UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORI WILBUSH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff, v. AMBAC FINANCIAL GROUP, INC., DIANA N. ADAMS, DAVID TRICK, JEFFREY S. STEIN and NADER TAVAKOLI, Defendants.	Civil Action No. 1:16cv05076-RMB JURY TRIAL DEMANDED

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court-appointed Lead Plaintiff Ori Wilbush ("Plaintiff") respectfully submits this memorandum of law in opposition to the Defendants' Motion to Dismiss the Amended Class Action Complaint (the "Motion") and accompanying memorandum of law ("Defs.' Br.").

PRELIMINARY STATEMENT[1]

This securities fraud action arises under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and SEC Rule 10b-5 based on the Defendants' materially false and misleading statements concerning Ambac's losses and loss exposure stemming from the Company's Puerto Rican bond portfolio.[2] Specifically, throughout the Class Period, Defendants concealed the true risk and loss exposure of Ambac's PRBP by, *inter alia*: (1) disclosing only $2.5 billion in principal exposure, but not $8.0 billion in interest exposure; (2) repeatedly assuring investors that Ambac would have "no losses" from its PRBP and, even after the Company recorded a *still undisclosed* amount of "small" reserves related to Puerto Rico, stating Ambac was "very well reserved" and had "no expectation of *actually* incurring losses;"[3] and (3) using a proprietary and ambiguous rating for its PRBP, leading investors to believe these bonds carried moderate credit risk when, in fact, they were in default or default was imminent with little prospect for recovery.

On June 29, 2015, Puerto Rico's governor announced the territory would default on all of its debt, revealing to investors for the first time that Ambac's loss exposure was far greater than represented and certainly more dire than "no losses." Upon the announcement, Ambac's stock dropped $6.47 per share. On November 9, 2015, Ambac revealed that it was recording a goodwill

[1] All capitalized terms shall have the meaning ascribed in Plaintiff's First Amended Class Action Complaint (ECF No. 25) ("FAC"). All references to "¶_" are to paragraphs in the FAC.
[2] As part of its financial guaranty business, Ambac insures the principal and interest on the following Puerto Rican municipal bonds: PR General Obligation, PBA, PRHTA – Highway, PRHTA – Transportation, PRIFA, PRCCDA, and COFINA. ¶50. Herein, Ambac's Puerto Rican Bond Portfolio is referred to as "PRBP."
[3] Unless indicated otherwise, all emphasis is added.

impairment charge as a result of a "substantial decrease in the Financial Guarantee reporting unit's fair value" relating, in part to the PRBP. In response, Ambac's stock price dropped $2.05 per share.

Defendants were aware that their PRBP had significantly deteriorated and was in imminent danger of default because, *inter alia*: (i) Moody's had downgraded the constituent bonds by fifteen ratings on its scale; (ii) credit default swap ("CDS") insurance was increasing and bond yields and credit spreads were widening; (iii) they closely monitored Ambac's Puerto Rico exposure; (iv) they had direct discussions with the Puerto Rican government; and (v) confidential sources told Defendants, directly, that the PRBP was deteriorating. Thus, the Governor's announcement was no "surprise" to Defendants as they disingenuously claim. Defendants concealed the true risk of Ambac's PRBP so that the Company could regain its credit rating in order to write new business, exit rehabilitation and to allow the Individual Defendants to reap significant bonuses.

Defendants' grounds for seeking dismissal are predicated on this Court making findings of fact that are wholly improper at the motion to dismiss stage and are otherwise without merit. First, they say Plaintiff has failed to allege a single false statement because all of the alleged misstatements are either forward-looking protected by the bespeaks caution doctrine, puffery, opinions or true statements of historical facts. To the extent the statements fall into any of these categories, they are actionable because the purported risk factors the Company issued are boilerplate and fail to warn of specific risks related to Puerto Rico and are contradicted by known facts. Second, contrary to Defendants' contention, Plaintiff has adequately alleged scienter through actual knowledge, confidential source accounts and motive. Finally, Plaintiff has amply alleged loss causation by alleging a connection between Defendants' disclosures and a subsequent increase or decrease in Ambac's stock price in response.

Nothing more is required and Plaintiff submits that Defendants' Motion should be denied.

STATEMENT OF FACTS[4]

I. Ambac's Future Viability Has Been in Jeopardy Since it Lost its Credit Rating

Ambac is a financial services holding company that provides financial guarantee products and other financial services worldwide. ¶28. For over thirty years, Ambac had a reputation for being one of the leading financial guarantee insurers in the world, due to its coveted "AAA" investment grade rating. ¶43. This all changed, however, when the 2007 subprime mortgage financial crisis hit. ¶45. At the time, Ambac was a major issuer of CDSs but, as these investments deteriorated, Ambac's projected future liabilities grew and its credit ratings and statutory surplus plummeted. *Id.* On November 8, 2010, Ambac filed for Chapter 11 bankruptcy, causing the Company to lose its credit rating and forcing it to stop writing new policies. ¶48. Ambac has been in run-off ever since. ¶¶46-48. Ambac's long-term viability is dependent upon the Company regaining its credit rating, as Ambac admits its "inability to write new business has and will continue to negatively impact Ambac's future operations and financial results." ¶4.

II. Ambac's PRBP Drastically Deteriorates Throughout the Class Period

As part of its financial guarantee business, Ambac insures the principal and interest on municipal bonds, including its PRBP. Prior to and throughout the Class Period, the following ***undisclosed*** economic indicators, known to Defendants, demonstrated that the credit quality of Ambac's PRBP was drastically deteriorating and, as a result, Ambac's loss exposure was significantly increasing.

Rapidly Declining Credit Ratings: The credit ratings of the bonds comprising the Company's PRBP deteriorated ***fifteen ratings*** on a Moody's scale and were ***downgraded no less***

[4] Defendants rely on various excerpts from Ambac' SEC filings. *See* Defs' Br. Exs. A, D, G, I, L, N, P. While the Court may take judicial notice of documents relied upon in the FAC, it may not take them for their truth. *Lapin v. Goldman Sachs Group, Inc.*, 506 F. Supp. 2d 221, 228 n.1 (S.D.N.Y. 2006).

than 224 times during the Class Period. ¶¶85, 87. By mid-2015, the overwhelming majority of Ambac's PRBP were rated Ca or C, meaning in default or imminent default with little prospect for recovery, and had corresponding historical default rates 69.18 to 69.19 percent. ¶¶86-89.

Increasing CDS Insurance: CDS insurance reflects the market's expectation that the issuer will default on its obligation. ¶110. At the beginning of the Class Period, the cost of CDS insurance to insure Puerto Rican bonds already showed an approximate 78 percent likelihood of default, with the cost of a five year CDS at 718.77 basis points. ¶111. By June 2015, the cost of a five year CDS rose to 1,759 basis points, 18 times that of the entire municipal credit swap market and implying a greater than 95 percent probability of default. ¶¶112-113.

