UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

LOCKHEED MARTIN CORPORATION, ROBERT STEVENS, BRUCE TANNER and LINDA GOODEN,

Defendants.

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No. 11 Civ. 5026 (JSR)(RLE)

ECF CASE

DEFENDANTS' MEMORANDUM OF LAW PURSUANT TO OCTOBER 1, 2012, HEARING, AND IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION OR SUMMARY JUDGMENT

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The Amended Complaint (the "AC") relies almost entirely on allegations attributed to the five "Confidential Witnesses" (the "CWs") who testified in open court on October 1 (the "October 1 Hearing" or "Ex. S"). Although there is substantial dispute over whether the CWs made certain statements to Plaintiff's investigator, there can be no dispute regarding the following facts: (1) there is no admissible evidence in the record, after extensive discovery to which the plaintiff was never entitled in the first place, supporting the crucial allegations; (2) the investigator concededly made little or no effort to probe the basis for each CW's supposed knowledge, leading to the inclusion in the AC of allegations that are based on hearsay and "surmise"; (3) the AC includes pivotal allegations, which the Court relied on in denying the motion to dismiss, that do not appear in or are directly contradicted by the investigator's notes; and (4) discovery has established that many of the allegations in the AC are demonstrably untrue. The AC must be dismissed.

I. THE ALLEGATIONS ATTRIBUTED TO THE CONFIDENTIAL WITNESSES ARE UNRELIABLE HEARSAY, SPECULATION, OR FABRICATED

As the Court has noted, a key question is whether allegations based on "double-triple hearsay or better can really support an allegation in the complaint even for pleading purposes," given the high bar set by the Private Securities Litigation Reform Act (the "PSLRA"). (Ex. S at 212-13, 214). In fact, courts require that CWs have "personal knowledge" of the information attributed to them in a complaint. The CW allegations here are blatantly unreliable and an insufficient foundation for a securities fraud claim.

A. Hearsay And Speculation Cannot Support An Inference Of Fraud

Generally, "hearsay allegations . . . and 'bald assertions' . . . will not defeat a Rule 12(b)(6) motion.'" Galvez v. Means, 1996 WL 487062, at *1 (S.D.N.Y. Aug. 27, 1996) (quoting Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996)). As the cases discussed below make clear, CW

allegations based on hearsay cannot support a securities fraud claim even for pleading purposes.

The Second Circuit held in Novak v. Kasaks that a securities fraud complaint need not disclose the identities of CWs, provided they are described "with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." 216 F.3d 300, 314 (2d Cir. 2000). Courts have applied Novak to hold that a CW "possess[es] the information alleged" only if the information is in his personal knowledge. In Campo v. Sears Holding Corp., the CWs disavowed the allegations attributed to them and also "testified that they had no personal knowledge of" central allegations in the complaint. 371 F. App'x 212, 217 (2d Cir. 2010). As a result, the court could not conclude "that an inference of scienter is cogent and at least as compelling as" any opposing inference. Id.

The more removed the CW is from the source of the information, the more unreliable the allegation becomes. Thus, allegations that suggest a CW obtained his information "'through intermediaries . . . undermin[es] the likelihood that he had personal knowledge of his allegations.'" Janbay v. Canadian Solar, Inc., 2012 WL 1080306, at *6 (S.D.N.Y. Mar. 30, 2012) (quoting Glaser v. The9, Ltd., 772 F. Supp. 2d 573, 595 (S.D.N.Y. 2011)). Missing links between the CW and senior executives likewise undermine the CW allegations and "are fatal to establishing scienter." Warchol v. Green Mountain Coffee Roasters, Inc., 2012 WL 256099, at *13 (D. Vt. Jan. 27, 2012); see also Bd. of Trs. of City of Ft. Lauderdale Gen. Emps. Ret. Sys. v. Mechel, 811 F. Supp. 2d 853, 880 (S.D.N.Y. 2011) (Sullivan, J.) (scienter insufficiently alleged where the CW "does not describe any communications with the Defendants or provide grounds to believe they were aware of the alleged scheme"); (Steinberg v. Ericsson LM Tel. Co., 2008 WL 5170640, at *13 (S.D.N.Y. Dec. 10, 2008) (Patterson, J.) (CW was "at least four hierarchical levels away from Defendants").

Similarly, speculation and rumor cannot support scienter allegations in a securities fraud complaint. Local No. 38 Int'l Bhd. of Elec. Workers Pension Fund v. Am. Exp. Co., 724 F. Supp. 2d 447, 462 (S.D.N.Y. 2010); Warchol, 2012 WL 256099, at *13. This principle was at play in the recent decision in Belmont Holdings Corp. v. SunTrust Banks, Inc., where the court declined to credit the CW's "speculation about what happened," and held that allegations "based on any of [the CW's] second-hand knowledge [cannot] be construed as providing support for Plaintiff's allegation." 2012 WL 4096146, at *13 (N.D. Ga. Aug. 28, 2012).

