm the District Court's

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[6] Plaintiffs also argue that the District Court erred by dismissing the remaining claims in its January 2014 Order and closing the case without granting Plaintiffs leave to replead *sua sponte*. We have described a similar argument in another case as frivolous, *see Williams*, 659 F.3d at 212, and, accordingly, we conclude that the District Court did not abuse its discretion in refusing to grant leave to replead *sua sponte*.

dismissal of those claims, and in the remainder of this opinion we focus only on claims arising from misstatements and omissions during the shorter class period from March 23, 2011 to September 1, 2011.

1. <u>Plaintiffs' FAS 5 Claim Based on the March 2011 Form 10-K</u>

To succeed on a claim under Section 10(b) of the Exchange Act and Rule 10b-5, "a plaintiff must allege that [each] defendant (1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff's reliance was the proximate cause of its injury." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 105 (2d Cir. 2007). And while "[f]inancial statements . . . which are not prepared in accordance with [GAAP are] presum[ptively] . . . misleading or inaccurate," 17 C.F.R. § 210.4-01(a)(1), "allegations of GAAP violations or accounting irregularities, standing alone, are insufficient to state a securities fraud claim." *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000). "Only where such allegations are coupled with evidence of corresponding fraudulent intent might they be sufficient." *Id.* (quotation marks omitted).

Plaintiffs allege that SAIC violated GAAP by failing to comply with FAS 5, which requires the issuer to disclose a loss contingency when a loss is a "reasonable possibility," meaning that it is "more than remote but less than likely." Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 5, Accounting for Contingencies ¶¶ 3, 10 (1975) (hereinafter FAS Board, Statement of FAS 5). Here, Plaintiffs assert that SAIC failed to disclose the loss contingency related to the CityTime fraud in SAIC's March 2011 Form 10-K.

At the outset, we note that the District Court appears to have misunderstood the standard applicable to claims under FAS 5 when it held that FAS 5 does not require disclosure "unless it is considered *probable* that a claim will be asserted." *SAIC II*, 2014 WL 407050, at *3 (emphasis added) (quotation marks omitted). The "probability" standard applies in lieu of the "reasonable possibility" standard only if the loss contingency arises from "an unasserted claim or assessment when there has been *no* manifestation by a potential claimant of an awareness of a possible claim or assessment." FAS Board, Statement of FAS 5 ¶ 10 (emphasis added). But in this case, the "reasonable possibility" standard applies in view of the PSAC's allegation that by March 2011 the City *had* manifested an awareness of a possible, sizeable claim against SAIC. With that standard in mind, we turn to the allegations in the PSAC relevant to the March 2011 Form 10-K.

By the time SAIC filed that 10-K, the PSAC alleges, the CityTime criminal investigation was as focused on SAIC as it was on SAIC's individual employees; the December 2010 criminal complaint against individuals involved in the CityTime project alluded to SAIC's improper actions; Denault had been interviewed by prosecutors, and both SAIC and Denault received a grand jury subpoena for the production of documents related to the CityTime project; Mayor Bloomberg announced a reevaluation of SAIC's role in the CityTime project, including a full review of all payments the City had made to SAIC; and SAIC agreed to pay Denault's and Bell's legal fees associated with any criminal proceedings. Moreover, the PSAC alleged that by March 9, 2011, when SAIC received the results of its internal investigation about possible fraud, SAIC was aware not only of Denault's wrongdoing but also its own potential liability to the City.

For these reasons we hold that the PSAC adequately alleged that SAIC violated FAS 5 by failing to disclose a loss contingency in its March 2011 10-K arising from the City's manifest awareness of a possible material claim against SAIC.

2. <u>Plaintiffs' Item 303 Claim Based on the March 2011 Form 10-K</u>

We next consider whether the PSAC adequately pleaded a violation of Item 303, which imposes specific "disclosure requirements on companies filing" reports on SEC Forms 10-K and 10-Q. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015). As relevant here, Item 303 requires that SAIC's 10-K "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii).[7] According to the SEC's interpre-

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[7] In *Stratte-McClure*, we held that Item 303 imposes an "affirmative duty to disclose . . . [that] can serve as the basis for a securities fraud claim under Section 10(b)." 776 F.3d at 101. We explained that "failure to comply with Item 303 . . . *can* give rise to liability under Rule 10b-5 so long as the omission is *ma-*

tive release regarding Item 303, "disclosure [under Item 303] is necessary 'where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations.'" *Stratte-McClure*, 776 F.3d at 101 (quoting Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Investment Company Act Release No. 16,961, 43 SEC Docket 1330 (May 18, 1989) (hereinafter SEC's Interpretive Release)).

The PSAC alleges that SAIC violated Item 303 by failing to disclose: "(i) that SAIC had overbilled [the City] hundreds of millions of dollars on CityTime over a multi-year period; and (ii) that SAIC's overbilling practices subjected it to numerous undisclosed risks, including monetary risks and reputational risks, particularly because government agencies are SAIC 's primary customers and any harm to its reputation and/or relationships with such agencies would adversely affect its current business, as well as its future revenues and growth prospects." Joint App'x 230.

SAIC makes two principal arguments in defense of the District Court's conclusion that Plaintiffs' Item 303 claim was inadequately pleaded. First, it argues that it must actually have known of the relevant uncertainty at the time of the March 2011 filing, but

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terial under *Basic [Inc. v. Levinson*, 485 U.S. 224 (1988)], and the other elements of Rule 10b-5 have been established." *Stratte-McClure*, 776 F.3d at 103-04 (emphases added).

that Plaintiffs failed to plead that SAIC actually knew then about the scheme. Second, it insists that the loss of the CityTime contract was not material to SAIC's operations as a whole.

We have never directly addressed whether Item 303 requires that a company actually know or merely should have known of the relevant trend, event, or uncertainty in order to be liable for failing to disclose it. Instead, we appear to have assumed, without deciding, that Item 303 required an allegation or showing of actual knowledge rather than a lesser standard of recklessness or negligence. In *Panther Partners*, for example, we held that the complaint adequately alleged that defects in the defendant corporation's semiconductor chips "constituted a known trend or uncertainty that [the defendant] reasonably expected would have a material unfavorable impact on revenues or income." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 121 (2d Cir. 2012). We did not separately consider whether the defendant actually had to know about the existing financial uncertainty associated with the defect. *Id.*; *see also Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir. 2011) (concluding that, where it was undisputed that "the downward trend in the real estate market was already known and existing at the time of the [initial public offering], . . . the sole remaining issue [was] whether the effect of the 'known' information was 'reasonably likely' to be material").

The plain language of Item 303 confirms our previous assumption that it requires the registrant's actual knowledge of the relevant trend or uncertainty. Item 303 demands that the registrant "[d]escribe any *known* trends or uncertainties" and also requires disclosure where "*the registrant knows of* events that will cause a material change in the relationship between costs and revenues," such as a "*known* future increase[] in costs of labor." 17 C.F.R. § 229.303(a)(3)(ii) (emphases added). The SEC's interpretation of Item 303 further confirms this plain-language reading of Item 303, insofar as it advises that the trends or uncertainties must be "presently *known to management*." SEC's Interpretive Release (emphasis added). We therefore hold that Item 303 requires the registrant to disclose only those trends, events, or uncertainties that it actually knows of when it files the relevant report with the SEC. It is not enough that it should have known of the existing trend, event, or uncertainty.

Here, the PSAC's allegations support a strong inference that SAIC actually knew (1) about the CityTime fraud before filing its Form 10-K on March 25, 2011, and (2) that it could be implicated in the fraud and required to repay the City the revenue generated by the CityTime contract.[8] Moreover, the PSAC plausibly alleges that, in December 2010, as a result of the CityTime fraud, both the City and New York State rejected pending contract awards to SAIC valued at more than $150 million. Exposure of the

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[8] This was not an "uncertainty" arising out of a run-of-the-mill civil enforcement investigation by the SEC. *See In re Lions Gate Entm't Corp. Sec. Litig.*, No. 14-CV-5197 (JGK), 2016 WL 297722, at *14 (S.D.N.Y. Jan. 22, 2016). Rather, as alleged in the PSAC, by early March 2011 SAIC was aware that it faced serious, ongoing criminal and civil investigations that exposed it to potential criminal and civil liability and that ultimately did result in criminal charges and substantial liability.

fraud also jeopardized SAIC's existing or future relationships with other governmental entities that accounted for a significant amount of its revenue. *See Panther Partners Inc.*, 681 F.3d at 121. Indeed, the PSAC alleges, SAIC anticipated that the potential sale of CityTime's timekeeping software to other municipalities presented a "market opportunity valued [internally] at approximately $2 billion." Joint App'x 134. SAIC was aware of the fraud by late March 2011 but was uncertain about its likely effect on SAIC's current and future revenues. Under those alleged circumstances, SAIC was required under Item 303 to "disclose the manner in which th[at] then-known trend[ ], event[ ], or uncertaint[y] might reasonably be expected to materially impact" SAIC's future revenues. *Litwin*, 634 F.3d at 719.

We next consider SAIC's argument that the loss of the CityTime contract was ultimately not material in view of the fact that it was a single contract out of SAIC's more than 10,000 ongoing contracts and that it was worth a fraction of SAIC's yearly revenues ($635 million compared to $10 billion). We reject SAIC's materiality argument, which asks us to consider quantitative factors only in the narrowest light in determining the financial impact of losing the CityTime project due to the fraud, and to otherwise ignore qualitative factors. *See id.* at 717-18.

When a district court is in effect faced with a motion to dismiss a complaint, we have cautioned that "[b]ecause materiality is a mixed question of law and fact, in the context of a [Rule] 12(b)(6) motion, '[the] complaint may not properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.'" *ECA*, 553 F.3d at 197 (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000)). Here, as we have just observed, the PSAC alleges that SAIC anticipated that the potential sale of CityTime's timekeeping software to other municipalities presented a "market opportunity valued [internally] at approximately $2 billion"—twenty percent of its yearly revenue. The PSAC also points to SAIC's possible exposure to significant civil and even criminal liability arising from the submission of fraudulent time and billing records to the City and the resulting risk of loss of revenue from future contracts for CityTime projects or debarment from other government contracts altogether. The seriousness of the CityTime fraud and the alleged importance of the CityTime project to SAIC's future presence in the City and its ability to sell similar services to other municipalities around the United States makes us reluctant to conclude at this stage that the alleged misstatements were "so obviously unimportant" either quantitatively or qualitatively that they could not be material.

3. Scienter

Next, we consider whether the plaintiffs have plausibly alleged that SAIC acted with the requisite scienter when it violated FAS 5 and Item 303 in connection with its March 2011 Form 10-K. In other words, does the PSAC allege "facts to show . . . strong circumstantial evidence of conscious misbehavior or recklessness" on SAIC's part? *ECA*, 553 F.3d at 198. It does. If credited, the allegations in the PSAC strongly suggest that by March 9, 2011, when SAIC received the results of its internal investigation but before it filed its 10-K, SAIC knew about Denault's kickback scheme, the extent of the CityTime fraud, and, as we have already explained, that it risked civil and criminal fines and penalties, let alone losing a significant number of current and future government contracts. We conclude that the allegations support the inference that SAIC acted with at least a reckless disregard of a known or obvious duty to disclose when, as alleged, it omitted this material information from its March 2011 10-K in violation of FAS 5 and Item 303.

SAIC responds that it is simply implausible that it (or, for that matter, any of the defendants) would deliberately conceal the "misconduct of rogue employees for just over two months, from the filing of the 10-K on March 25 until [SAIC's] disclosures on June 2, 2011," because the benefits of a brief concealment would be low. Appellee's Br. 53. But this "argument confuses expected with realized benefits." *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008). For it is "cogent and at least as compelling as any opposing inference of nonfraudulent intent," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007), to infer that at the time it filed its 10-K in March 2011, SAIC believed it had more time before prosecutors would reveal its role in the scheme and before the City formally requested reimbursement; and if SAIC believed that it had more time, then "the benefits of concealment might [have] exceed[ed] the costs" as of March 2011. *Tellabs*, 513 F.3d at 710. In fact, at that time, it was unclear when and to what degree SAIC's role in the fraud would be made public. The

PSAC's theory, then—that the Government and the City uncovered SAIC's role in the fraud sooner than SAIC expected and compelled an earlier-than-expected disclosure in June 2011—is hardly implausible.

In sum, we disagree with the District Court's conclusion that amending the complaint to include the FAS 5 and Item 303 claims based on the March 2011 10-K would be futile.

4. Plaintiffs' Remaining Claims

We briefly address Plaintiffs' remaining claims on appeal.

First, the District Court dismissed with prejudice the FAS 5 claim based on SAIC's June 2011 Form 8-K and then refused to grant leave to amend the claim in the PSAC. *See SAIC I*, 2013 WL 5462289, at *10-11; *SAIC III*, 2014 WL 4953614, at *4. We agree with the District Court that amendment of this claim would be futile, notwithstanding the new facts alleged in the PSAC. SAIC's June 2011 Form 8-K adequately disclosed the total amount that SAIC billed the City under the CityTime project, the $40 million in outstanding receivables, Denault's arrest for fraud, SAIC's subsequent $2.5 million reimbursement offer to the City, and the "reasonable possibility" of additional exposure to loss from "a demand for reimbursement of other amounts." Joint App'x 254-55. Plaintiffs failed to identify in their complaint any additional disclosures SAIC should have made in the 8-K to more accurately portray the extent of SAIC's exposure to liability from the project.