Increasing Yields and Credit Spreads: The yields and credit spreads on Puerto Rico's municipal debt significantly widened throughout the Class Period, indicating an imminent risk of default. ¶117. As of November 2013, Puerto Rican bonds were trading at yields of 10 percent, or roughly 2.5 to 6.7 times greater than yields on U.S. Treasuries – the benchmark for yield comparisons in the sector. ¶120. By December 2015, they were trading at 42 percent, or roughly 10.6 to 28 times greater than U.S. Treasury yields. ¶119. These figures are alarming, as a spread of 20 percent is regarded as a clear indication of default. ¶¶119-20.

Defendants do not dispute they were aware of the above economic indicators, nor do they dispute their accuracy. Indeed, defendant Matanle admitted during a March 27, 2014 Investor Day Call that Ambac looks to "market data," including "daily news and rating changes" in evaluating portfolio risk and setting reserves. ¶426. Defendant Trick made a similar admission. ¶427.

III. Defendants Were Aware That Ambac's PRBP Was Rapidly Deteriorating and Nearing Default Prior to and Throughout the Class Period

Defendants admittedly "actively review[ed]" Ambac's "Puerto Rico exposure," including the above economic indications, throughout the Class Period. ¶168. *See also* ¶196 (Ambac

"remains focused on our exposure to . . . Puerto Rico"); ¶203 ("we are actively monitoring the situation in . . . Puerto Rico"); ¶239 ("we are proactively involved in managing our exposure [to Puerto Rico]"). Indeed, unable to write new business, Ambac's sole focus has been monitoring and mitigating its credit risk, which is an "important component of [its] risk management." ¶61. Beginning in 2013, Ambac "heightened its surveillance efforts on all exposures." ¶63.

Ambac monitored and managed credit risk primarily through four committees, which were "integral to Ambac's strategy of mitigating losses:" (1) ALCO; (2) PRM; (3) RRG; and (4) CRM. ¶64. ALCO was responsible for risk remediation, including evaluating credit risk and determining reserves. ¶¶65-70. PRM focused on loss mitigation, risk reduction and surveillance and was "designed to detect deterioration in *credit quality* or changes in the *economic*, regulatory or political environment." ¶¶69-72. Defendants were members of and/or regularly received updates from these committees. ¶¶421-22 (PRM and CRM met on a regular basis and reported directly to the CEO (*i.e.*, Defendant Adams and Tavakoli) and regularly updated the Audit Committee and board of directors (*i.e.*, Defendant Stein)); ¶434 (Defendant Matanle was the Senior Managing Director of PRM); ¶65 (Defendants Adams, Trick, Tavakoli and Matanle were members of ALCO). Notably, Defendant Matanle was in charge of supervising and recommending reserves for Puerto Rico. ¶69. Accordingly, Defendants were aware of the above economic indications through their duty to oversee credit risk, loss mitigation and reserves on the above committees.

Former Ambac employees confirmed that Defendants were not only aware that Ambac's loss exposure related to its PRBP was rapidly increasing, they also knew Ambac had inadequate models to determine loss exposure and reserves. According to a former Ambac Financial Group Municipal Credit Analyst, Public Finance Group, who worked directly on the Puerto Rican bond exposure from March 2012 to May 2014 ("CW3"), Defendants knew that Ambac's PRBP began

deteriorating in October 2013. ¶68. Another former employee, who developed loss estimation models from May 2009 to September 2014 ("CW2"), attended ALCO meetings with Defendants Adams, Trick and Matanle where they discussed Ambac's Puerto Rico loss exposure and reserves. ¶¶65, 69. During these meetings in 2013 and 2014, CW2 said concerns were raised regarding the validity of the PRBP, as well as whether Ambac had "the tools . . . [and] capabilities to . . . assess . . . [and] project the losses." ¶66. CW3 stated that Ambac's PRBP was "convoluted" and difficult to gather data for. ¶67. Thus, according to CW3, Ambac knew that it "did not have a good model or the tools" to capture all of the exposure related to the portfolio. ¶67. Defendant Tavakoli acknowledged in a staff meeting in 2013 or 2014 that Ambac had loss exposure to Puerto Rico, yet Defendants continued to tell investors they expected "no losses." ¶¶68, 165.

Defendants "engaged in constructive discussions with the Commonwealth" as early as November 2014 in which they had "taken on a more active and prominent role in the discussions" ¶410. By May 2015, Defendants claimed to have "a strong voice in the various discussions" in Puerto Rico. ¶310. Defendants also established a Special Situations Group for the sole purpose of "mitigat[ing] losses on over $2.2 bn of financial guarantees on municipal bonds." ¶418.

IV. Defendants Concealed Ambac's True Loss Exposure on its Puerto Rico Bonds

Throughout the Class Period, Defendants made a series of materially false and misleading statements to conceal the true risk and loss exposure of the PRBP. Specifically, Defendants falsely represented that Ambac would have "no losses" on these bonds, was "very well-reserved for [its] exposure to Puerto Rico" and, despite taking a "small," *undisclosed* amount of reserves, that Ambac would not "actually incur[] any losses." ¶¶165, 168, 312.

Defendants also only disclosed Ambac's $2.5 billion in principal exposure on its PRBP, without ever disclosing in Ambac's SEC filings the more than $8 billion in interest exposure (more than ***four times*** the principal), in order to portray Ambac's exposure as being much smaller than

it actually was. To further conceal the true exposure to Puerto Rico, Ambac used an ambiguous internal credit rating of BIG (defined as "Below Investment Grade"), which covered anything from a Moody's rating of Baa1 (medium quality with moderate credit risk) to Ca-C (in default or default imminent with little prospect for recovery of principal or interest). ¶86. Ambac did not change its BIG rating throughout the Class Period, despite Moody's downgrading the bonds comprising its PRBP by 15 ratings, at least 244 times. ¶87. Thus, in reality, the PRBP had significantly greater loss exposure than represented, its "small" reserves were inadequate and Ambac would incur far more than "no losses" on its Puerto Rican position.

In order to conceal the extent of Defendants' failure to appropriately reserve for Ambac's PRBP, Defendants engaged in a series of buybacks of its PRBP from March 10, 2014 to May 2, 2016, spending $63 million to extinguish about $300 million of likely pay-outs. ¶¶346-47.

V. The Truth is Revealed

On July 29, 2015, Puerto Rico's governor announced that the island's more than $70 billion in debt was "not payable" and Puerto Rico would likely default on upcoming interest payments. ¶314. This news revealed to the market for the first time that Ambac's PRBP had deteriorated far more than represented, and carried far greater risk and loss exposure for Ambac. The governor's announcement sent Ambac's stock price careening downwards by 29 percent. ¶315. On November 9, 2015, Ambac revealed that it was forced to record a goodwill impairment charge of $514.5 million as a result of a "substantial decrease in the Financial Guarantee reporting unit's fair value" driven by, among other things, "wider Ambac credit spreads" relating at least in part to Puerto Rico. ¶336. Upon this news, Ambac's stock dropped $2.05 per share. ¶337.

VI. Ambac Top Executives Are Forced to Resign

In December 2014, right after the Special Situations Group was formed, defendant Adams was forced to resign. ¶441. On June 30, 2016, Congress passed PROMESA and Puerto Rico's

governor announced it would stop making payments on its General Obligation bonds. ¶¶348, 352. Immediately thereafter, in July 2016, Joan Allman, Managing Director of Public Finance Credit Oversight Team, was abruptly terminated. ¶355. After Puerto Rico defaulted for a fourth time on August 9, 2016, defendant Matanle purportedly "retired," effective September 30, 2016. ¶356.

ARGUMENT

I. Defendants Cannot Meet Their Burden on a Motion to Dismiss

On a motion to dismiss, the Court must "accept[ ] all factual allegations in the complaint [as true] and draw[ ] all reasonable inferences in the plaintiff's favor." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). "[T]o survive a motion to dismiss, a complaint must [merely] 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). A "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Further, to state a claim under Section 10(b), a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011). As discussed below, the FAC pleads each element with the requisite particularity.[5]

A. The FAC Alleges Defendants' Statements Were False When Made[6]

The PSLRA requires that the FAC "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). "The test

[5] Defendants do not challenge the reliance and damages elements of Plaintiff's Section 10(b) claim.

[6] In light of the page limitation on Plaintiff's response to the Motion, Plaintiff addresses Defendants' arguments regarding the FAC's alleged misstatements in Exhibit 1 to this opposition in format similar to what Defendants used.

for whether a statement is materially misleading under Section 10(b) is not whether the statement is misleading in and of itself, but whether the defendants' representations, *taken together and in context,* would have misled a reasonable investor." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 250 (2d Cir. 2016). As discussed below, Plaintiff alleged contemporaneous facts demonstrating Defendants' statements are material and were false when made.

1. False and Misleading Statements Regarding Losses and Reserves

a. Losses and Loss Exposure

Throughout the Class Period, Ambac effectively guaranteed investors that it would have "***no losses*** on [its PRBP] exposures" (¶¶165, 168, 198). Contrary to Defendants' statements, Ambac's PRBP had far greater loss exposure and certainly more than "no" losses, as evidenced by numerous contradictory facts existing at the time the statements were made, including the downgrading by Moody's to levels indicating a present or "imminent default" and "high credit risk" (¶¶ 53, 90-107); (2) rising cost of CDS insurance pointing to a greater than 95% probability of default (¶112-114); (3) rising yields on Puerto Rican Bonds to levels 3.3 to 8.7 times those of U.S. Treasuries, indicating junk status and credit distress with a substantial possibility of default (¶¶120-21);[7] (4) confidential sources informed Defendants as early as October 2013 that the credit quality of the Company's PRBP was deteriorating (¶¶65-69); and (5) Defendants' own admission at ALCO meetings that there was at least "some" loss exposure to Puerto Rico (¶68).

Defendants were aware of the above information contradicting their public statements through their attendance at various committee meetings where Puerto Rico loss exposure and reserves were discussed and because, by their own admission, they were "actively reviewing [Ambac's] Puerto Rico exposure" (¶¶168, 196, 287) through their "[o]ngoing surveillance of credit

[7] Defendants concede that the economic factors Plaintiff cites (the accuracy of which they do not dispute) indicate at least "a chance of incurring a loss." Defs.' Br. at 17.

risk in [Ambac's] insured portfolio" (¶¶174, 267) and "discussions with the Commonwealth" (¶¶261). Courts have found similar representations actionable. *See, e.g., In re CIT Grp. Inc. Sec. Litig.*, No. 08Civ.6613, 2010 U.S. Dist. LEXIS 57467, at *9 (S.D.N.Y. June 10, 2010) (statement "there's almost ***no credit risk*** in [the student loan] business" actionable through duty to monitor performance of portfolio); *In re Sadia, S.A. Sec. Litig.*, 643 F. Supp. 2d 521, 528 (S.D.N.Y. 2009) (characterization of exposure as "nominal" actionable where company's Risk Management Committee received reports to the contrary).

Defendants incorrectly contend that the above statements were "forward-looking." Defs.' Br. at 15-16. In order to avail themselves of the safe harbor protections, Defendants must "demonstrate that their cautionary language was not boilerplate and conveyed substantive information." *Vivendi*, 838 F.3d at 247. Here, Defendants' statements are just that: boilerplate and fail to warn of *specific* risks. Moreover, the purported warnings had already materialized and, thus, are not protected. *Edison Fund v. Cogent Inv. Strategies Fund, Ltd.*, 551 F. Supp. 2d 210, 226 (S.D.N.Y. 2008). For instance, stating Ambac's credits are "vulnerable to downgrade" (Defs.' Br. at 16) is insufficient when Moody's had already downgraded the bonds in the Company's PRBP and continued to do so throughout the Class Period. Similarly, warnings that "conditions might deteriorate" are insufficient where, as here, conditions were already deteriorating.

Defendants' risk disclosures in SEC filings are similarly boilerplate. For example, a risk disclosure that "public finance credits," generally, "may be materially underestimated" or that "[l]oss of market access is a risk" fails to put investors on notice of specific risks related to *Puerto Rico* insured bonds. *See Scantek Med., Inc. v. Sabella*, 583 F. Supp. 2d 477, 497 (S.D.N.Y. 2008) (cautionary language failed to "warn of the specific risk that caused Sabella and Accordant's loss--the risk that shipments to Brazil would not commence."); *In re AIG 2008 Sec. Litig.*, 741 F. Supp.

2d 511, 531 (S.D.N.Y. 2010).[8] Moreover, because these purported cautionary statements were "supported by specific statements of fact," including that Ambac's PRBP was "still investment grade" and, thus, Ambac expected to have "no losses," taken in context, they were not forward-looking because reasonable investors could rely on these statements, viewed as a whole, and find them to be materially misleading. *City of Providence v. Aeropostale, Inc.*, No. 11Civ.7132, 2013 U.S. Dist. LEXIS 44948, at *36-37 (S.D.N.Y. Mar. 25, 2013) (statements regarding projections accompanied by present facts not forward-looking and actionable).