Second, Plaintiffs challenge the District Court's dismissal of their claims that SAIC's 2011 Annual

Report contained materially false statements about SAIC's commitment to ethics and integrity. In particular, the PSAC points to representations in the Annual Report regarding SAIC's "culture of high ethical standards, integrity, operational excellence, and customer satisfaction" and its "reputation for upholding the highest standards of personal integrity and business conduct." Joint App'x 252. We affirm the District Court's dismissal of the claims based on these representations for substantially the reasons provided by the District Court. *See SAIC I*, 2013 WL 5462289, at *13. On appeal, Plaintiffs argue that these general statements, while typically not actionable, are actionable in this context because Defendants were aware of facts undermining the positive statements about SAIC's commitment to ethics and integrity. But "Plaintiffs' claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment." *City of Pontiac Policemen's & Firemen's Ret. Sys.*, 752 F.3d at 1 183; *see also ECA*, 553 F.3d at 206 ("No investor would take such statements seriously in assessing a potential investment, for the simple fact that almost every investment bank makes these statements."). We cannot distinguish the statements in the Annual Report from the statements at issue in *ECA*, for example, in which we referred to representations in an SEC filing about a bank's reputation for integrity as "no more than 'puffery' which does not give rise to securities violations," and suggested that such statements are typically "too general to cause a reasonable investor to rely upon them," in part because an investor "would not depend on [the statements] as a guarantee that [the company] would never take a step that might adversely affect its reputation." *ECA*, 553 F.3d at 206. This is not to say that statements about a company's reputation for integrity or ethical conduct can never give rise to a securities violation. Some statements, in context, may amount to more than "puffery" and may in some circumstances violate the securities laws: for example, a company's specific statements that emphasize its reputation for integrity or ethical conduct as central to its financial condition or that are clearly designed to distinguish the company from other specified companies in the same industry.

Finally, we affirm the District Court's dismissal of Plaintiffs' internal control claim based on the March 2011 Form 10-K and their claims against Sopp and Havenstein. In initially dismissing these claims without prejudice in its September 2013 Order, the District Court granted Plaintiffs an opportunity to amend their complaint within forty-five days, but Plaintiffs, without explanation, failed to do so. Under the circumstances, Plaintiffs' failure to comply with the District Court's reasonable schedule was a legitimate reason to dismiss those claims with prejudice.[9]

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9 Because Plaintiffs have made no specific arguments with respect to the District Court's dismissal of their claims against the individual defendants, we alternatively affirm the dismissal of these claims on the ground that they have been abandoned. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998).

CONCLUSION

For the foregoing reasons, we **VACATE** the judgment of the District Court with respect to Plaintiffs' FAS 5 and Item 303 claims based on SAIC's March 2011 Form 10-K and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of District Court with respect to Plaintiffs' other claims.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In Re SAIC, Inc.
SECURITIES LITIGATION

12 Civ. 1353 (DAB)
MEMORANDUM AND ORDER

- -X

DEBORAH A. BATTS, United States District Judge.

Plaintiffs Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund, on behalf of themselves and other similarly situated investors, ("Plaintiffs") commenced a putative class action pursuant to Section 10(b), 15 U.S.C. § 78j(b), and Section 20(a), 15 U.S.C. § 78(t), of the Securities Exchange Act of 1934 (the "Exchange Act"). On September 30, 2013, having considered support and opposition papers related to Defendant SAIC's ("SAIC" or "Defendant")[1] and Individual Defendants'[2] Motions to Dismiss, the Court issued an Order ("September

[1] Following a spin-off transaction, Defendant SAIC, Inc. changed its name to Leidos Holdings, Inc. *In re SAIC, Inc.*, No. 12 Civ. 1353, 2014 U.S. Dist. LEXIS 13629, at *4 n.1 (S.D.N.Y. Jan. 30, 2014). For the purposes of this action and the sake of consistency, however, the Court will to refer to it as SAIC.

[2] Individual Defendants included Kenneth C. Dahlberg, Walt Havenstein, Mark W. Sopp, Deborah H. Alderson, and Gerard Denault.

2013 Order") concluding that the Amended Class Action Complaint ("Complaint") largely failed to meet the heightened pleading standard of Rule 9(b) and the PSLRA. *See In re SAIC, Inc.*, No. 12 Civ. 1353, 2013 U.S. Dist. LEXIS 142606, at *4 (S.D.N.Y. Sept. 30, 2013). The Court, therefore, granted in part and denied in part the Motions to Dismiss, dismissing all of Plaintiffs' Section 10(b) claims with the exception of those Generally Accepted Accounting Principles ("GAAP") claims related to SAIC's March 2011 Form 10-K statements.[3] *Id.* The Court also dismissed the Section 20(a) claims against Individual Defendants. *Id.*

On October 16, 2013, Defendant filed a Motion to Reconsider pursuant to Local Rule 6.3, (ECF No. 104, 105), and Plaintiffs filed their Opposition to the Motion. (ECF No. 108.) On December 2, 2013, while the Motion to Reconsider was pending, SAIC filed an Answer to the Complaint. (ECF No. 112.) The Court, in a January 30, 2014 Opinion (the "January 2014 Order"), granted Defendant's Motion to Reconsider its September 30, 2013 Opinion, and dismissed the Complaint with prejudice. *In re SAIC, Inc.*, No. 12 Civ. 1353, 2014 U.S. Dist. LEXIS 13629 (S.D.N.Y.

[3] In the September 2013 Order, the Court granted Plaintiffs leave to amend the Section 10(b) claims based on the Company's March 2011 GAAP and internal control statements, as well as the corresponding Section 20(a) claim against all Individual Defendants except Denault. *In re SAIC, Inc.*, 2013 U.S. Dist. LEXIS 142606, at *50-51. Plaintiffs failed to do so and, thus, those claims were ultimately dismissed with prejudice. *In re SAIC, Inc.*, No. 12 Civ. 1353, 2014 U.S. Dist. LEXIS 13629, at *3 n.3.

Jan. 30, 2014). The Clerk of the Court entered Judgment for Defendants on the following day. (ECF No. 123.)[4]

On March 4, 2014, Plaintiffs filed a Motion to Vacate and/or Obtain Relief from the Judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b)(1), (2), (6), as well as a Motion for Leave to File the Proposed Second Amended Class Action Complaint ("SACAC"), which they submitted as an exhibit to a declaration in support of the Motion. (ECF No. 124, 125, 126, Ex. 1.) Defendant opposed the Motions in a timely manner. (ECF No. 130, 131.) For the reasons stated herein, Plaintiffs' Motions are DENIED.

I. BACKGROUND

The instant Motion arises in a closed case in which Plaintiffs brought action against former SAIC employees and others. The Complaint alleged that Defendant was responsible for the fraudulent overbilling of the City of New York, then a client of SAIC, under a contract for the development of a web-based employee time-keeping system called "CityTime." The September 2013 Order describes in detail the facts leading up to the filing of the action, and they will not be repeated here.

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4 Plaintiffs note that they wrote the Court to request a delay of entry of Judgment. (Pls.' Mem. Law at 10 n.11; ECF No. 122.) However, they have provided no support to suggest that such a request should or could be granted so as to permit them to "consider the Order and decide whether a request for review by the Court is appropriate." (ECF No. 122.) Even more, the instant motion was filed on March 4, 2014, 18 days beyond their February 14, 2014 requested date for entry of judgment. (ECF No. 122, 124.)

II. DISCUSSION

A. Legal Standard for a Motion to Reconsider

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); . . . or any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (2), (6);[5] *see Smith v. City of New York*, No. 12 Civ. 8131, 2014 U.S. Dist. LEXIS 78475, *5-6 (S.D.N.Y. June 9, 2014) (citing *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)) ("While there are no formal guidelines, courts have recognized four basic grounds on which a motion for reconsideration may be granted: the need to prevent

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[5] Though Plaintiffs also file their Motion pursuant to Fed. R. Civ. P. 59(e), such "[a] motion . . . must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The Clerk of the Court entered the Judgment in this case on January 31, 2014, (ECF No. 123), but Plaintiffs did not file their Motion until March 4, 2014. (ECF No. 124.) Rule 59(e) makes it abundantly clear that Plaintiffs' Motion, which was filed 32 days after entry of Judgment, is untimely. On that basis alone, the Court will not consider the Motion as if made pursuant to that Rule, but "construe[s] [the] motion as brought under Federal Rule of Civil Procedure 60(b)." *Shechet v. Doar*, 518 Fed. App'x 26, 27 (2d Cir. 2013); *see Schlafman v. State Univ. of N.Y.*, 541 Fed. App'x 91, 92 (2d Cir. 2013) (citing Fed. R. Civ. P. 60(c)) ("A Rule 60(b) 'must be made within a reasonable time,'" and if made "'for reasons [set out in Fed. R. Civ. P. 60(b)] (1), (2), and (3), no more than a year after the entry of the judgment or order or the date of the proceeding.")

manifest injustice, the need to correct errors of law or fact, the availability of new evidence, or an intervening change in controlling law."). Furthermore, "[t]he standard for granting motions pursuant to Rule 60(b) is 'strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" *Schlafman v. State Univ. of N.Y.*, 541 Fed. App'x 91, 92 (2d Cir. 2013) (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). "Motions under Rule 60(b) are addressed to the sound discretion of the district court and are generally granted only upon a showing of exceptional circumstances." *Xiu Feng Li v. Hock*, 371 Fed. App'x 171, 175-76 (2d Cir. 2010) (citing *Mendell ex rel Viacom Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990)).

A Rule 60(b) Motion, however, is not one in which a party may reargue "those issues already considered when a party does not like the way the original motion was resolved," *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y. 1996), and the Court will deny a motion that "seeks solely to relitigate an issue already decided." *Shrader*, 70 F.3d at 257. Nor may "[a] movant . . . raise on a motion for reconsideration any matter that it did not raise previously to the court on the underlying motion sought to be reconsidered." *Newton v. City of New York*, No. 07 Civ. 6211, 2009 U.S. Dist. LEXIS 104775, at *3 n.5 (S.D.N.Y. Nov. 10, 2009) (citing *Comprehensive Habilitation Servs., Inc.*, 233 F.R.D. 355, 361 (S.D.N.Y. 2005). While the Court may grant a 60(b) Motion as a means "to correct a clear error or prevent manifest injustice," *Montalvo v. United States*, No. 11 Civ. 6864, 2013 U.S. Dist. LEXIS 82082, at *3 (S.D.N.Y. June 11, 2013) (quoting *Banco de Seguros Del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp. 2d 427, 428 (S.D.N.Y. 2002)), "the court must not allow a party to use the motion to reargue as a substitute for appealing from a final judgment." *Davis v. Gap, Inc.*, 186 F.R.D. 322, 324 (S.D.N.Y. 1999) (citations omitted); *House v. Sec'y of Health & Human Serv.*, 688 F.2d 7, 9 (2d Cir. 1982) (citing *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) ("the rule is not to be used as a substitute for appeal . . . ."). Therefore, the Court will adhere to the strict standard to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Banco de Seguros del Estado*, 230 F. Supp. 2d at 428 (citing *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170) (S.D.N.Y. 1988).

B. Plaintiffs' New Evidence and Other Contentions

Plaintiffs suggest that the Court should consider "new evidence," which consists of information drawn from the trial in *United States of America v. Mazer, et al.*, No. 11 Cr. 121 (S.D.N.Y.) and Appendix A to SFAS No. 5. (Pls.' Mem. Law at 1, 10-11, 22; SACAC ¶ 43, 143, 149, 215, 342.) "In order to successfully vacate a judgment based on 'new evidence' pursuant to Rule 60(b)(2), however, plaintiffs must present evidence that is 'truly newly discovered or . . . could not have been found by due diligence.'" *Friedline v. N.Y. City Dep't of Educ.*, No. 06 Civ. 1836, 2008 U.S. Dist. LEXIS 106498, *15 (S.D.N.Y. Dec. 31, 2008) (citing

United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493 (2d Cir. 1983)). "Thus, evidence that was in plaintiffs' possession before judgment was rendered is not 'newly discovered,' and does not entitle plaintiffs to relief." *Friedline*, 2008 U.S. Dist. LEXIS 106498 at *16 (citing *Potamkin Cadillac Corp.*, 697 F.2d at 493).

Here, Plaintiffs acknowledge that the trial *ended* on November 22, 2013, but they make no assertion that they opposed Defendant's Motion to Reconsider based on the information elicited from trial. (Pls.' Mem. Law at 22.) Quite to the contrary, Plaintiffs indicate that "[b]ecause the Court had not yet decided that motion adversely to Plaintiffs, it was not necessary or appropriate for them to seek leave to amend or place before the Court additional allegations to substantiate the surviving SFAS 5 and Item 303 claims." (Pls.' Mem. Law at 22.) This "wait and see" approach is curious, given that the Court had already dismissed the bulk of Plaintiffs' claims. Plaintiffs then make the assertion, without support, that "transcripts were not readily available" before the issuance of the January 2014 Order. (Pls.' Reply Mem. Law at 8.) Even if the Court found that the trial materials supported Plaintiffs' allegations, which it does not, they would not constitute new evidence.

Plaintiffs also invoke Appendix A to SFAS No. 5 to support their assertion that because "SAIC has admitted it had approximately $40 million in outstanding receivables," there should have been a reported loss contingency. (Pls.' Mem. Law at 11) (emphasis in original). As an initial matter, the Court considered, and indeed cited, SFAS No. 5 in its previous Opinion. *See In re SAIC, Inc.*, 2014 U.S. Dist. LEXIS 13629 at *9. Furthermore, despite Plaintiffs' assertion to the contrary, the Complaint did not state an "exposure to loss" claim based on outstanding receivables. (Pls.' Reply Mem. Law at 4; *see also* Compl. ¶ 57.) The Court finds that, like the trial material, Appendix A to SFAS No. 5 is not new evidence, and Plaintiffs' arguments based on "the Collectability of Receivables" pursuant to it could have been made prior to this Motion and entry of Judgment. (Pls.' Mem. Law at 10-11.)