Defendants' contention that their statements regarding Ambac's "small" reserves related to Puerto Rico were cautionary is wrong because: (i) those statements are not properly identified as risk disclosures; (ii) do not warn of any *specific* risk; and (iii) are misleading when considered in context with statements that Ambac expected "no losses." *See, e.g., Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 194 (S.D.N.Y. 2010) (defendants' contradictory statements "nullified any risk disclosures"); *DeMarco v. Lehman Bros.*, 309 F. Supp. 2d 631 (S.D.N.Y. 2004) (continued positive assessments coupled with "skeptical language," "is tantamount to a statement that the reader of the reports should discount the skeptical language").[9] Similarly, as Defendants concede (Defs.' Br. at 12), their positive statements regarding a purportedly "improving" Puerto Rico situation further contradicts any risk disclosure about potential losses.[10]

---

[8] While Defendants argue their risk disclosures purportedly evolved over the Class Period (Defs.' Br. at 16), a review of the risk disclosures related to Puerto Rico reveals that the disclosures changed only ***one time***, in August 2014, and no changes were made thereafter. Moreover, the new language still failed to provide warnings to specifically inform of the risks. For example, the disclosure that Ambac's "exposures to the Commonwealth of Puerto Rico are under stress arising from the Commonwealth's poor financial condition, low ratings and limited access to capital" does nothing to warn that all economic indicators show a significant increase in the PRBP's loss exposure and likely imminent default. *See* Ex. 2.

[9] That Ambac may not have paid out a claim until January 1, 2016 is equally unavailing. Simply because a claim was not paid until months later, presumably after negotiation, does not mean there was "no" loss exposure at the time.

[10] Defendants' argument that these statements are opinions (Defs.' Br. at 14-15) is belied by the fact that the speaker knew they were false when made. *See infra* [III.b.]. Moreover, the safe harbor "do[es] not apply to statements of present or historical facts," as here. *Vivendi*, 765 F. Supp. 2d at 568. Further, Defendants' reliance on *Livent* is misplaced as *Livent* prohibits contradictory statements by the plaintiff (such as "plaintiffs had no awareness of specific

b. Loss Reserves

Throughout the Class Period, Defendants falsely assured investors that Ambac's reserves were "adequate to cover the ultimate net cost of claims." ¶¶149, 176, 209, 226. 239, 261, 272. Just six weeks before the truth was revealed, Defendants claimed that Ambac was "***very well reserved*** for [its] exposure to Puerto Rico" (¶312). These statements were materially false and misleading when made because: (i) Defendants failed to disclose the ***specific amount*** reserved for the Company's Puerto Rico exposure; and (ii) Ambac's "small" reserves for Puerto Rico were not adequate to cover imminent losses on its $10 billion Puerto Rico exposure.

It is well settled that once a corporation chooses to speak, "it has a duty to disclose any additional material fact 'necessary to make the statements [already contained therein] not misleading.'" *In re GE Sec. Litig.*, 857 F. Supp. 2d 367, 386-87 (S.D.N.Y. 2012) (alteration in original). Throughout the Class Period, Defendants disclosed only the total amount of reserves for Public Finance, but refused to disclose the *specific amount* of reserves taken for the PRBP, even when asked by analysts. ¶165. Where, as here, a corporation chooses to speak about the adequacy of its reserves for a particular category (*i.e.*, PRBP), it is put "in play" and Defendants must disclose the specific reserve amount. *See e.g.*, *In re Ambac Fin. Grp., Inc.*, 693 F. Supp. 2d 241, 270-71 (S.D.N.Y. 2010) ("given that Ambac's officers characterized the company's underwriting standards as 'rigorous' and 'conservative,' the failure to disclose a lowering of such standards was 'a material omission'"); *GE Sec.*, 857 F. Supp. 2d at 386-87 (failure to disclose amount of subprime exposure within larger loan portfolio misleading where company chose to speak about the "high quality" of its portfolio); *In re Citigroup Bond Litig.*, 723 F. Supp. 2d 568, 589-90 (S.D.N.Y. 2010)

information revealed in some particular document while at the same time asserting they relied upon the contents of that same document"), not inconsistent statements made by the *defendant*, as here.

(failure to disclose CDO exposure actionable where disclosed only "maximum" loss exposure, particularly where stated "actual losses are not expected to be material").

Defendants' statements regarding their loss reserves are not opinions (Defs.' Mem. at 14-15) because the reserves were based on the then-present state of the Company's financial condition, and Defendants possessed contemporaneous information contradicting their own statements (*infra* II).[11] *See In re SLM Corp. Sec. Litig.*, 740 F. Supp. 2d 542, 555-56 (S.D.N.Y. 2010) ("Statements regarding loss reserves are not projections [if] they are directed to the then-present state of the Company's financial condition."); *In re Bayer AG Sec. Litig.*, No. 03-1546 WHP, 2004 U.S. Dist. LEXIS 19593, at *41 (S.D.N.Y. Sep. 30, 2004) (statement that a litigation reserve was unnecessary was actionable in light of known contemporaneous contradicting facts); *E*Trade*, 712 F. Supp. 2d at 194 (characterization of loan losses as "adequate" or "solid" actionable where defendants "acknowledged the high risk nature of the loans - and, in fact, hired executives in a desperate attempt to 'balance' these risks") (citation omitted).

Even if the Court finds Defendants' reserve statements are opinion, they are still actionable because "they are worded as guarantees" and Defendants' purported belief was not reasonable in light of known contradicting facts.[12] *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998). Here, Defendants described their reserves with unwavering conviction as "very well-reserved," and "adequate." ¶¶198, 310, 312, 333. Defendants' statements are also actionable because they were accompanied by specific facts intended to confirm that their reserves were "adequate". *See* ¶310 (stating Ambac is "confident" that its "Puerto Rico positions are relatively solid"

[11] Notably, Defendants, citing *Fait v. Regions*, incorrectly assert that a statement of opinion is actionable only if it is both objectively false and subjectively disbelieved by the speaker. Defs.' Br. at 14. That portion of *Fait*, however, has since been called into question. *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 164 F. Supp. 3d 568, 581 n.8 (S.D.N.Y. 2016) (stating "[t]he Supreme Court's recent holding in *Omnicar*e appears to extend securities fraud liability to statements of opinion that are subjectively believed when made, but nonetheless materially misleading.").

[12] *Dobina v. Weatherford Int'l Ltd.,* 909 F. Supp. 2d 228, 245-46 (S.D.N.Y. 2012) (securities claim can be based on subjective opinions where the speaker "knew that it had no reasonable basis for it").

accompanied with "we're aware of all the possible actions that could affect our exposures"); ¶261 (stating Ambac's reserves are "'reasonably sized given the current situation, the overall size of our exposure to Puerto Rico, the interrelated nature of the credits, and the sluggishness of the economy."); ¶198 (stating there is "no expectations of actually incurring any losses" preceded by a summary of the steps Puerto Rico's government took to "eliminate liquidity issues").[13]

While Defendants' historical statements regarding Ambac's public finance bonds (which includes Puerto Rico) having no losses may be literally true[14] (Defs.' Br. at 11-12), a reasonable investors would view them to mean that Ambac would have ***no*** losses on the PRBP because Ambac's past experience was indicative of future performance. *E*Trade,* 712 F. Supp. 2d at 194 (statement about adequacy of loan loss reserve actionable and not a "projection about future performance" where "based on past events and current economic conditions."); *In re APAC Teleservice, Inc., Secs. Litig.*, No. 97-9145(BJS), 1999 WL 1052004, at *8 (S.D.N.Y. Nov. 19, 1999) ("Linking future success to present and past performance does not render statements immune from liability.").

B. False and Misleading Statements Regarding Credit Rating and Risk Exposure

Throughout the Class Period, Ambac ambiguously labeled its PRBP using its own internal BIG (below investment grade) rating, which encompassed a wide range of ratings on the Moody's

[13] The cases Defendants rely on do not lead to a different conclusion. *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011) arose under Section 11 of the Securities Act where plaintiffs expressly disclaimed any theory based on fraud or intentional or reckless misconduct and therefore could not claim subjective falsity without sacrificing the benefit of their lower pleading standard. *Omincare* is similarly a section 11 case and recognized that a statement is actionable if not believed by the speaker *or* if supported by false facts. *Omnicare v. Laborers Dist. Council Constr. Industry Pension Fund*, 135 S.Ct. 1318, 1325-26 (2015). *Pirnik v. Fiat Chrysler Autos, N.V.*, 2016 WL 5818590, at *9 (S.D.N.Y. Oct. 5, 2016) relied on two single facts and "lack[ed] internal analyses, confidential witnesses, or other particularized allegations" to allege scienter. Unlike *Pirnik*, there are confidential witnesses and multiple other particularized allegations demonstrating scienter here. *See* Section II, *infra*.

[14] *See, e.g.*, ¶176 ("most of our adversely classified credits resolv[ed] ***without loss*** to Ambac"); ¶176 (regarding public finance bonds "[h]igh severity outcomes are ***unprecedented*** . . . and have not been factored into our current loss reserves in most cases").

scale. ¶86.[15] Ambac did not change the BIG rating on its PRBP during the Class Period,[16] despite that, at the same time, Moody's downgraded these same bonds ***fifteen*** ratings on its scale at least ***244 times*** with many bonds obtaining the absolute lowest credit rating. ¶¶86-87. By using this all-encompassing rating system, Ambac was able to conceal the precipitous downgrade of its PRBP, leading investors to believe the bonds were "medium quality with moderate credit risk" when they were, in fact, at imminent risk of default. ¶86. Where, as here, the Defendants' classification is so broad as to imply little risk exposure, such statements are actionable. *See Sadia*, 643 F. Supp. 2d at 530 (characterization of currency hedging activity as "risk-reducing and non-speculative" implied exposure was insubstantial).

C. False and Misleading Statements Regarding Exposure to PRBP

From November 2013 to July 2014, Ambac represented its exposure to the PRBP was $2.5 billion, but neglected to inform investors that Ambac's true exposure was actually $10.5 billion *with interest*, more than ***four times*** that previously represented. ¶52; *see Citigroup*, 753 F.Supp.2d at 235 (statements giving impression that CDS loss exposure was minimal when it was actually more than $50 billion, misleading). Even in July 2014 when Ambac disclosed its total exposure to Puerto Rico in an unnoticeable presentation on the Company's website, it still did not disclose Ambac's total exposure in its SEC filings, nor did it disclose its *loss* exposure from its PRBP. This is not sufficient to notify investors of Ambac's true exposure. *See Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168 (2d Cir. 2000) (rejecting defendants' argument that because earlier documents contained accurate information it neutralized any misleading impressions created by subsequent

[15] In contrast to the cases Defendants cite, which rely on industry standards to support the proposition that compliance with accepted principles is not misleading (Defs. Br. at 13-14), here, Ambac used its own rating that was contrary to industry standards. *See Kleinman v. Elan Corp., plc*, 706 F.3d 145, 154-55 (2d Cir. 2013) (challenging the use of scientifically accepted post-hoc analysis in studies); *Davison v. Ventrus Biosciences, Inc.*, 2014 WL 1805242 (S.D.N.Y. May 5, 2014) (plaintiff criticized study sample size as unreliable).

[16] The only change Ambac made to its internal rating was with respect to the COFINA bonds, which it downgraded from BBB- in March 2014 to BIG in March 2015.

financial reports). In fact, a 2015 *Bloomberg* article criticized Ambac for the misleading nature of its disclosure: "[t]he difference between principal at issuance and the amount due at maturity is enormous . . . . Ignoring the accreted value is irresponsible." ¶59 n.6.

Defendants claim that their omission of interest exposure was immaterial because a reasonable investor knows bonds also contain interest. Defs.' Br. at 11. However, disclosing the existence of interest is hardly the same as disclosing *the amount* of the interest exposure, which was ***over four times*** the principal exposure disclosed to investors. At best, Defendants' argument presents an issue of fact. *Citigroup*, 753 F.Supp.2d at 236 (whether defendants' representation of CDO holdings "at par" was misleading is a factual dispute not to be resolved on a motion to dismiss). Moreover, Defendants' "truth-on-the-market" defense (Defs.' Br. at 11) is without merit because the inconspicuous presentations on Ambac's website were insufficient "to neutralize any misleading impressions created" in the Company's press releases and SEC filings. *Ganino*, 228 F.3d at 168. In any event, the truth-on-the-market "defense is intensely fact–specific and is rarely an appropriate basis for dismiss[al]." *Ganino*, 228 F.3d at 168.[17]

D. Defendants' Statements Are Not Puffery

Statements may be deemed "puffery" only when they are "so vague, broad, and non-specific that a reasonable investor would not rely on it." *Vivendi* 765 F. Supp. 2d 512 at 572. The alleged false statements (*cf.* Defs.' Br. at 17-18) are not puffery because, when viewed in context, they are concrete, verifiable, and demonstrably false statements regarding Ambac's risk management and exposure, among other things. *See, e.g.*, ¶168 ("We are actively reviewing our Puerto Rico exposure" preceded by present statement of Ambac's Puerto Rico exposure by bond

[17] The case Defendants rely upon, *Hunt v. All. N Am. Gov't Income Tr. Inc.,* 159 F.3d 723 (2d Cir. 1998) (Defs.' Br. at 11), is inapposite. Not only was the chart at issue in *Hunt* disclosed in an SEC filing, but the chart "purported only to compare the Funds *returns* . . . [thus] [n]o reasonable investor could have viewed this chart as an exhaustive description of the Fund's *risks*." *Id.* (emphasis in original).

type and followed by statement regarding reserves taken); ¶¶174, 176 ("Ongoing surveillance of credit risks in our insured portfolio is an important component of our risk management" followed by present fact that "losses in the public finance portfolio have been contained, without most of our adversely classified credits resolving without loss to Ambac"). "[M]isstatements regarding risk management, discipline, monitoring and credit quality are not 'puffery' where . . . they [are] misrepresentations of existing facts." *E*Trade*, 712 F. Supp. 2d at 190; *In re Bear Stearns Cos., Inc. Sec., Deriv., & ERISA Litig.*, 763 F. Supp. 2d 423, 494 (S.D.N.Y. 2011) (statements that company "regularly evaluates and enhances [its] VaR models in an effort to more accurately measure the risk of loss" actionable); *In re Am. Int'l Grp., Inc.*, 741 F. Supp. 2d 511, 530 (S.D.N.Y. 2010) (statements "emphasizing the strength of the Company's risk controls" actionable).[18]

II. PLAINTIFF HAS SUFFICIENTLY ALLEGED SCIENTER

A "strong inference" of scienter can be established by alleging facts "(1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *In re OSG Secs. Litig.*, 12 F. Supp. 3d 622, 629 (S.D.N.Y. 2014). A "complaint will survive . . . 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." *Id.* "In making this determination, the court must review all the allegations holistically." *Matrixx*, 131 S.Ct. at 1324.