Plaintiffs also contend that the January 2014 Opinion was mistaken. According to Plaintiffs, the Court committed clear error, in fact and law, when it found that Plaintiffs failed to properly allege a violation of the SFAS No. 5 and Item 303, and that Plaintiffs inadequately pleaded scienter. (*See* Pls.' Mem. Law at 6-7, 15, 16, 19.) Their arguments, however, are no different than those considered previously. So, while the Second Circuit has "established a principle that Rule 60(b)(1) [is] available for a district court to correct legal errors by the court," *Gey Assocs. Gen. P'ship v. 310 Assocs.*, 346 F.3d 31, 35 (2d Cir. 2003) (citing *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964)), and "implicitly extended th[e] rule to the correction of mistakes of fact," *id*. (citing *Cappillino v. Hyde Park Cent. Sch. Dist.*, 135 F.3d 264 (2d Cir. 1997), neither of those situations is the before the Court. Nor have Plaintiffs demonstrated that "there has been a change in controlling law." *King County v. IKB Deutsche Industriebank AG*, 863 F. Supp. 2d 317, 319 (S.D.N.Y. 2012). Therefore, the Court rejects Plaintiffs' claims for the very same reasons set out in the January 2014 Order.

This case is unusual in that the Defendant's Motion to Reconsider was granted in the first place. However, the Opinion granting that Motion was warranted because the facts and law required it. Upon consideration of the submissions, the Court declines to review a rehashing of the same facts, and has no basis for sustaining this action on the basis of the same. Because Plaintiffs have failed to make the requisite "showing of exceptional circumstances," *Lesch v. United States*, 372 Fed. App'x 182, 183 (2d Cir. 2010) (citing *Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004)), their Motion must be, and HEREBY is, DENIED.

C. Motion for Leave to Amend

"A plaintiff need not be given leave to amend if it fails to specify either to the district court or to the court of appeals how amendment would cure the pleading deficiencies in its complaint." *TechnoMarine SA v. Giftports, Inc.*, 2014 U.S. App'x LEXIS 13487, *30 (2d Cir. 2014) (citing *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 n.71 (2d Cir. 2014)). Furthermore, "[a]s a procedural matter, '[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to [Rules] 59(e) or 60(b).'" *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) (citing *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008). However, "[u]nless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint." *National Petrochemical Co. v. The M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991).

Plaintiffs seek to amend their pleadings to broaden the class period and, thus, revive the previously dismissed claims. (*See* SACAC ¶ 1.) They make this Motion despite not having amended the Complaint at the Court's invitation. *In re SAIC, Inc.*, 2013 U.S. Dist. LEXIS 142606, at *50-51; *See State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990) ("When the moving party has had an opportunity to assert the amendment earlier, but has waited until after judgment before requesting leave, a court may exercise its discretion more exactingly."). Further, Plaintiffs' SACAC does not establish "that SAIC knowingly or recklessly made false and material misleading statements and omissions during the Class Period." (Pls.' Reply Mem. Law at 9.) In fact, it is still marred by hindsight pleading and speculation, providing nothing that would change the outcome of the case. Because "plaintiff[s] are unable to demonstrate that [they] would be able to amend [the] complaint in a manner which would survive dismissal, opportunity to replead [was] rightfully denied." *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53-54 (2d Cir. 1999); *see also Betts v. Shearman*, 751 F.3d 78, 86 (2d Cir. 2014) ("[T]he district court [does] not abuse its discretion [where] any amendment to the complaint on the claims . . . would be futile."). Therefore, Plaintiffs' request for leave to amend the Complaint is DENIED.

III. CONCLUSION

For the reasons stated herein, Plaintiffs' Motions are DENIED.

SO ORDERED.

Dated: September 30, 2014
New York, New York

s/

Deborah A. Batts
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

In Re SAIC, Inc. SECURITIES LITIGATION	12 Civ. 1353 (DAB) <u>MEMORANDUM AND ORDER</u>

- -X

DEBORAH A. BATTS, United States District Judge.

Plaintiffs Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund, on behalf of themselves and other similarly situated investors, ("Plaintiffs") commenced a putative class action pursuant to Section 10(b), 15 U.S.C. § 78j(b), and Section 20(a), 15 U.S.C. § 78(t), of the Securities Exchange Act of 1934 (the "Exchange Act"). On September 30, 2013, having considered support and opposition papers related to Defendant SAIC's ("SAIC" or "Defendant")[1] and Individual Defendants'[2] Motions to Dismiss, the Court issued an Order ("September 2013 Order") concluding that the Amended Class Ac-

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[1] Following a spin-off transaction, SAIC, Inc. changed its name to Leidos Holdings, Inc. (Def.'s Mem. Law at 1.) For the purposes of this action and the sake of consistency, however, the Court will to refer to it as SAIC.

[2] Individual Defendants included Kenneth C. Dahlberg, Walt Havenstein, Mark W. Sopp, Deborah H. Alderson, and Gerard Denault.

tion Complaint ("Complaint") largely failed to meet the heightened pleading standard of Rule 9(b) and the PSLRA. *See In re SAIC, Inc.*, 12 Civ. 1353, 2013 U.S. Dist. LEXIS 142606, at *4 (S.D.N.Y. Sept. 30, 2013). The Court, therefore, granted in part and denied in part the Motions to Dismiss, dismissing all of Plaintiffs' Section 10(b) claims with the exception of those Generally Accepted Accounting Principles ("GAAP") claims related to SAIC's March 2011 Form 10-K statements.[3] *Id.* The Court also dismissed the Section 20(a) claims against Individual Defendants. *Id.*

On October 16, Defendant filed a Motion to Reconsider pursuant to Local Rule 6.3, which is the basis of the instant Memorandum and Order. (ECF No. 104, 105.)[4] For the reasons set forth herein, Defendant's Motion to Reconsider is GRANTED. On reconsideration, the Motion to Dismiss is GRANTED and the Complaint is DISMISSED with prejudice.

I. BACKGROUND

The instant action arises from a scheme, devised by former SAIC employees and others, in which the City of New York, then a SAIC client, was fraudu-

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[3] In the September 2013 Order, the Court granted Plaintiffs leave to amend the Section 10(b) claims based on the Company's March 2011 GAAP and internal control statements, as well as the corresponding Section 20(a) claim against all Individual Defendants except Denault. *See In re SAIC, Inc.*, 2013 U.S. Dist. LEXIS 142606, at *50-51. Plaintiffs failed to do so and, pursuant to the September 2013, those claims are DISMISSED with prejudice.

[4] Defendant SAIC also filed an Answer to the Complaint on December 2, 2013. (ECF No. 112.)

lently overbilled for the development of a web-based employee time-keeping system called "CityTime." The September 2013 Order describes the factual basis for the action in meticulous detail, and it will not be repeated here.

II. DISCUSSION

A. Legal Standard for a Motion to Reconsider

The standard for granting a motion to reconsider "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSC Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 392 (S.D.N.Y. 2000) (holding that a motion for reconsideration "is appropriate only where the movant demonstrates that the Court has overlooked controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court."). Reconsideration is also appropriate when there has been a change in controlling law. *King County, WA v. IKB Deutche Industriebank AG*, 863 F. Supp. 2d 317, 319 (S.D.N.Y. 2012). In addition, "[t]he standards governing a motion to alter or amend judgment pursuant to Rule 59(e) and motions for reconsideration or reargument pursuant to Local Rule 6.3 are the same." *Word v. Croce*, No. 00 Civ. 6496, 2001 U.S. Dist. LEXIS 9071, at *5 (S.D.N.Y. July 5, 2001).

A motion for reconsideration is not one in which a party may reargue "those issues already considered when a party does not like the way the original motion was resolved." *In re Houbigant Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y. 1996). Thus Local Rule 6.3 should be "narrowly construed and strictly applied" to avoid repetitive arguments already submitted to the Court. *National Congress for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52, 53 (S.D.N.Y. 1999) (citation omitted). Nor should the parties simply "address facts, issues or arguments not previously presented to the Court." *U.S. Titan v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 182 F.R.D. 97, 100 (S.D.N.Y. 1998) (citations omitted). Reconsideration may only be granted where the moving party can demonstrate that the court overlooked decisions or information that might "reasonably be expected to alter the conclusion reached by the court," *Lesch v. United States*, 372 F. App'x 182, 183 (2d Cir. 2010) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)), or that reconsideration is necessary "to correct a clear error or prevent manifest injustice." *Montalvo v. United States*, No. 11 Civ. 6864, 2013 U.S. Dist. LEXIS 82082, at *3 (S.D.N.Y. June 11, 2013) (quoting *Banco de Seguros Del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp. 2d 427, 428 (S.D.N.Y. 2002)).

B. The September 2013 Order

In its September 30, 2013 Order, the Court denied Defendant's Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), Rule 9(b), and the PSLRA insofar as it related to Plaintiffs' Section 10(b) claim based on SAIC's March 2011 10-K Financial Statement. The Court concluded that Plaintiffs "ma[de] out a plausible claim that Defendants violated [Statement of Financial Accounting Standards No. 5

("SFAS No. 5")] in filing the March 2011 10-K Form," *In re SAIC, Inc.*, 2013 U.S. Dist. LEXIS 142606, at *30, and that the "facts alleged, and resolved according to the reasoning in the loss contingency analysis" were sufficient to state a claim on the Item 303 allegation for the same period. *Id.* at *33. The Court otherwise dismissed all of Plaintiffs' claims, granting Plaintiffs leave to amend the Section 10(b) claims based on the Company's March 2011 GAAP and internal control statements, as well as the corresponding Section 20(a) claim against all Individual Defendants except Defendant Denault. *Id.* at *50

C. Arguments on Reconsideration of the September 2013 Order

In its brief in support of the instant motion, Defendant argues that the Court used a less stringent legal standard than what is required to analyze the remaining claims. Defendant suggests that the Court conflated the legal standard, using the "reasonably possible" standard for the first part of the test, which called for a higher "probable" standard. (Def.'s Mem. Law at 2.) Defendant further asserts that two organizations, the American Bar Association ("ABA") and the Public Company Accounting Oversight Board ("PCAOB"), support its position that SFAS No. 5 contemplates "a high[er] threshold for disclosure" than the one used by the Court. (Def.'s Mem Law at 4.) Having revisited the Complaint and the factual allegations asserted therein, the Court agrees.

Defendant asserts correctly that SFAS No. 5 mandates disclosure "when a company considers it '*probable*'—not 'reasonably possible'—that the claim will be asserted against it . . . ." (Def.'s Mem Law at 2) (emphasis in original.) SFAS No. 5 states that "disclosure is not required . . . unless it is considered probable that a claim will be asserted and *there is a reasonable possibility that the outcome will be unfavorable*." (SFAS No. 5 ¶ 10) (emphasis added.) The Court's mention of a reasonably possible "loss contingency" refers to an unfavorable outcome, which only needs to be reasonably possible, not the potential assertion of a claim, which must be probable. *In re SAIC, Inc.*, 2013 U.S. Dist. LEXIS 142606, *30; (*see also*, Def.'s Mem. Law at 2.) However, in concluding that "by its March 2011 filing, the Company knew or should have known that a loss contingency was reasonably possible and required disclosure," the Court was in error. *In re SAIC, Inc.*, 2013 U.S. Dist. LEXIS 142606, *30. The Court made a factual assumption that led it to apply a lower standard than what the law requires.

Defendant further supports its argument by referencing ABA and PCAOB guidelines, which are "standards for lawyers and auditors under SFAS 5 for the disclosure of unasserted claims." (Def.'s Mem. Law at 4.) The Court, however, finds that Defendant's reference to these guidelines is inappropriate on reconsideration. Defendant makes no claim that the guidelines information was made available to the Court; considering it now would undermine the precept that, on a motion to reconsider, parties "may not advance new facts, issues, or arguments not previously presented to the court." *Walsh v. McGee*, 918 F. Supp. 107, 110 (S.D.N.Y. 1996) (internal citation omitted); (*See also*, Pl.'s Mem. Law at 7) ("SAIC did not invoke these guidelines earlier and, consequently, it cannot do so now.") (citation omitted.) The Court, therefore, cannot consider this newly asserted information. The ABA and PCAOB guidelines are of no consequence here, however, because the Court misapprehended the facts set forth in the Complaint and supporting documents.

The remaining claims hinge on three allegations: (1) the U.S. Attorney's Office, in December 2010, indicated that it would file criminal complaints against four non-SAIC employees related to the CityTime project; (2) SAIC, also in December 2010, placed Defendant Denault on administrative leave and commenced an internal investigation[5] into the CityTime project; and (3) the U.S. Attorney's Office, in February 2011, indicted five non-SAIC employees and obtained a guilty plea from one non-SAIC employee related to the CityTime project. (Compl. ¶¶ 4, 5, 21, 68, 112, 114, 115) (Def.'s Mem. Law at 5.) While Plaintiffs allege, and Defendant agrees, that an internal investigation was underway at the time of the March 2011 filing, no assertions were put forward to the effect that SAIC had uncovered any employee wrongdoing by that point, much less facts that would prompt disclosure. (Compl. ¶ 114.) Nor does the Complaint suggest Defendant was made aware that it was a focus of the criminal investigation prior to the March 2011 filing. The Government's commencing and prosecuting criminal cases against actors who were not employed by SAIC, and the company's

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[5] At the conclusion of the investigation, Defendant Denault was terminated. (Compl. ¶ 114)

launching of an internal investigation, without more, is not enough to make out a securities fraud claim.

Defendant argues that the aforementioned occurrences did not prompt it to make disclosures in the March 2011 10-K filing because GAAP, in SAIC's professional judgment, did not dictate disclosure. (*See, e.g.*, Def.'s Reply Mem. Law at 5.) There is merit to this argument. "The provisions of GAAP are subject to interpretation," and the principles "'tolerate a range of reasonable treatments, leaving the choice among alternatives to management." *In re Fannie Mae 2008 Sec. Litig.*, 742 F. Supp. 2d 382, 408 (S.D.N.Y. 2010) (citing *Thor Power Tool Co. v. Comm'r of Internal Revenue*, 439 U.S. 522, 544 (1979)). The allegations do not suggest that, by the time of the March 2011 filing, the information available left the company with the belief that a claim or assessment against it was probable. Therefore, the facts as stated in the Complaint do not undermine Defendant's professional judgment on this issue and, as a result, the Complaint falls short of the probability standard required to plead an omission for a 10(b) claim.

Plaintiffs contend that Defendant reasserts arguments presented on the underlying Motion and that, to the extent that new arguments are made, Defendant should have raised them earlier. As noted herein *supra*, however, the Court declines to consider the ABA and PCAOB arguments that Defendant puts forth. And while the Court sympathizes with Plaintiffs' concern regarding asserting the identical arguments, on reconsideration, the Court should correct its initial mistake rather than proceed as if it did not exist. *See Capitol Records, LLC v. Vimeo,* *LLC*, 09 Civ. 10101, 2013 U.S. Dist. LEXIS 181882, at *8 (S.D.N.Y. Dec. 31, 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (Reconsideration is proper if there is "the need to correct a clear error or prevent manifest injustice.")

Similarly, Plaintiffs' Item 303 claim must also fail. Item 303 is a "[r]egulation [that] 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.'" *Panther Partners Inc. v. Ikanos Communs., Inc.*, 681 F.3d 114, 120 (2d Cir. 2012) (internal citation omitted). At the motion to dismiss stage, Item 303's disclosure mandate "requires that a plaintiff plead, with specificity, facts establishing that the defendant had actual knowledge" of the purported trend, demand, commitment, event, or uncertainty. *Blackmoss Invs. Inc. v. Aca Capital Holdings, Inc.*, No. 07 Civ. 10528, 2010 U.S. Dist. LEXIS 2899, *24-25 (S.D.N.Y. Jan. 12, 2010); *see also Steckman v. Hart Brewing.*, 143 F.3d 1293, 1297 (9th Cir. 1998) (Item 303 "mandates . . . knowledge of an adverse trend.") Though "materiality is undoubtedly a flexible concept due to its fact-specific nature," *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 722 (2d Cir. 2011), the three events alleged to have occurred between December 2010 and March 2011 (i.e. the U.S. Attorney's Office filing criminal complaints, Defendant SAIC's placing Denault on administrative leave pending an internal investigation, and the U.S. Attorney's filing of indictments) are not enough to establish that the management (1) had knowledge that the company could be implicated in the CityTime project fraud or (2) could have predicted a material impact on the company. Though the Complaint makes a litany of allegations, as noted *supra*, it offers little to support the claim that SAIC had a disclosure obligation. In reversing the initial findings, the Court now corrects this oversight.

Furthermore, Plaintiffs are unable to establish scienter on the remaining claims. Scienter requires Plaintiffs to "state with particularity facts giving rise to a strong inference that each defendant acted with scienter–an intent to deceive or reckless disregard for the truth." *In re Hi-Crush Partners L.P. Sec. Litig.*, 12 Civ. 8557, 2013 U.S. Dist. LEXIS 171110 (S.D.N.Y. Dec. 2, 2013) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007)). While the Court does not require "great specificity," at the initial pleading phases, *id.* (citing *Ganino v. Citizens Utils. Corp.*, 228 F.3d 154, 169 (2d Cir. 2000)), recklessness does require Plaintiffs to plead facts showing "a state of mind approximating actual intent, and not merely a heightened form of negligence." *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000) (quotation and citation omitted). Absent showing that Defendant possessed additional information, Plaintiffs have, at best, shown a potential difference in professional judgment, which is as "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc.*, 551 U.S. at 324. Therefore, Plaintiffs also fail on this element of the claim.

The Court does not revisit this matter lightly. Typically, a motion to reconsider should not displace a court's decision, nor should it serve "as a substitute for appealing from a final judgment." *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 170 F.R.D. 111, 113 (S.D.N.Y. 1997) (citation omitted). However, the Court shares the Defendant's concern that the September 2013 Order might be understood to embrace the theory that SFAS No. 5 "require[s] companies to speculate about how government or internal investigations might come out," and could raise the "legitimate [public interest] concern [of]" corporations "resolving uncertainties in a way that invites assertion of claims or otherwise causes unnecessary harm to the client and stockholders." (Def.'s Mem. Law at 6) (internal citation omitted.) Leaving the September 2013 Order in place, moreover, would permit the prosecution of a case where the evidence is insufficient to support going forward. It would unfairly compel the company, which has already been beset by the massive fraud related to the CityTime project, to defend a costly suit, and would cause further harm to Defendant SAIC and its stakeholders. Defendant has made a "showing of exceptional circumstances," *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986), whereby "factual matters that were put before the Court on the underlying motion" were misconstrued. *Lichtenberg v. Besicorp Group Inc.*, 28 Fed. App'x 73, 75 (2d Cir. 2002) (citation omitted). The Court intervenes, therefore, "to prevent manifest injustice" from ensuing in the instant case. *United States v. Speed*, 10 Civ. 3333, 2012 U.S. Dist. LEXIS 66028, *2 (S.D.N.Y. May 8, 2012) (citing *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004)). As such, the Defendant's Motion to Reconsider is GRANTED and the remaining claims are DISMISSED.

D. Leave to Replead

When a complaint has been dismissed, permission to amend it "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Nevertheless, the Court may dismiss without leave to replead when amendment would be "futile," or would not survive a motion to dismiss. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 168 (2d Cir. 2003) (internal citations omitted), *rev'd on other grounds sub nom. City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). Here, the bulk of Plaintiffs' claims have been dismissed earlier with prejudice, and Plaintiffs' Class Action Amended Complaint cannot, on the facts set forth in the rounds of briefing (including the Court's January 9, 2013 conference), make out any claim with the requisite state of mind. The alleged omissions were, at best, a result of differences in professional judgment within the range permitted by GAAP. The Complaint cannot form the basis of the alleged violations under the Exchange Act, and an amendment thereto would be futile.

III. CONCLUSION

Accordingly, Defendant's Motion for Reconsideration is GRANTED. On reconsideration, Plaintiffs' remaining claims are DISMISSED with prejudice and without leave to replead. The Clerk of Court is directed to CLOSE the docket in this case.

SO ORDERED.

Dated: January 30, 2014
New York, New York

s/
Deborah A. Batts
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

In Re SAIC, Inc.
SECURITIES LITIGATION

12 Civ. 1353 (DAB)
MEMORANDUM AND ORDER

- -X

DEBORAH A. BATTS, United States District Judge.

Lead Plaintiffs Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund bring this putative securities fraud class action, on behalf of themselves and other similarly situated investors (collectively "Plaintiffs"), against SAIC, Inc. ("SAIC" or the "Company") and five of its current and former employees (collectively "Defendants"): Kenneth C. Dahlberg ("Dahlberg"), Walt Havenstein ("Havenstein"), Mark W. Sopp ("Sopp"), Deborah H. Alderson ("Alderson"), and Gerard Denault ("Denault") (collectively, the "Individual Defendants").[1] Plain-

[1] The Individual Defendants held the following positions at SAIC during the putative class period: (1) Dahlberg, Chief Executive Officer ("CEO") until September 30, 2009 and Chairman of the Board of Directors until June 18, 2010; (2) Havenstein, CEO from September 21, 2009 to March 1, 2012; (3) Sopp, Chief Financial Officer ("CFO"); (4) Alderson, Group President from 2005 until October 2011; and (5) Denault, Vice President and

tiffs commenced this action pursuant to Section 10(b), 15 U.S.C. § 78j(b), and Section 20{a), 15 U.S.C. § 78(t), of the Securities Exchange Act of 1934 (the "Exchange Act").

Defendants move this Court to dismiss the Class Action Amended Complaint (the "Complaint") pursuant to Rules 9(b) and 12(b) (6) of the Federal Rules of Civil Procedure and Section 78u-4(b) of the Private Securities Litigation Reform Act ("PSLRA"), arguing that the Complaint lacks adequate allegations of falsity, scienter, and loss causation. Because the Court finds that the Complaint fails to meet the heightened pleading standard of Rule 9(b) and the PSLRA, Plaintiffs' Section 10(b) claims are DISMISSED with the exception of the SAIC's March 2011 Form 10-K statements related to Generally Accepted Accounting Principles ("GAAP").[2] Likewise, because the Court finds that the Complaint fails to allege scienter with particularity, the Section 20(a) claims against Individual Defendants are DISMISSED.

I. BACKGROUND

The instant action arises from a scheme, devised by former SAIC employees and others, in which the City of New York ("NYC"), then a SAIC client, was

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CityTime Operations Manager until December 21, 2010 (Compl. ¶¶ 17-21).

[2] In the United States, GAAP "are the official standards adopted by the American Institute of Certified Public Accountants (the "AICPA"), a private professional association" which established the Financial Accounting Standards Board (the "FASB"). *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 160 n.5 (2d Cir. 2000). "The SEC treats the FASB's standards as authoritative." *Id.*

fraudulently overbilled for the development of a web-based employee time-keeping system called "City-Time." (Compl. ¶ 2.) Plaintiffs' allege that SAIC's press releases, public statements, and filings with the Securities and Exchange Commission ("SEC") were materially misleading for failure to disclose facts related to the overbilling scheme, including the scope of the investigations launched by the U.S. Attorney's Office and NYC, and the subsequent federal prosecution of those having committed the fraud. (Compl. ¶¶ 3-10.) Plaintiffs contend that Defendants, having knowingly made materially false statements and omissions in violation of Sections 10(b) and 20(a) of the Exchange Act, caused those who purchased SAIC's common stock between April 11, 2007 and September 1, 2011 ("the Class Period") to suffer economic losses.

A. The Overbilling Scheme

SAIC is a defense company providing scientific, engineering, systems integration, and technical services and solutions to federal, state, local agencies, foreign governments, and commercial customers. (Compl. ¶¶ 2, 16.) In 2001, SAIC contracted with NYC to develop and implement an automated time, attendance, and workforce management system for certain NYC agencies ("CityTime," the "Project," or the "Contract"). (*Id.* at ¶ 2.) While the Project was originally budgeted to cost $63 million, NYC had, by April 2010, paid $628 million; the increased cost was mainly caused by an overbilling scheme created by SAIC employees and others. (*Id.* at ¶¶ 2, 41.)

Denault and Bell were the SAIC employees responsible for running CityTime. (Compl. ¶¶ 35, 46, 139.) In 2003, they recommended that the Company hire Technodyne LLC ("Technodyne") as a "sole source" contractor, to provide staffing services for CityTime. (*Id.*) Technodyne was thereby exempted from having to compete for the contract. (*Id.*) At that same time, Denault, Bell, and Technodyne orchestrated an elaborate kickback scheme; Technodyne would pay Denault and Bell for each hour a Technodyne consultant or subcontractor worked on CityTime, and Denault and Bell would hire more workers than the Project required and inflate their billable hours and hourly rates. (*Id.* at ¶¶ 33-37.)

By 2006, NYC had paid SAIC approximately $22 million more than the original Project estimate. (*Id.* at ¶¶ 2, 38.) Denault and others were successful in lobbying to amend the CityTime Contract that year and, pursuant to the changes, costs for overruns were now to be borne by NYC.[3] (*Id.*) The number of consultants on the CityTime Project increased from 150 to more than 300. (*Id.* at ¶ 40.) SAIC would ultimately bill NYC $628 million for the Project, approximately ten times the amount originally estimated, and 74% of the total was paid to Technodyne. (*Id.* at ¶ 41.)

1. Investigation and Deferred Prosecution

On December 15, 2010, the U.S. Attorney's Office filed a criminal complaint alleging that four consult-

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[3] Under the original "fixed price" contract, SAIC was responsible for project costs beyond what was budgeted. The amended "fixed price level of effort" contract, on the other hand, shifted the burden to make NYC responsible for bearing costs overruns. (Compl. ¶ 38.)

ants to the NYC Office of Payroll Administration operated a fraud scheme, which resulted in overbilling on the CityTime Project. (Compl. ¶ 4.) On February 10, 2011, the U.S. Attorney's Office issued a press release in which it announced the indictment of the consultants, one of whom had already plead guilty to allegations related to the CityTime fraud scheme. (*Id.* at ¶ 5.) Then, on June 20, 2011, the U.S. Attorney's Office issued a press release announcing that it had unsealed a superseding indictment, which added Denault and Technodyne as Defendants. (*Id.* at ¶ 6.) The press release also noted that Bell had pled guilty to charges related to the CityTime Project overbilling scheme. (*Id.*) NYC Mayor Michael Bloomberg wrote SAIC shortly thereafter and, in a June 29, 2011 letter, he requested that the Company reimburse NYC for the approximate $600 million paid under the contract, as well as the cost to investigate and remedy the Project. (*Id.* at ¶ 120.)