[18] Defendants' cases are inapposite. *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009) did not involve a fraud perpetrated by an issuer on its own shareholders; rather, it alleged the defendant banks contradicted general statements about their "integrity" and "disciplined" risk management when they aided and abetted frauds committed by other companies. *Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55 (2d Cir. 1996) found "broad, general" statements by the company that it would not "compromise its financial integrity" and was committed "to create earnings opportunities" were puffery.

A. Defendants Had Actual Knowledge and/or Acted Recklessly

Defendants Admittedly Monitored Ambac's Exposure on its Puerto Rican Bonds: Defendants admittedly "actively review[ed Ambac's] Puerto Rico exposure" (¶¶168, 196, 287) through their "[o]ngoing surveillance of credit risk in [Ambac's] insured portfolio" (¶¶174, 267). *See also* ¶406-07 (Ambac "spent a considerable amount of time focusing on [its] exposure to . . . Puerto Rico. [Ambac is] actively monitoring the situation in Puerto Rico, and [ ] continuously analyzing [its] position, along with developments in the market and within the Commonwealth.").

Defendants monitored Puerto Rico and Ambac's PRBP through the ALCO and PRM Committees and the Special Situations Group. Defendants Adams, Trick and Tavakoli were members of ALCO. ¶65. Defendant Matanle was the Senior Managing Director and Head of PRM, which reported directly to Ambac's CEO (*i.e.*, Defendants Adams and Tavakoli). ¶356. As discussed below, Plaintiff's confidential sources confirmed Defendants' attendance at ALCO meetings where Puerto Rico's loss exposure and reserves were discussed. These facts support their knowledge of Puerto Rico's likely default and Ambac's inadequate loss reserves. *See, e.g., CIT Grp.*, 2010 U.S. Dist. LEXIS 57467, at *9-14 (duty to monitor performance of student loan portfolio supports scienter); *Citigroup*, 753 F. Supp. 2d at 237 (awareness of risk evident where "daily meetings regarding Citigroup's CDO exposures" were held); *In re Van der Moolen Holding N.V. Secs. Litig.*, 405 F. Supp. 2d 388, 407 (S.D.N.Y. 2005) (positions on committees made defendant "aware of or had access to" the information at those meetings); *In re AOL Time Warner, Inc. Secs. and "ERISA" Litig.*, 381 F. Supp. 2d 192, 221-22 (S.D.N.Y. 2004) (committee that met weekly sufficient to infer knowledge).

Ambac also created a Special Situations Group in 2014 for the sole purpose of "mitigat[ing] losses on over $2.2 billion of financial guarantees on municipal bonds on Puerto Rico." ¶418. The creation of a specific committee to oversee the PRBP exposure supports Defendants' knowledge.

In re Check Point Software Techs. Ltd. Litig., 2006 WL 1116699, at *3 (S.D.N.Y. Apr. 2006) (Berman, J.) (implementation of regular teleconferences entitled Major Deal Review to increase visibility of sales pipeline supports knowledge "of material differences between their public statements and Check Point's financial performance").

Confidential Sources: According to CW2, at ALCO meetings during 2013 and 2014 that CW2 attended with Defendants Adams, Trick and Matanle, they discussed concerns regarding Ambac's Puerto Rico exposure and the fact that the Company lacked the ability to "assess" or "project the losses" for the bonds. ¶¶65-67. CW3 corroborated CW2's account that Ambac lacked the tools to properly estimate reserves and loss exposure on the PRBP. ¶67.[19] CW3 further confirmed CW2's account that the credit quality of Ambac's PRBP began deteriorating during 2013 and 2014. *Id.* CW4 confirmed attendance at staff meetings with Tavakoli in 2013 or 2014 at which Ambac's loss exposure to Puerto Rico was acknowledged. ¶68.

Defendants' challenge to the CWs is unavailing, as a "motion to dismiss is not the proper vehicle to test the credibility of witnesses." *Lewy v. SkyPeople Fruit Juice, Inc.*, No. 11Civ.2700, 2012 WL 3957916, at *13 (S.D.N.Y. Sept. 10, 2012). Regardless, information from confidential witnesses can be relied upon where, as here, the confidential witnesses '"are described . . . with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.'" *See E*Trade*, 712 F. Supp. 2d at 196. Each CW was present at, or was a member of Ambac's committee meetings, and confirmed the Defendants' attendance at such meetings and discussions of Ambac's Puerto Rico exposure. ¶¶65-69. This is sufficient to establish knowledge. *See Plumbers & Pipefitters Nat. Pension Fund v. Orthofix*

[19] CW2 and CW3's allegations are consistent with Ambac's admission that the Company lacked sufficient internal controls over setting reserves. ¶392. Defendants' internal control violations supports scienter. *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 672 F. Supp. 2d 596, 608 (S.D.N.Y. 2009) (weak internal controls support "strong inference of scienter").

Intern. N.V., 89 F. Supp. 3d 602, 616 (S.D.N.Y. 2015) ("highly probable" that the regional sales director, "who interacted with [the] President of that unit in the past, would be 'well-positioned to attest to the participation of the individual defendants' in promoting' certain sales practices in that region."); *In re EVCI Colleges Holding Corp. Secs. Litig.*, 469 F. Supp. 2d 88, 97 (S.D.N.Y. 2006). Moreover, the CWs' statements were corroborated by each other and other details in the FAC, such as the declining market conditions for Puerto Rico bonds (¶¶85, 111-12, 119). *See E*Trade*, 712 F. Supp. 2d at 197 ("The fact that this case involves '[c]orroboration from multiple sources also supports an inference of a scienter.'").