On March 14, 2012, SAIC issued a press release announcing that it had entered into a Deferred Prosecution Agreement ("DPA") with the U.S. Attorney's Office. (Compl. ¶ 10.) According to the terms of the DPA, the Company would pay more the $500 million to the federal government and suffer other penalties, which were designed to prevent a similar occurrence. (*Id.*) SAIC also issued a Statement of Responsibility ("SOR") in which it "accept[ed] responsibility for the illegal conduct alleged against Denault and admitted by Bell," "acknowledge[d] that [its] conduct and managerial failures . . . contributed to the ability of Denault and Bell to commit their alleged crimes," and admitted that NYC was defrauded by SAIC. (*Id.* at ¶¶ 10, 46.) SAIC admitted that it failed to take "actions that might have detected . . . the charged conspiracies," including (1) supervising properly Denault' s activities, (2) controlling costs of the Project, (3) addressing concerns regarding Denault' s relationship with Technodyne, (4) investigating properly an anonymous ethics complaint alleging a kickback scheme. (*Id.* at ¶¶ 44, 47.)

2. Alleged False Statements and Omissions

Lead Plaintiffs filed the initial Complaint in this action on February 2, 2012, and the Amended Complaint August 27, 2012. The action, brought on behalf of purchasers of the Company's common stock during the Class Period, alleges that Defendants SAIC and five officers and employees knowingly or recklessly made material false statements or omissions of fact in SEC filings, press releases, and annual shareholders statements, which caused the putative class economic losses. The alleged false statements and omissions fall into four categories: (1) statements regarding conformity to GAAP (the "GAAP claims"); (2) statements regarding SAIC's disclosure and internal controls (the "control claims"); (3) statements regarding SAIC's commitment to ethics and integrity (the "integrity claims"); and (4) statements and regarding the CityTime Project (the "CityTime claims").

II. LEGAL STANDARD

A. Motion to Dismiss: Rules 9(b) and 12(b)(6) and the PSLRA

For a complaint to survive dismissal under Federal Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544

(2007). "A claim has facial plausibility," the Supreme Court explained,

> [W]hen the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "'merely' consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662 (2009) (quoting *Twombly*, 550 U.S. at 556-57). The "plaintiff' s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted). "[I]n keeping with these principles," the Supreme Court stated,

> A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 678.

A complaint alleging securities fraud "must [also] satisfy the heightened pleading requirements of the PSLRA and Federal Rule of Civil Procedure 9(b) by stating with particularity the circumstances constituting the fraud." *Slayton v. Am. Express, Co.*, 604 F.3d 758, 766 (2d Cir. 2010). "Under the PSLRA, the complaint must 'specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading,' and 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase, Co.*, 553 F.3d 187, 196 (2d Cir. 2009) (quoting 15 U.S.C. § 78u-4(b) (1)-(2)). "Therefore, while [the Court will] normally draw reasonable inferences in the non-movant' s favor on a motion to dismiss, the PSLRA establishes a more stringent rule for inferences involving scienter because [it] requires particular allegations giving rise to a stronger inference of scienter." *Id.* (internal quotation marks and citations omitted).

On a Rule 12(b)(6) motion, the Court may consider the complaint as well as "any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 88 (2d Cir. 2007) (citation omitted). The Court may also consider "well publicized stock prices." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154 (2d Cir. 2000).

B. Applicable Law for Section 10b and Rule 10b-5 Claims

Plaintiffs' bring their securities fraud claims pursuant to section 10(b) of the Exchange Act, which makes it unlawful to "use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). The implementing regulation, Rule 10b-5, states that it is unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b). To succeed on a Rule 10b-5 claim, then, "a plaintiff must allege that [each] defendant (1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff' s reliance was the proximate cause of its injury." *Solow v. Citigroup, Inc.*, No.12-2499-cv, 2013 U.S. App. LEXIS 903, *2-3 (2d Cir. Jan. 15, 2013). Parties disagree as to whether the Complaint alleges sufficiently (1) a misstatement or omission of material fact, (2) scienter, and (3) loss causation and, therefore, whether the pleadings can survive a Motion to Dismiss for failure to state a claim.

1. Misstatement or Omission of Material Fact

At the Motion to Dismiss stage, the elements of Rule 10b-5 claims are governed by the heightened pleading standards of Federal Rule 9(b) and PSLRA section § 78u-4(b). Pursuant to Federal Rule 9(b), the false statement element requires the Complaint to "state with particularity the circumstances constituting fraud," and demands that the plaintiff "(1) specify the statements that [it] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004); Fed. R. Civ. P. 9(b). Likewise, the PSLRA requires a plaintiff, for each "untrue statement of material fact" and "omi[ssion] to state a material fact" to "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading . . ." 15 U.S.C. § 78u-4(b)(1). Where there is an allegations of fraud based on omissions, the plaintiff must allege that "the corporation is subject to a duty to disclose the omitted facts." *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267-68 (2d Cir. 1993).

"[T]o determine whether a misleading statement [or omission] is material, courts must engage in a fact-specific inquiry," *ECA*, 553 F.3d 187, 197 (2d Cir. 2009) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988)), because the question "necessarily depends on all relevant circumstances of the particular case." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000). The pleading requirements for materiality demands that the Complaint "offer sufficient evidence of 'a statement or omission that a reasonable investor would have considered significant in making investment decisions.'" *Lau v. Mezei*, No. 10 Civ. 4838, 2012 U.S. Dist. LEXIS 116608, at *5 (S.D.N.Y. Aug. 16, 2012) (quoting *Litwin v. Black-*

stone Grp., L.P., 634 F.3d 706, 716-17 (2d Cir. 2011)). "It is not sufficient to allege that the investor *might* have considered the misrepresentation or omission important," *Ganino*, 228 F.3d at 162 (emphasis added), because the cause of action requires the pleading of "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix 'of information made available.'" *ECA*, 553 F.3d at 197 (2d Cir. 2009). Still, because "materiality is a mixed question of law and fact," on a motion to dismiss the "'complaint may not properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.'" *Id.* (quoting *Ganino*, 228 F.3d at 162).

2. Scienter

"Section 21D(b)(2) of the PSLRA . . . establishes a more stringent role for inferences involving scienter," *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008), requiring that a complaint plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). The required state of mind on this claim "is an intent 'to deceive, manipulate, defraud," or, alternatively, "recklessness is a sufficiently culpable mental state . . . ." *ECA*, 553 F.3d at 198 (2d Cir. 2009). Furthermore, the bar for recklessness will not be met unless it is alleged adequately that the defendant "at the least" demonstrated "an extreme departure from the standards of ordinary care" such that "the danger was either known . . . or so obvious that the defendant must have been aware of it." *Id.* (quoting *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000)).

When pleading the strong inference of scienter, "litigants and lower courts need and should not employ or rely on magic words such as 'motive and opportunity,'" but the Second Circuit has indicated that its "prior case law [explaining motive and opportunity] may be helpful in providing guidance as to how the 'strong inference' standard may be met." *Novak*, 216 F.3d at 311. In lieu of "alleging facts to show that defendants had both motive and opportunity to commit fraud," a plaintiff may meet its burden by "alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Ganino*, 228 F.3d at 168-169 (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)). This Circuit has held that the inference of the requisite state of mind "may arise where the complaint sufficiently alleges that the defendants: (1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." *Dynex Capital, Inc.*, 531 F.3d at 195 (2d Cir. 2008) (citing *Novak*, 216 F.3d at 311). Finally, the U.S. Supreme Court recently held that a factual allegation will meet the pleading requirement "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

3. Loss Causation

The PSLRA dictates that "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate th[e law] caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. §78u-4(b)(4). Federal Rule 8 sets out the pleading standard to allege adequately "loss causation," requiring that the Complaint "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). "Loss causation . . . is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003). This element has been loosely "described . . . in terms of the tort-law concept of proximate cause, i.e., 'that the damages suffered by plaintiff must be a foreseeable consequence of any misrepresentation or material omission.'" *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005) (quoting *Emergent Capital Inv. Mgmt., LLC*, 343 F.3d at 197). "Thus to establish loss causation, 'a plaintiff must allege . . . that the subject of the fraudulent statement or omission was the cause of the actual loss suffered,' i.e., that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172-173 (2d Cir. 2005) (quoting *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001)).

C. GAAP Claims

1. SFAS No. 5 Claims, April 2007 through December 2010

The Complaint alleges that "[d]uring the Class Period, Defendants repeatedly represented that the Company's financial statements, and its related financial disclosures, were presented in conformity with" GAAP, but the "representations were materially false and misleading." (Compl. ¶ 54.) More precisely, Plaintiffs' allege that, on the Forms 10-K and 10-Q filed during the Class Period, as well as the June 2011 8-K (collectively, "Financial Statements"), Defendants "materially inflated the Company's income by improperly delaying the recognition of charges totaling hundreds of millions [sic] dollars" and "failed to disclose appropriate loss contingencies on the CityTime contract." (Compl. ¶¶ 54, 67, 70-84, 86, 91, 92, 94-99, 102-09, 113, 116.) The Complaint further alleges that SAIC "violated the affirmative disclosure duties imposed by Regulation S-K . . . by failing to disclose" the CityTime overbilling scheme and its attendant business risks. (*Id.* at ¶ 52.) The alleged improper delay of charges and the failure to disclose loss contingencies relating to CityTime, Plaintiffs claim, constitute a failure to comply with GAAP' s Statement of Financial Accounting Standards ("SFAS") No. 5, and thus SEC Regulation S-X Rule 4-01(a), which makes "[f]inancial statements filed . . . not . . . in accordance with generally accepted accounting principles . . . presum[ptively] . . . misleading or inaccurate." 17 C.F.R. § 210.4-01(a)(1); (Compl. ¶¶ 52, 56-58.)

SFAS No. 5 requires the accrual of "[a]n estimated loss from a loss contingency" when a company deems "it is probable that an asset had been impaired or a liability had been incurred at the date" of the issuance of the financial statements and "[t]he amount of loss can be reasonably estimated." (SFAS No. 5, Accounting for Contingencies, 1 8); (Compl. ¶ 57.) We know, however, that "[t]he provisions of GAAP are subject to interpretation," and that GAAP" 'tolerate[s] a range of reasonable treatments, leaving the choice among alternatives to management.'" *In re Fannie Mae 2008 Sec. Litig.*, 742 F. Supp. 2d 382, 408 (S.D.N.Y. 2010) (citing *Thor Power Tool Co. v. Comm'r of Internal Revenue*, 439 U.S. 522, 544 (1979)). And, while "financial statements filed with the [SEC] . . . not prepared in accordance with generally accepted accounting principles will be presumed to be misleading or inaccurate," *In re Fannie Mae 2008 Sec. Litig.*, 742 F. Supp. 2d at 408 (citing 17 C.F.R. § 210.4-01(a)(1)), a plaintiff's claim that a company violated GAAP, "without corresponding fraudulent intent, is not sufficient to state a securities fraud claim." *Id.* (citing *Novak*, 216 F.3d at 309; *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999))." Therefore, even if a defendant makes "repeated misrepresentations[ ] in . . . separate public filings and press releases," absent sufficient allegations of "further evidence of conscious misbehavior or recklessness, " the Court will find that "representations indicate[ ] only mismanagement, not fraud." *Stevelman*, 174 F.3d at 85 (citing *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977)).

Plaintiffs' claims are based on statements contained in the Company's (1) 10-K Forms filed in April

2007, March 2008, March 2009, April 2010; (2) 10-Q Forms filed in June 2007, September 2007, December 2007, June 2008, September 2008, December 2008, June 2009, September 2009, December 2009, June 2010, December 2010, March 2011, and June 2011 (3) and 8-K Form filed in June 2011. (Compl. ¶¶ 65, 70, 72, 76, 79, 81, 83, 86, 92, 95, 97, 99, 103, 107, 109, 114, 116, 117.) With the exception of the March 2011 filing, however, Plaintiffs fall short of the heightened pleading requirements on the GAAP claims. First, with regard to these claims, the Complaint neither alleges a misstatement nor omission. When certain conditions are met, i.e. it is probable that there is an incurred loss with reasonable estimableness, SFAS No. 5 demands accrual of the loss. (SFAS No. 5, Accounting for Contingencies, ¶ 8.) But "a loss contingency is not simply a potential future loss. Instead, SFAS No. 5 requires accrual or disclosure of a loss contingency when it is 'probable' or 'reasonably possible' that a loss has already been incurred." *Charter Twp. of Clinton Police & Fire Ret. Sys. v. KKR Fin. Holdings LLC*, No. 08 Civ. 7062 2010 U.S. Dist. LEXIS 122127, at *57 (S.D.N.Y. Nov. 17, 2010) (citing SFAS No. 5, Accounting for Contingencies, ¶¶ 8, 10; *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 576 (6th Cir. 2008); *Schick v. Ernst & Young*, 808 F. Supp. 1097, 1103 n.4 (S.D.N.Y. 1992)).

Though the Court requires pleading of facts showing it is plausible that a loss was incurred prior to the March 2011 filing, Plaintiffs simply recite details about the CityTime fraud that, as far as the Court can discern, became known to Parties only after the fact. (Compl. ¶ 68.) The Complaint points to nothing in SAIC's filings that would plausibly constitute a misstatement or omission occurring prior to December 2010, at which point the Company placed Mr. Denault on administrative leave. (*Id.* at ¶ 21.) The failure stems from the Complaint's "assum[ption], without supporting factual allegations, that [the Company] must have suffered a loss" when the CityTime over-billing scheme began. *Charter Twp. of Clinton Police & Fire Ret.*, 2010 U.S. Dist. LEXIS 122127 at *57-58. "This naked form of hindsight pleading, however, does not show that the Financial Statements violated SFAS No. 5." *Id.* at *58. The allegations of fraud prior to March 2011 lack support from the pleadings and, therefore, they are not plausible.

Furthermore, "merely alleging a GAAP violation is insufficient to establish scienter, and . . . Plaintiffs ha[ve] not alleged any facts suggesting fraudulent intent in the [purported] GAAP violation[s]." *ECA*, 553 F.3d 187, 195-96 (2d Cir. 2009) (citations omitted). Whether SAIC's financial statements were submitted in compliance with SFAS No. 5 depends on the probability that a loss was incurred and Plaintiff' s ability to estimate the loss. The pleading requirements for scienter demand that the Complaint allege Defendants' knowledge of the probable loss and ability to estimate reasonably the amount of loss. Therefore, even if there were statements amounting to plausible allegations of GAAP violations and related misrepresentations or omissions prior to December 2011, the Complaint is devoid of factual assertions to allege the requisite state of mind. On this point, then, the Complaint also fails.

To allege scienter, Plaintiffs state that the Company must have known "or recklessly disregarded," as early as April 2007, "that [it] had overbilled NYC hundreds of millions of dollars." (Compl. ¶ 65, 68.) In support of this, Plaintiffs point to several "red flag" events. The Company signed the SOR as a part of a March 2012 DPA with the U.S. Attorney's Office, in which it admitted, *inter alia*, that (1) Technodyne obtained the CityTime subcontract in a non-competitive process, (2) in 2005, SAIC received an anonymous ethics complaint claiming Denault was receiving kickbacks from Technodyne, (3) SAIC did not alert NYC or the Board of the complaint, and failed to investigate it properly, and (4) Denault's supervisors failed to investigate or report other employees' CityTime related concerns. (Compl. ¶¶ 46, 48.) The Complaint also quotes a large portion of an April 2012 *Washington Post* article, which cites additional missed signs including (1) Denault's "widely known" friendship and professional association with the consultant that NYC hired to manage CityTime, (2) the 2003 complaint of a NYC official concerning SAIC's lack of conformity with industry practices, and (3) references to the information admitted in the Company's SOR. (Compl. ¶¶ 138-40)

Despite the litany of "red flag" events, the Court cannot conclude that Plaintiffs allege adequately fraudulent intent. The events do not give rise to a strong inference that, prior to the criminal charges and investigation of CityTime becoming public in December 2010, the Company knew a loss contingency was reasonably possible or that SAIC was reckless in its disregard thereto. Even more, the allegations fail to indicate whether an individual responsible for the

Financial Statements knew of the ethics complaint or additional employee concerns. *See Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (finding no corporate scienter because plaintiff failed to plead that "*someone* whose scienter is imputable to the corporate defendants and who was responsible for the statements made was . . . reckless toward the [statements'] alleged falsity") (emphasis in original). Indeed, the quoted SOR passages state explicitly that Denault's managers "failed to pass on the [employee] concerns to the proper Company personnel for investigation." (Compl. ¶ 46.) And, as with the Plaintiffs' allegations that SAIC's SEC filings contained false statements, facts favorable to Plaintiffs' position that are drawn from the newspaper editorial and the SOR have the benefit of hindsight. The information presented, which is based on multiple investigations, does not indicate what was within the Company's line of vision at the time the pre-December 2010 Financial Statements were signed. As such, the Complaint' s allegations lead to an inference that is more compelling than the fraud that Plaintiffs claim: that the facts surrounding the CityTime project were not known to Company officials, and that any filed "[mis]statements . . . were the result of mere [negligence] at the management level based on false information fed [to] it from below." *Dynex Capital, Inc.*, 531 F.3d at 197 (quoting *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702 (7th Cir. 2008)) (internal quotation marks omitted).

In short, "[t]he Amended Complaint does not allege facts indicating that there was a 'reasonable possibility' that [SAIC] had suffered a loss as of the effective date of the" December 2010 filing, nor does it allege the requisite state of mind for misstatements or omissions. *Charter Twp. of Clinton Police & Fire Ret. Sys.*, 2010 U.S. Dist. LEXIS 122127 at *57. The claims of misrepresentation and omission lack the particularity required by Rule 9(b), and the Complaint is devoid of facts to allege a strong inference of scienter, i.e. at least as compelling as an opposing one, in accordance with PSLRA. The allegations regarding SAIC's pre-December 2012 GAAP-related statements may indicate the presence of mere mismanagement, but they do not pique an inference of recklessness sufficient to survive a Motion to Dismiss. Accordingly, the GAAP-related claims predating December 2010 are DISMISSED with prejudice.

2. SFAS No. 5 Claims After December 2010

The Complaint makes similar GAAP claims against SAIC for the filings made after December 2010. Specifically, Plaintiffs allege that the Company's Financial Statements violated SFAS No. 5 and, therefore, were false because it (1) failed to disclose a loss contingency relating to CityTime when the Company "knew or recklessly ignored that there was more than a slight chance that NYC would assert a claim" against it (Compl. ¶¶ 62, 68, 109, 113, 116, 118); (2) "downplayed SAIC's liability and reasonably anticipated losses," to investors, noting only the "$2.5 million the Company offered to refund" (Compl. ¶ 118); and (3) misled Plaintiffs about the size of the losses when the Company "knew or should have known the extent to which its earnings under the CityTime [Project] were 'exposed to loss.'" (Compl. ¶¶ 61, 118.) Plaintiffs point to the events of December 2010, alleging that losses became reasonably knowable when the U.S. Attorney's Office brought criminal charges against non-SAIC CityTime employees and the Company placed Denault on mandatory leave while undertaking an internal investigation. (Compl. ¶¶ 68, 112, 114, 115.) These facts, Plaintiffs argue, offered SAIC sufficient information such that it gave rise to a duty to disclose a loss contingency.

The Complaint, on these allegations, makes out a plausible claim that Defendants violated SFAS No. 5 in filing the March 2011 10-K Form. Defendants' knowledge of a federal investigation into the overbilling fraud scheme relating to their project, combined with the U.S. Attorney's December 2010 Criminal Complaint and the Company's own investigation of its lead employee on the project, is sufficient to allege plausibly and with particularity that, by its March 2011 filing, the Company knew or should have known that a loss contingency was reasonably possible and required disclosure.[4] Plaintiffs have alleged a false statement or material omission regarding the March 2011 10-K Form, which Defendants "knew or recklessly ignored," and have thus established a

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[4] The Complaint quotes SFAS No. 5 ¶ 10, setting forth rules for accounting for loss contingencies where "there is at least a reasonable possibility that a loss or an additional loss may have been incurred." (Compl. ¶ 57.) At a minimum, the alleged facts are sufficient to survive the Motion to Dismiss on the March 2011 10-K Form claim. Whereas the Complaint does not contain enough facts to allege a loss prior to SAIC's filing of the March 2011 10-K Form or establish that such a loss was reasonably estimable, SFAS No. 5 establishes accounting protocol even where Defendants could not reasonably estimate the loss, which, as noted above, has been pleaded sufficiently.

strong inference of scienter.[5] Nothing more is needed on this claim at this time.

Plaintiffs further claim that, despite the Company's disclosure of a loss contingency and $2.5 million refund offer to NYC related to the CityTime Project, SAIC violated SFAS No. 5 because it failed to record in its June 2011 Form 8-K and 10-Q filings (the "June 2011 Filings") additional probable and reasonably estimable losses. (Compl. ¶¶ at 61, 68, 114, 116, 117, 118.) Plaintiffs argue that the Company's knowledge of the total amount billed for the CityTime Project and NYC's decision to withhold the final $40 million due to SAIC, provided sufficient information to estimate reasonably and record the additional loss contingency. (Compl. at ¶¶ 33, 41, 114.)

The Court finds that the allegations regarding the June 2011 Filings are inadequate to make out a cause of action. Put simply, the allegations pleaded-that SAIC knew the total revenue generated from the CityTime Project and that NYC made clear that it would refrain from paying $40 million pending its investigation–does not plausibly demonstrate that the Company could reasonably estimate how much it improperly billed NYC and, thus, what losses had

[5] Plaintiffs have plausibly alleged loss causation, as they have met the Rule 8 notice pleading standard by "provid[ing] a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). Here, Plaintiffs have alleged facts showing that the SAIC's stock price fell from $17.21 to $12.97 between June 2, 2011 and September 1, 2011, when SAIC disclosed piecemeal to investors the details of the CityTime scandal. (Compl. ¶¶ 119-23, 144-48.)

been incurred. The Company acknowledged that additional losses were probable, and the Complaint does not plead facts to refute the adequacy of the statement pursuant to SFAS No. 5. Therefore, on this claim, Plaintiffs have not sufficiently pleaded a violation of SFAS No. 5. The Court, accordingly, DENIES Defendants' Motion to Dismiss Plaintiffs' GAAP claims concerning the statements made in the March 2011 Form 10-K and GRANTS Defendants' Motion insofar as it relates to the June 2011 Filings claims. The claims related to the June 2011 filing are DISMISSED with prejudice.

3. Item 303 Claims

The Complaint also alleges the falsity of SAIC's SEC filings because the company failed to disclose a known trend or uncertainty reasonably expected to have a material impact. (Compl. ¶ .) As such, Plaintiffs claim, Defendants acted contrary to Item 303 of Regulation S-K. *See* 17 C.F.R. § 229.303(a)(3). Item 303's mandate to disclose known trends "requires that a plaintiff plead, with specificity, facts establishing that the defendant had actual knowledge of the purported trend." *Blackmoss Invs. Inc. v. Aca Capital Holdings, Inc.*, No. 07 Civ. 10528, 2010 U.S. Dist. LEXIS 2899, *24-25 (S.D.N.Y. Jan. 12, 2010); *see also Steckman v. Hart Brewing.*, 143 F.3d 1293, 1297 (9th Cir. 1998) (Item 303 "mandates . . . knowledge of an adverse trend.") This claim is based on the facts alleged, and resolved according to the reasoning in the loss contingency analysis, in sections 1 and 2 *supra*. Accordingly, Plaintiffs have, with the exception of the March 2011 Form 10-K filing, failed to allege with specificity the Company's actual knowledge of a known uncertainty reasonably likely to have a material impact on the Company. Therefore, Plaintiffs' Item 303 fraud claims, with the exception of those related to the March 2011 Form 10-K, are DISMISSED with prejudice.

D. Disclosure and Internal Control Claim

The Complaint alleges that SAIC's certification of its disclosure and internal controls (the "Control Certifications") made in its Financial Statements were materially false because the Company and several of its officers, namely Havenstein, Dahlberg, and Sopp (the "Certifying Officers"), knew or should have known that those controls were ineffective as a result of the overbilling fraud. (Compl. ¶¶ 65-68, 76, 85, 99, 109, 136.) Pursuant to the Sarbanes-Oxley Act of 2002, officers of public companies must execute certifications, to be submitted with their SEC 10-K and 10-Q Form filings, explaining the effectiveness of the company's internal controls. 15 U.S.C. § 7241(a)(4); 116 Stat. 2353 (2002). Certifications must contain statements of management's responsibility for establishing and maintaining adequate internal control over financial reporting, including within ninety days of the most recent filing. *Id.* Here, Plaintiffs allegations are insufficient to state a claim.

The Complaint contains a large block quote from one of the Company's Control Certifications, which spans three pages, and is alleged to have been restated in all material respects in each SAIC 10-K and 10-Q filing made during the Class Period. (Compl. ¶¶ 65-66.) The quoted material includes, *inter alia*, a statement that, to the best of the Certifying Officers' knowledge, the filing "does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statement made . . . not misleading."[6] (Compl. ¶ 65.) The block quote also states that the Certifying Officers designed and evaluated the effectiveness of the Company's disclosure and internal controls and disclosed all "material weaknesses in the design or operation" of those controls. (Compl. ¶ 65.)

The Second Circuit and the District Court have dismissed similarly styled complaints for failing to contain specific facts explaining why and how the statements were materially false. In *Boca Raton Firefighters & Police Pension Fund v. Bahash*, 506 Fed. Appx. 32 (2d Cir. 2012), for example, the Complaint contained "large block quot[es]" of SEC filings followed by a general assertion of falsity based on "a bullet-list of 'true facts.'" *Id.* at 37-38. In that case, the Circuit Court affirmed the dismissal of the Complaint after failing to find falsity in the statements because the "large block quot[es]" did not demonstrate with specificity "how and why the [internal control] statements were false and how other facts might show a strong inference of scienter." *Id.* at 38. Similarly, in *Tabor v. Bodisen Biotech, Inc.*, 579 F. Supp. 2d 438, 452 (S.D.N.Y. 2008), the Court found no falsity because the "large block quotes of SEC filings followed by generalized explanations of

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[6] Thus, for this particular statement to be knowingly false, the officers must have been cognizant of its falsity at the time it was made. *See Hall v. Children's Place Retail Stores, Inc.*, 580 F. Supp. 2d 212, 232-33 (S.D.N.Y. 2008) (finding that a control certification statement false only where defendants "had knowledge of that falsity").

how the statements were false or misleading are not sufficient." *Id.* at 53.

Concerning the Control Certifications, the Complaint here fails largely for the same reasons: Plaintiffs have neither pleaded the falsity nor the requisite state of mind with sufficient particularity. As in *Bahash*, the Complaint contains a large block quote of one of the Control Certifications followed by a general allegation of falsity based on a bullet- point list of adverse facts such as knowledge of the overbilling fraud. (Compl. ¶¶ 65-68.) The Complaint merely asserts that SAIC's Control Certifications "were materially false and misleading" and that "Defendants lacked a reasonable basis for their positive statements" contained therein. (Comp. ¶ 68.) Plaintiffs, however, offer nothing to support the claims beyond the allegations rejected by this Court in section C.1 *supra*, i.e. allegations made in hindsight. Plaintiffs' claims related to internal controls are insufficient because the allegations do not specify which particular statements among the large block quote are false, why the statements were false, and the allegations do not plead facts giving an inference of scienter. As such, the Control Certification claims against the Company and its Certifying Officers are DISMISSED.