Economic Factors: Through Defendants' admitted monitoring of Ambac's PRBP exposure and credit risk, they would have informed themselves of the relevant economic factors discussed above (PRBP credit ratings, CDS insurance and yields) (*Supra* SOFs, Section II) directly impacting the credit risk and loss exposure related to the PRBP.[20] A strong inference of scienter exists where defendants are aware of information, yet make statements in blatant disregard of those known facts. *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 775 (2d Cir. 2010) ("The many warnings and 'red flags,'" such as those "described in a *Wall Street Journal Asia* article further support this inference [of scienter]."); *Ambac*, 693 F. Supp. 2d at 269 (statements about "Ambac's surveillance of 'very current information,' when combined with plaintiffs' detailed allegations about the deterioration in Ambac's CDO portfolio, supports the inference that Leonard acted recklessly").[21]

[20] While Defendants do not contest the accuracy of this data or that they monitored it during the Class Period, they claim those facts were public information that the market was aware of. Defs.' Br. at 22. It is well-settled, however, that a reasonable investor is not required to hire an expert to decipher Defendants' disclosures (as Plaintiff did here). *Virginia Bankshares*, 501 U.S. at 1097. *See also Alaska Elec. Pension Fund v. Pharmacia Corp*., 554 F.3d 342, 347 (3d Cir. 2009) ("the hypothetical reasonable investor need not be a scientific expert"). Moreover, whether an allegedly omitted fact was available to the market is a fact intensive inquiry that is "rarely an appropriate basis for dismissing." *In re Pfizer, Inc. Sec. Litig.*, 538 F.Supp.2d 621, 632 n. 61 (S.D.N.Y.2008) (citation omitted). The case Defendants rely on, *Youngers v. Virtus Inv. Partners, Inc.*, 195 F. Supp. 3d 499 (S.D.N.Y. 2016), is inapplicable because the public information there was not available to defendants at the time of the statements and did not report contrary facts.

[21] Defendants' failure to properly and timely reserve for losses on the PRBP (¶¶176-79) violates GAAP and their own internal reserve policy. *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000) (violation of internal policy supports

Communications with Puerto Rican Government: Knowledge is inferred from Defendants' direct communications with the Puerto Rican government regarding loss mitigation strategies as early as November 2014 (¶¶409-410). *U.S. v. Kozeny*, 664 F. Supp. 2d 369, 375 (S.D.N.Y. 2009) (knowledge inferenced through communications); *In re JP Morgan Chase Secs. Litig.*, 363 F. Supp. 2d 595, 627-28 (S.D.N.Y. 2005) (knowledge inferred by executive position, referenced meetings, and alleged discussions during those meetings).

"Core" Business: It is undisputed that Ambac's primary business is its Financial Guarantee business, which provides monoline insurance for bonds issued by municipalities such as Puerto Rico. CW3 and CW4 confirmed that Ambac's Puerto Rican bonds were a "major part" and "big portion" of Ambac's total portfolio. ¶67. The importance of the PRBP to Ambac's business supports a strong inference of scienter. *In re Forest Labs. Sec. Litig.*, No. 05Civ.2827, 2006 WL 5616712, at *10 (S.D.N.Y. July 21, 2006) (*citing In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F.Supp.2d 474, 489 (S.D.N.Y. 2004) (fact that false statements "concerned the core operations of the company" supports scienter) (Berman, J.).

Buybacks: Defendants' fraudulent intent is also evidenced by Ambac's last minute buybacks to extinguish guarantees on Puerto Rican bonds. ¶¶346-47. Defendants' belated buybacks in order to conceal that Ambac was severely under-reserved for its loss exposure on Puerto Rican bonds supports scienter. *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2011) (post-class period write-offs, can, with other factual allegations, constitute sufficient pleadings as to recklessness); *In re Scholastic Corp. Secs. Litig.*, 252 F.3d 63, 73 (2d Cir. 2001) (post-class period special charge supports inference of knowledge).

scienter); *In re Bausch & Lomb, Inc. Sec. Litig.*, 2003 WL 23101782, at *24 (W.D.N.Y. Mar. 28, 2003) (violation of GAAP and own revenue policy indicative of scienter).

The Suspicious Resignations of Ambac's Officers: On December 23, 2014, after Ambac announced the establishment of the Special Situations Group, Defendant Adams resigned. ¶136. In July of 2016, immediately after PROMESA was passed, Joan Allman, abruptly resigned. ¶¶355, 442. On August 9, 2016, shortly after Puerto Rico defaulted for a fourth time, Defendant Matanle purportedly retired after fifteen years of employment. ¶443. The sudden and suspicious timing of these resignations, when weighed in the totality of circumstances presented, demonstrates an inference of scienter. *Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 575 (S.D.N.Y 2012) (executive resignation supported inference of scienter).[22]

B. Defendants' Motive and Opportunity to Mislead Supports Scienter

Plaintiff has sufficiently alleged that Defendants had the motive and opportunity to conceal Ambac's true risk and loss exposure in order to repurchase the securities in the Segregated Account, "derisk" the Company's portfolio, and regain the Company's coveted AAA credit rating in order to begin writing new business. Ambac lost its credit rating and ability to write new business, and was required to establish the Segregated Account, after being forced into Chapter 11 bankruptcy as a result of the 2007 subprime crisis. ¶¶446-448. Claims on policies allocated to the Segregated Account are not permitted to be paid until approved by the OCI. *Id*. Credit quality is an important factor the OCI examines before approving repayment. *Id*. Similarly, until Ambac regains a credit rating and "derisks" the Company's portfolios, it will not be able to write new business. Ambac's critical need to obtain a credit rating and improve the creditworthiness of its

[22] Defendants rely on *In re PXRE Group, Ltd., Secs. Litig.*, 600 F. Supp. 2d 510 (S.D.N.Y. 2009), where no facts demonstrated the people resigning actually knew there were flaws in the loss estimates. By contrast, Defendant Matanle supervised the loss reverses on Puerto Rico and was an ALCO member and head of PRM (¶¶26, 69), Adams was the President and CEO who attended ALCO meetings where concerns about Puerto Rico were raised (¶65), and Allman was the Managing Director of Public Finance Credit Oversight Team. ¶442. Defendants' reliance on *Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573 (S.D.N.Y. 2011) is equally unpersuasive, since the resignations occurred during the class period with no relation to any particular events occurring around the same time. Here, by contrast, Plaintiff has tied the resignations to specific events evidencing fraud.

portfolio creates an inference of scienter. *In re MicroStrategy, Inc. Sec. Litig*., 115 F. Supp. 2d 620, 648-49 (E.D. Va. 2000) (Motive to maintain a high credit rating to comply with the specific terms of a credit agreement probative of scienter); *Dexia SA/NV v. Bear, Stearns & Co*., 929 F. Supp. 2d 231, 241-42 (S.D.N.Y. 2013) (alleged motive to obtain high credit ratings to sell risky RMBS certificates supports defendants' knowledge of the falsity of their statements).[23] Indeed, as the economic situation in Puerto Rico deteriorated, the OCI began disapproving purchases. ¶450. Later, the OCI revealed it was particularly concerned about Ambac's Puerto Rico exposure and stated its loss projections on the PRBP "were higher than those of the Company." *Id*. On December 16, 2016, the OCI filed a supplement to their 2016 Annual Report, concluding that Ambac has "insufficient capital to demonstrate…that the Segregated Account Rehabilitation Proceedings could be concluded and leave Ambac Assurance with sufficient financial resources to meet all policy obligations." Accordingly, the OCI required an increase in Ambac's surplus capital before any further redemptions from the Segregated Account could occur.[24]