E. Ethics and Integrity Claims

The Complaint alleges that, between 2009 and 2011, the Company made available Annual Shareholders Reports (the "Shareholder Reports"), which contained materially false statements about the Company's ethics and integrity. (Compl. ¶¶ 87-90, 100, 110-12.) The Shareholder Reports boast about the Company's "core value[s]," "culture of high ethical standards, integrity, operational excellence, and customer satisfaction," and "reputation for upholding the highest standards of personal integrity and business conduct." (Compl. ¶¶ 88, 110-11.) The Shareholder Reports, furthermore, reference SAIC's high ranking on both *Fortune*'s list of the World's Most Admired Companies within the information technology services industry and the Ethisphere Institute's list of the World's Most Ethical Companies among government contractors. (Compl. ¶¶ 87, 100, 111.) Plaintiffs argue, however, that these statements should have never been included in the corporate literature. They assert that "Defendants lacked a reasonable basis for their positive statements about the Company" because the Company was knowingly engaged in an overbilling fraud scheme. (Compl. ¶¶ 68, 90, 111.)

Even construing the allegations in a light most favorable Plaintiffs, the Shareholder Reports' references to SAIC's ranking on the publications' lists, as well as the statements regarding the Company's integrity and commitment to ethics, amount to inactionable puffery. Unlike those listed in the Complaint, actionable statements are those that, when considered by a "reasonable purchaser" of company stock, would "meaningfully alter[ ] the mix of available information about the company." *Bahash*, 506 Fed. Appx. at 37. This Court has held that only in very limited circumstances will "optimistic statements . . . be actionable," but those circumstances require "a showing that the defendants did not genuinely or reasonably believe the positive opinions they touted . . . or that the opinions imply certainty." *La-*

pin v. Goldman Sachs Group, Inc., 506 F. Supp. 2d 221, 239 (S.D.N.Y. 2006) (finding the statements actionable when "the opinion was without a basis in fact or the speakers were aware of facts undermining the positive statements."). Most, however, are "statements [that] are too general to cause a reasonable investor to rely upon," and the Second Circuit has held that they do "not give rise to securities violations." *ECA*, 553 F.3d at 206 (citing *Lasker*, 85 F.3d at 58, 59); *see also Bahash*, 506 Fed. Appx. at 37 (finding inactionable a company's statements that "integrity, reliability and credibility. . . has enabled [it] to compete successfully in an increasingly global and complex market.").

Plaintiffs' allegations here entail precisely the type of generality that, if allowed to proceed, would "bring within the sweep of federal securities laws many routine representations made by" companies. *ECA*, 553 F.3d at 206. The claims of ethics and integrity contained in the Shareholder Reports are not "distinguishable from the 'puffery' [the Court] identified in *ECA*; they are neither specific nor capable of influencing a reasonable investor.[7] Therefore, "[t]he 'puffery' designation" rightfully "stems from the generic, indefinite nature of the statements at issue." *Bahash*, 506 Fed. Appx. at 37.

Additionally, Plaintiffs have failed to allege with particularity that Defendants knew of or recklessly

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[7] Nor have Plaintiffs, in any of their submissions, pointed to case law to support the theory that referencing a company's ranking on an independent publication might qualify as a material misstatement.

disregarded the overbilling scheme concerning CityTime.[8] As such, Plaintiffs have failed to plead that Defendants did not reasonably believe the veracity of the ethics and integrity statements.

Defendants' Motion to Dismiss the claims concerning SAIC's ethics and integrity statements is GRANTED and Plaintiffs ethics and integrity claims are DISMISSED with prejudice. *See Brown v. United States*, 2011 U.S. Dist. LEXIS 47133 (S.D.N.Y. May 3, 2011) (quoting *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003) ("Thus 'it is well established that leave to amend a complaint need not be granted when amendment would be futile.'")

F. CityTime Project Claims

The Complaint alleges that the Company's description of the CityTime Project, made in the 2009 Annual Shareholders Report and as described to investors on a June 2, 2011 conference call ("June Conference Call"), were materially false. Regarding the former description, Plaintiffs contend that the statements were "materially false and misleading when made [ ] because Defendants sought to portray the CityTime Project as a success and an example of the [Company's] quality work," when, in fact, "SAIC was engaged in a massive billing fraud pertaining to the CityTime contract." (Compl. ¶ 90.) Regarding the latter, Plaintiffs assert that statements made were materially false because they "downplayed SAIC's liability and reasonably anticipated losses . . . by assuring investors that NYC 'ha[d] not filed any

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8 *See e.g.*, Section C.1-2, *supra*.

claims against the Company.'" (Compl. ¶¶ 115, 118.) Plaintiffs' allegations, again, fail to state actionable claims.

The 2009 Shareholders Report provides an example of the Company's "Key IT Initiative[s]," describing SAIC's work towards "developing, operating, and implementing a work force management system." (Compl. ¶ 89.) (*see also* Mendro Decl., Ex. 10 at 23, SAIC, Inc., FY 2009 Annual Report.) Plaintiffs assert that the statements in the 2009 Shareholders Report were misrepresentations because they "sought to portray the CityTime contract as a success and an example of the [Company's] quality work." (Compl. ¶ 90.) Though Plaintiffs contend that the Company portrayed CityTime as a "success" and an example of "top quality work," neither those descriptors, nor any similar ones, are mentioned in the quoted portions of the 2009 Shareholders Report. (Compl. ¶ 90.) Rather, in the section entitled "Critical Infrastructure," the 2009 Shareholder Report describes the general nature of the CityTime project, including the number of employees and agencies it would impact, as well as what the completed project would accomplish. (Mendro Decl., Ex. 10 at 23, SAIC, Inc., FY 2009 Annual Report.) Having failed to highlight anything beyond a fairly benign description of the CityTime Project, Plaintiffs have not, and cannot, establish falsity in the relevant portion of the 2009 Shareholders Report. Plaintiffs' allegations, then, are insufficient to make a plausible claim for material falsehoods.

Similarly, the Complaint does not plead adequately a cause related to the June Conference Call. During the June Conference Call, Defendant Havenstein is alleged to have discussed with ªanalysts and investors . . . the Company's operations and earnings" and, succinctly, matters to related to ªthe CityTime contract and the pending investigation." (Compl. ¶ 115.) Plaintiffs further allege that the statements "downplayed SAIC's liability and reasonably anticipated losses associated with the CityTime project, by assuring investors that NYC 'ha[d) not filed any claim against the Company,'" and to have falsely indicated the SAIC's knowledge of further exposure. (Compl. 118.)

During the course of the call with investors, however, Defendant Havenstein, in large part, summarized the information contained in the Company's June 2011 8-K filing. (*See* Compl. ¶¶ 113-14.) Halvenstein's statements, *inter alia*, (1) noted the arrest and criminal charges brought against Defendant Denault; (2) indicated that Denault's employment had been terminated; (3) mentioned that NYC announced its intention to pursue recovery of improperly charged costs but had yet to request reimbursement or file a claim against the Company; and (4) conveyed that, with the exception of the company's offer to refund $2.5 million to NYC, the Company had not incurred losses on the project. (Compl. ¶ 115.) Despite Plaintiffs' bald assertions, nowhere in the Complaint is there an indication of falsity in the aforementioned statements. Plaintiffs do not claim that NYC had, at the time of that call, requested reimbursement and, in fact, Defendants notified shareholders of NYC's request for reimbursement in a July 2011 8-K, which was filed two days after NYC *actually* requested reimbursement. (Williams Decl., Ex. C.). Nor do Plaintiffs' support their contention that the Company misled investors when it expressed its uncertainty about "additional exposure to loss." (Compl. ¶¶ 114, 118.) Plaintiffs' failure to make such contentions, in effect, render impotent any claims regarding Halvenstein's statements on the June 2011 Conference Call.

If Plaintiffs' claim of falsity is premised on the theory that NYC's reimbursement request, which was made subsequent to the 2011 Conference Call, rendered Havenstein's statements untrue, they present no law to support it. Indeed, such hindsight pleading, a hallmark of the instant Complaint, is insufficient to undermine Halvenstein's then-accurate statement, that NYC "has not yet filed any claims against the Company." (Compl. ¶ 115.) And, as noted *supra*, if there was a duty to correct, SAIC did so in its July 2011 8-K filing.

Accordingly, Plaintiffs' allegations that SAIC made false statements about the CityTime Project, both during the 2011 Conference Call and in the 2009 Shareholders Report, are DISMISSED with prejudice. *See Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 140 (2d Cir. 2011) (holding that "where amendment would be futile, denial of leave to amend is proper") (internal citation omitted).

G. Control Person Claim

To state a claim for secondary liability for a control person under Section 20(a) of the Exchange Act, Plaintiffs must allege (1) a primary violation of the Exchange Act by a controlled person, (2) actual control by the defendant, and (3) the controlling person's culpable participation in the primary violation. *See In re Bristol Myers Squibb Co. Sec. Litig.*, 586

F. Supp. 2d 148, 170-71 (S.D.N.Y. 2008). Moreover, in pleading culpability, a plaintiff "must allege, at minimum, particularized facts of the controlling person's misbehavior or recklessness" to withstand a motion to dismiss. *Kalin v. Xanboo, Inc.*, 526 F. Supp. 2d 392, 406 (S.D.N.Y. 2007).

The first element of Section 20(a) liability requires Plaintiffs to establish a primary securities violation by a controlled person. Here, the Section 20(a) claims against Individual Defendants are premised on the Company's primary violation of Section 10(b) of the Exchange Act. As discussed above, Plaintiffs have alleged adequately a primary violation by the Company for omitting material facts in its March 2011 Financial Statement and representing that the filing was made in conformity with GAAP.[9] Plaintiffs have, therefore, met the first element of the claim.

The second element requires control of the primary violator by the defendant. Control can be established by pleading facts supporting a reasonable inference that the control person "possessed the power to direct or cause the direction of the management and policies" of the primary violator. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472-73 (2d Cir. 1996) (internal quotations omitted). While the officer or director status alone is insufficient to establish control, the Court may find control where an officer or director has signed financial statements containing false or misleading statements. *In re Alstrom SA Sec. Litig.*, 406 F. Supp. 2d 433, 488

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[9] *See supra* Section C.2.

(S.D.N.Y. 2005). Plaintiffs have pleaded sufficiently Defendants Havenstein's and Sopp's control over the March 2011 Financial Statement, both of whom are alleged to have signed the putative offending document. (Compl. ¶ 109.) The allegations are sufficient to meet the second prong for control liability under Section 20(a).[10]

The third element requires that a plaintiff allege "some level of culpable participation at least approximating recklessness in the section 10(b) context." *Lapin v. Goldman Sachs Group, Inc.*, 506 F. Supp. 2d 221, 248 (S.D.N.Y. 2006). "A plaintiff asserting a section 20(a) claim must allege at least 'particularized facts of the controlling person's conscious misbehavior or recklessness.'" *In re Satyam Computer Servs. Secs. Litig.*, 915 F. Supp. 2d 450, 483 (S.D.N.Y. 2013) (citing *In re CIT Grp. Inc. Sec. Litig.*, No. 08 Civ. 6613, 2010 U.S. Dist. LEXIS 57467, at *5 (S.D.N.Y. June 10, 2010)). Here, Plaintiffs have failed to allege scienter with respect to Defendants

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[10] Plaintiffs have, however, failed to establish the exercise of control by the remaining Individual Defendants, namely Alderson, Dahlberg, and Denault, none of whom signed the March 2011 Financial Statement that is the only statement subject to a plausible primary violation of the Exchange Act. (*See supra* Section C.2.) Furthermore, there is nothing alleged in the Complaint to establish that Defendant Denault was anything more than a SAIC employee at the middle-management level, thus making it impossible to demonstrate that he exercised control over the executives in charge of signing and issuing the securities filings. Accordingly, Plaintiffs' section 20(a) claims against Dahlberg and Alderson are DISMISSED without prejudice, and their claim against Denault is DISMISSED with prejudice.

Havenstein and Sopp. While the Complaint plausibly alleges the Company's scienter, it contains no particularized facts of Havenstein's or Sopp's conscious misbehavior or recklessness. *See Rich v. Maidstone Fin., Inc.*, No. 98 Civ. 2569, 2001 WL 286757, at *11 (S.D.N.Y. Mar. 23, 2011) (holding that Section 20(a) liability requires "detailed allegations regarding the state of mind of the 'control person'"); *Kalin v. Xanboo, Inc.*, 526 F. Supp. 2d 392, 406 (S.D.N.Y. 2007) (holding that to withstand a motion to dismiss "a section 20(a) claim must allege, at a minimum, particularized facts of the controlling person's conscious misbehavior or recklessness"). Plaintiffs have, therefore, failed to allege plausibly that Havenstein or Sopp were culpable participants in the primary violation. *See Dynex Capital, Inc.*, 531 F.3d 190, 195-96 ("[I]t is possible to raise the required inference with regard to a corporate defendant without doing so with regard to a specific individual defendant."). Accordingly, Plaintiffs' Section 20(a) claim against Defendants Havenstein and Sopp is DISMISSED, along with the remaining Individual Defendants, without prejudice.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), Rule 9(b), and the PSLRA is DENIED as to Plaintiff's Section 10(b) claim based on SAIC's March 2011 Financial Statement. Defendants' Motion to Dismiss is GRANTED as to the remaining Section 10(b) claims, as well as the Section 20(a) claim against all Individual Defendants.