III. LOSS CAUSATION

To adequately plead loss causation under the *Dura*, a plaintiff need only provide defendants "with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005). This standard is satisfied where a complaint alleges *either* a corrective disclosure or the materialization of a concealed risk that has

[23] Defendants rely on three cases that all stand for the same proposition: a desire to maintain a high credit rating to maximize securities or raise money is not a sufficient motive. Defs.' Br. at 19. However, as Defendants concede, this is not a case where Defendants are trying to maintain a high credit rating; rather, they are attempting to get *any* credit rating in order to *write new business* and continue as a business. Fighting to regain a credit rating after acknowledging that Ambac cannot survive without one is a much more dire circumstance than maintaining an already existing rating.
[24] Defendants were also motivated to conceal Ambac's true loss exposure to the PRBP to reap substantial bonuses. *See In re Kidder Peabody Secs. Litig.*, 10 F. Supp. 2d 398, 418 (S.D.N.Y. 1998) (motive alleged where bonuses were dependent on the reported profits of the division involved in the alleged fraud and were "substantial" amounts); *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 944 (9th Cir. 2003) ("strong inference of scienter" inferred where plaintiff alleged defendants were "motivated to inflate America West's financial results and stock prices because their eligibility for stock options and executive bonuses" based principally on company's financial performance).

some logical connection to the losses that plaintiffs allege they suffered. *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 175 (2d Cir. 2005). Plaintiff has satisfied this standard by alleging a number of false and misleading statements regarding Ambac's PRBP, risk management and reserves made by Defendants during the Class Period and the market's subsequent positive reaction to those statements (¶463) and Defendants do not argue otherwise. The FAC also alleges a series of partially corrective disclosures between June 29, 2015 and November 9, 2015 in which the price of Ambac's common stock fell immediately following the disclosure of information revealing the nature, amount and scope of the Company's true loss exposure to Puerto Rico. ¶¶314-15, 317, 335-37. For example:

- June 29, 2015 - Puerto Rican Governor announces Commonwealth defaulting on more than $70 billion of debt (¶314), revealing for first time that PRBP had far more risk than previously represented. Upon the news, Ambac's stock price dropped approximately 29% from $22.39 per share on June 26, 2015 to $15.91 per share on July 1, 2015 (¶315).
- November 9, 2015 - announcement Ambac recorded goodwill charge of $514.4 million as a result of, among other things, widening credit spreads on Puerto Rico, causing stock price to drop 12% (¶335).

Defendants erroneously contend that the FAC does not sufficiently plead loss causation because: (1) Plaintiff has not pled any corrective disclosures; and (2) the drop in Ambac's stock price was the result of "a marketwide phenomenon." Defs.' Br. at 24-25. In effect, Defendants claim that *Dura* requires a defendant to admit the precise misconduct alleged. This contention is plainly wrong and would otherwise allow dishonest defendants to avoid liability simply by remaining silent. *See Richardson v. TVIA, Inc.*, 2007 U.S. Dist. LEXIS 28406, at *19-20 (N.D. Cal. Apr. 16, 2007) ("reading *Dura* to require proof of a, complete, corrective [] disclosure . . . would allow wrongdoers to immunize themselves with a protracted series of partial disclosures"). Indeed, the full details of a fraud are rarely, if ever, admitted and a mirror-image corrective disclosure is not required.

Defendants' contention that Ambac's stock drop on June 29th was related to marketwide factors as evidenced by the drops of its competitors' stock (Defs.' Mem. at 25) must be rejected because Defendants may not rely on information outside the four corners of the FAC. Accordingly, the Court may not consider Defendants' Ex. Q or ftne 5 of their brief. *Ge Dandong v. Pinnacle Performance Ltd.*, 966 F. Supp. 2d 374, 388 (S.D.N.Y. 2013) (excluding facts outside the complaint on Rule 12(b)(6) motion). Moreover, it is not the plaintiff's burden at this stage to eliminate all other causes of a stock drop even in the event of a marketwide drop. *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Secs., LLC*, 797 F.3d 160, 189 (2d Cir. 2015). Finally, Defendants' argument that they previously disclosed the information in the governor's announcement "well before" (Defs.' Br. at 25) is equally unavailing because, as discussed above (Section I *supra*), their purported risk disclosures were inadequate because they were boilerplate, failed to warn of the specific risks related to Puerto Rico and were contradicted by Defendants' other statements.[25] These well-pled facts amply put Defendants on notice of Plaintiff's loss causation theory.[26]

IV. 20A CONTROL PERSON CLAIMS

Defendants concede that if the FAC pleads primary liability for securities fraud under §10(a) then it also pleads "control person" liability under §20(a). Defs.' Br. at 25. Because the FAC adequately pleads primary liability, the Court must also sustain the control person claims. *In re Xethanol Corp. Sec. Litig.*, 2007 WL 2572088, at *4 (S.D.N.Y. Sept. 7, 2007).

[25] Defendant' contention that Ambac's inclusion of a July 2014 presentation containing the principal and interest exposure of Puerto Rico bonds on the Company's website is a corrective disclosure (Defs.' Br. at 24-25) must be rejected because: the presentation was never provided in any public announcement and, thus, was not a public disclosure (*Ganino*, 228 F.3d at 167-68); and it is not even dated so it is unclear when it was posted. Also, there was other positive information in the market at the same time that counterbalanced the negative disclosure. ¶¶209, 211.

[26] Defendants erroneously rely on *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005). There, unlike here, the plaintiffs did not allege that the subject of the defendants' fraud, or any corrective disclosure regarding the falsity of those recommendations was the cause of the decline in stock value which plaintiffs claimed as their loss.

CONCLUSION

For the aforementioned reasons, Defendants' Motion should be denied.[27]

Dated: April 25, 2017

/s/ *Shannon L. Hopkins*

LEVI & KORSINSKY LLP
Shannon L. Hopkins (SH-1887)
Nancy A. Kulesa (NK-2015)
Stephanie A. Bartone
Meghan Daley
733 Summer Street, Suite 304
Stamford, CT 06901
Tel.: (203) 992-4523
Fax: (212) 363-7171
Email: shopkins@zlk.com
Email: nkulesa@zlk.com
Email: sbartone@zlk.com
Email: mdaley@zlk.com

Counsel for Plaintiff

[27] If the Court finds deficiencies in the FAC, Plaintiff respectfully requests leave to amend. Fed. R. Civ. P. 15(a)(2).