When a complaint has been dismissed, permission to amend it shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). However, the Court may dismiss without leave to amend when amendment would be futile, or would not survive a motion to dismiss. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 168 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197 (2005). "Where the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." *Beachum v. AWISCO New York Corp.*, 459 F. App'x 58, 59 (2d Cir. 2012) (quoting *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999)) (internal quotation marks omitted).

The Court, therefore, GRANTS Plaintiffs leave to amend the Section 10(b) claims based on the Company's March 2011 GAAP and internal control statements, and the corresponding Section 20(a) claim against all Individual Defendants except Denault. All of the remaining claims, i.e. the ethics and integrity statements, the Section 10(b) claims based on SAIC's pre-December 2010 and June 2011 GAAP and internal control statements, the corresponding Section 20(a) claims, all Section 20(a) claim against Defendant Denault, and the alleged false statements made in the shareholders reports and the June 2011 conference call, are DISMISSED WITH PREJUDICE. The Amended Complaint shall be filed within forty-five days of the date of this Order. Failure to do so shall result in dismissal with prejudice of all claims except for those based on the Company's March 2011 Financial Statement.

SO ORDERED.

s/
Deborah A. Batts
United States District Judge

Dated: September 30, 2013
New York, New York

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of August, two thousand sixteen.

Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, Indiana Public Employees' Retirement Fund,

Plaintiffs - Appellants,

City of Westland Police and Fire Retirement System, on behalf of itself and all others similarly situated, Locals 302 and 612 Of The International Union of Operating Engineers-Employers Construction Industry Retirement Fund, on behalf of themselves and all others similarly situated, IBEW Local Union No. 58 Annuity Fund and The Electrical Workers Pension Trust Fund of IBEW Local Union No. 58,

Plaintiffs,

ORDER

Docket No: 14-4140

v.

SAIC, Inc., Mark W. Sopp,
Walter P. Havenstein,

Defendants - Appellees,

Gerard Denault, Kenneth C. Dahlberg,
Deborah H. Alderson,

Defendants.

Appellee, SAIC, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX F

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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[1] So in original. Probably should be followed by a comma.

17 C.F.R. § 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

(a) *Full fiscal years*. Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a)(1) through (5) of this Item and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the registrant's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant, reportable segment or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity*. Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(2) *Capital resources*. (i) Describe the registrant's material commitments for capital expenditures as of the end of the latest fiscal period, and in-

dicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments.

(ii) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any expected material changes in the mix and relative cost of such resources. The discussion shall consider changes between equity, debt and any off-balance sheet financing arrangements.

(3) *Results of operations*. (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, should be described in order to understand the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.

(iii) To the extent that the financial statements disclose material increases in net sales or revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services.

(iv) For the three most recent fiscal years of the registrant or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, discuss the impact of inflation and changing prices on the registrant's net sales and revenues and on income from continuing operations.

(4) *Off-balance sheet arrangements*. (i) In a separately-captioned section, discuss the registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors. The disclosure shall include the items specified in paragraphs (a)(4)(i)(A), (B), (C) and (D) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the registrant believes is necessary for such an understanding.

(A) The nature and business purpose to the registrant of such off-balance sheet arrangements;

(B) The importance to the registrant of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support or other benefits;

(C) The amounts of revenues, expenses and cash flows of the registrant arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the registrant in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the registrant arising from such arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; and

(D) Any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the registrant, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the registrant has taken or proposes to take in response to any such circumstances.

(ii) As used in this paragraph (a)(4), the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant has:

(A) Any obligation under a guarantee contract that has any of the characteristics identified in FASB ASC paragraph 460-10-15-4 (Guarantees Topic), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FASB ASC paragraphs 460-10-15-7, 460-10-25-1, and 460-10-30-1.

(B) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(C) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in stockholders' equity in the registrant's statement of financial position, and therefore excluded from the scope of FASB ASC Topic 815, *Derivatives and Hedging*, pursuant to FASB ASC subparagraph 815-10-15-74(a), as may be modified or supplemented; or

(D) Any obligation, including a contingent obligation, arising out of a variable interest (as defined in the FASB ASC Master Glossary), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the registrant, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the registrant.

(5) *Tabular disclosure of contractual obligations*. (i) In a tabular format, provide the information specified in this paragraph (a)(5) as of the latest fiscal year end balance sheet date with respect to the registrant's known contractual obligations specified in the table that follows this paragraph (a)(5)(i). The registrant shall provide amounts, aggregated by type of contractual obligation. The registrant may disaggregate the specified categories of contractual obligations using other categories suitable to its business, but the presentation must include all of the obligations of the registrant that fall within the specified categories. A presentation covering at least the periods specified shall be included. The tabular presentation may be accompanied by footnotes to describe provisions that create, increase or accelerate obligations, or other pertinent data to the extent necessary

for an understanding of the timing and amount of the registrant's specified contractual obligations.

Contractual obligations	Payments due by period			3–5 years	More than 5 years
	Total	Less than 1 year	1–3 years		
[Long-Term Debt Obligations].					
[Capital Lease Obligations].					
[Operating Lease Obligations].					
[Purchase Obligations].					
[Other Long-Term Liabilities Reflected on the Registrant's Balance Sheet under GAAP].					
Total.					

(ii) *Definitions*: The following definitions apply to this paragraph (a)(5):

(A) *Long-term debt obligation* means a payment obligation under long-term borrowings referenced in FASB ASC paragraph 470-10-50-1 (Debt Topic), as may be modified or supplemented.

(B) *Capital lease obligation* means a payment obligation under a lease classified as a capital lease pursuant to FASB ASC Topic 840, *Leases*"., as may be modified or supplemented.

(C) *Operating lease obligation* means a payment obligation under a lease classified as an operating lease and disclosed pursuant to FASB ASC Topic 840, as may be modified or supplemented.

(D) *Purchase obligation* means an agreement to purchase goods or services that is enforceable and legally binding on the registrant that specifies all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the approximate timing of the transaction.

> *Instructions to paragraph 303(a):* 1. The registrant's discussion and analysis shall be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition and results of operations. Generally, the discussion shall cover the three-year period covered by the financial statements and shall use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding. However, where trend information is relevant, reference to the five-year selected financial data appearing pursuant to Item 301 of Regulation S–K (§ 229.301) may be necessary. A smaller reporting company's discussion shall cover the two-year period required in Article 8 of Regulation S–X and shall use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding.
>
> 2. The purpose of the discussion and analysis shall be to provide to investors and other users information relevant to an assessment of the financial condition and results of operations of the registrant as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources.

3. The discussion and analysis 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. This would include descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported operations and are not expected to have an impact upon future operations.

4. Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described to the extent necessary to an understanding of the registrant's businesses as a whole; *Provided*, *however*, That if the causes for a change in one line item also relate to other line items, no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Registrants need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the consolidated financial statements.

5. The term "liquidity" as used in this Item refers to the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs for cash. Except

where it is otherwise clear from the discussion, the registrant shall indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition. Liquidity generally shall be discussed on both a long-term and short-term basis. The issue of liquidity shall be discussed in the context of the registrant's own business or businesses. For example a discussion of working capital may be appropriate for certain manufacturing, industrial or related operations but might be inappropriate for a bank or public utility.

6. Where financial statements presented or incorporated by reference in the registration statement are required by § 210.4-08(e)(3) of Regulation S-X [17 CFR part 210] to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity shall include a discussion of the nature and extent of such restrictions and the impact such restrictions have had and are expected to have on the ability of the parent company to meet its cash obligations.

7. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230.175], Rule 3b-6 under the Exchange Act [17 CFR 240.3b-6]

and Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

8. Registrants are only required to discuss the effects of inflation and other changes in prices when considered material. This discussion may be made in whatever manner appears appropriate under the circumstances. All that is required is a brief textual presentation of management's views. No specific numerical financial data need be presented except as Rule 3-20(c) of Regulation S-X (§ 210.3-20(c) of this chapter) otherwise requires. However, registrants may elect to voluntarily disclose supplemental information on the effects of changing prices as provided for in FASB ASC Topic 255, *Changing Prices*, or through other supplemental disclosures. The Commission encourages experimentation with these disclosures in order to provide the most meaningful presentation of the impact of price changes on the registrant's financial statements.

9. Registrants that elect to disclose supplementary information on the effects of changing prices as specified by FASB ASC Topic 255 may combine such explanations with the discussion and analysis required pursuant to this Item or may supply such information separately with appropriate cross reference.

10. All references to the registrant in the discussion and in this Item shall mean the registrant and its subsidiaries consolidated.

11. Foreign private registrants also shall discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by United States nationals.

12. If the registrant is a foreign private issuer, the discussion shall focus on the primary financial statements presented in the registration statement or report. There shall be a reference to the reconciliation to United States generally accepted accounting principles, and a discussion of any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes is necessary for an understanding of the financial statements as a whole.

13. The attention of bank holding companies is directed to the information called for in Guide 3 (§ 229.801(c) and § 229.802(c)).

14. The attention of property-casualty insurance companies is directed to the information called for in Guide 6 (§ 229.801(f)).

Instructions to paragraph 303(a)(4): 1. No obligation to make disclosure under paragraph (a)(4) of this Item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditionally binding or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

2. Registrants should aggregate off-balance sheet arrangements in groups or categories that provide material information in an efficient and understandable manner and should avoid repetition and disclosure of immaterial information. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. Distinctions in arrangements and their effects must be discussed to the extent the information is material, but the discussion should avoid repetition and disclosure of immaterial information.

3. For purposes of paragraph (a)(4) of this Item only, contingent liabilities arising out of litigation, arbitration or regulatory actions are not considered to be off-balance sheet arrangements.

4. Generally, the disclosure required by paragraph (a)(4) shall cover the most recent fiscal year. However, the discussion should address changes from the previous year where such discussion is necessary to an understanding of the disclosure.

5. In satisfying the requirements of paragraph (a)(4) of this Item, the discussion of off-balance sheet arrangements need not repeat information provided in the footnotes to the financial statements, provided that

> such discussion clearly cross-references to specific information in the relevant footnotes and integrates the substance of the footnotes into such discussion in a manner designed to inform readers of the significance of the information that is not included within the body of such discussion.

(b) *Interim periods*. If interim period financial statements are included or are required to be included by Article 3 of Regulation S-X (17 CFR 210), a management's discussion and analysis of the financial condition and results of operations shall be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (b)(1) and (2) of this Item. The discussion and analysis shall include a discussion of material changes in those items specifically listed in paragraph (a) of this Item, except that the impact of inflation and changing prices on operations for interim periods need not be addressed.

(1) *Material changes in financial condition*. Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also shall be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations*. Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year. If the registrant is required to or has elected to provide an income statement for the most recent fiscal quarter, such discussion also shall cover material changes with respect to that fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year. In addition, if the registrant has elected to provide an income statement for the twelvemonth period ended as of the date of the most recent interim balance sheet provided, the discussion also shall cover material changes with respect to that twelve-month period and the twelve-month period ended as of the corresponding interim balance sheet date of the preceding fiscal year. Notwithstanding the above, if for purposes of a registration statement a registrant subject to paragraph (b) of § 210.3-03 of Regulation S-X provides a statement of income for the twelve-month period ended as of the date of the most recent interim balance sheet provided in lieu of the interim income statements otherwise required, the discussion of material changes in that twelve-month period will be in respect to the preceding fiscal year rather than the corresponding preceding period.

Instructions to paragraph (b) of Item 303: 1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information shall be prepared pursuant to this paragraph (b) and the discussion of the full fiscal year's information shall be prepared pursuant to paragraph (a) of this Item. Such discussions may be combined.

2. In preparing the discussion and analysis required by this paragraph (b), the registrant may presume that users of the interim financial information have read or have access to the discussion and analysis required by paragraph (a) for the preceding fiscal year.

3. The discussion and analysis required by this paragraph (b) is required to focus only on material changes. Where the interim financial statements reveal material changes from period to period in one or more significant line items, the causes for the changes shall be described if they have not already been disclosed: *Provided*, *however*, That if the causes for a change in one line item also relate to other line items, no repetition is required. Registrants need not recite the amounts of changes from period to period which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the financial statements. The information provided shall include that which is available to the registrant without undue effort or expense and which does not clearly appear in the registrant's condensed interim financial statements.

4. The registrant's discussion of material changes in results of operations shall iden-

tify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

5. The registrant shall discuss any seasonal aspects of its business which have had a material effect upon its financial condition or results of operation.

6. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230. 175], Rule 3b-6 under the Exchange Act [17 CFR 249.3b-6] and Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

7. The registrant is not required to include the table required by paragraph (a)(5) of this Item for interim periods. Instead, the registrant should disclose material changes outside the ordinary course of the registrant's business in the specified contractual obligations during the interim period.

(c) *Safe harbor*. (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z-2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u-5) ("statutory safe harbors") shall apply to forward-looking information provided pursuant to paragraphs (a)(4) and (5) of this Item, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (c) of this Item only:

(i) All information required by paragraphs (a)(4) and (5) of this Item is deemed to be a *forward looking statement* as that term is defined in the statutory safe harbors, except for historical facts.

(ii) With respect to paragraph (a)(4) of this Item, the meaningful cautionary statements element of the statutory safe harbors will be satisfied if a registrant satisfies all requirements of that same paragraph (a)(4) of this Item.

(d) *Smaller reporting companies*. A smaller reporting company, as defined by § 229.10(f)(1), may provide the information required in paragraph (a)(3)(iv) of this Item for the last two most recent fiscal years of the registrant if it provides financial information on net sales and revenues and on income from continuing operations for only two years. A smaller reporting company is not required to provide the information required by paragraph (a)(5) of this Item.