As the logic of Novak v. Kasaks strongly suggests, CW allegations based on hearsay cannot form the basis for a securities fraud claim. Other jurisdictions have held, often relying upon Novak, that CW allegations based on hearsay ordinarily are insufficient to state a securities fraud claim. The Eighth Circuit is among the courts that have held that allegations based on hearsay will not ordinarily pass muster. See Horizon Asset Mgmt. Inc. v. H&R Block, Inc., 580 F.3d 755 (8th Cir. 2009). The court held in Horizon that the complaint did not make clear whether the allegations were based on first-hand knowledge or "merely conveyed hearsay information that was passed along by others," "second-hand reporting of a confidential witness." Accordingly, the allegations were "not strong and compelling" and could not support a strong inference of scienter. Id. at 764. Because "second-hand reporting" of hearsay information by definition does not constitute personal knowledge, such allegations fail under the PSLRA.

In Zucco Partners, LLC v. Digimarc Corp., the Ninth Circuit relied on Novak in holding that the complaint must demonstrate "that the witnesses in question have personal knowledge of the events they report." 552 F.3d 981, 995 (9th Cir. 2009). The court affirmed dismissal because "[s]ome of the confidential witnesses were simply not positioned to know the information alleged [and] many report only unreliable hearsay." Id. at 996. For example, one

CW reported that a financial analyst told the CW that a manager instructed employees to inappropriately reassign payroll time. Id. The court rejected this "triple hearsay" allegation, while also discounting another allegation "based on at least one level of hearsay."[1]

Various district courts, in this Circuit and across the country, have taken a similar approach, relying on Novak and Zucco to hold that "[b]ecause the confidential witness must have personal knowledge the testimony cannot be based on hearsay." In re Trex Co. Sec. Litig., 454 F. Supp. 2d 560, 573 (W.D. Va. 2006). As the District of Connecticut has held, CW allegations "based on impermissible hearsay . . . cannot be considered," because such allegations do not meet the PSLRA requirement of personal knowledge. Malin v. XL Capital Ltd., 499 F. Supp. 3d 117, 139 n.17 (D. Ct. 2007).[2] Novak and its progeny make clear that CW allegations based on hearsay, speculation, rumor, or opinion are insufficient. In many such cases, the CWs were not in a position to have personal knowledge of the types of information attributed to them—which is demonstrably so in this case, too.

1. CWs Have No Personal Knowledge Concerning The Vast Majority Of Allegations Attributed To Them

Moving past the first layers of hearsay—i.e., Robbins Geller's retelling of Mr. Keatly's retelling of statements allegedly made to him—the allegations attributed to the CWs are unreliable hearsay. Most of the CWs were not positioned to have information on the most

[1] The Zucco court noted in a footnote that hearsay allegations are "not automatically disqualif[ied] from consideration" in every case. 552 F. 3d at 997 n.4. "However, a hearsay statement, while not automatically precluded from consideration to support allegations of scienter, may indicate that [the statement] is not sufficiently reliable." Id.

[2] Accord In re Downey Sec. Litig., 2009 WL 2767670, at *9 (C.D. Cal. Aug. 21, 2009) (CW allegations should be "disregarded" if based on hearsay); In re Dothill Sys. Corp. Sec. Litig., 2009 WL 734296, at *13-14 (S.D. Cal. Mar. 18, 2009) (dismissing securities fraud class action complaint where it provided insufficient information to show whether CW was "speaking from personal knowledge or merely regurgitating gossip and innuendo"); Limantour v. Cray Inc., 432 F. Supp. 2d 1129, 1155 (W.D. Wash. 2006) ("To the extent the statements of these CWs are hearsay, they cannot support any inference of scienter, much less a strong inference.").

significant allegations attributed to them.[3] Even if they discussed these topics, the statements attributed to them in the AC would have constituted unreliable hearsay, speculation, or opinion.

CW-3 (William Parsons) -- The Court has indicated a preliminary view that Mr. Parsons testified credibly. Defendants also suggest that he is a useful prism through which to view this case. If the Court were to review the transcripts of his deposition and court testimony, we expect it would agree that Mr. Parsons has no possible axe to grind (given the lack of any contractual or financial ties to Lockheed Martin), and he freely admits discussing many topics with the investigator. But he denies making the most significant allegations attributed to him by Plaintiff, while also explaining that he has no first-hand knowledge on some topics at all. To the extent the Court found Mr. Parsons credible, and to the extent the Court likewise found Margaret Burns (CW-1) credible, that both witnesses deny telling the investigator the key allegations attributed to them bolsters the credibility of the other CWs' denials and provides a basis for concluding that the investigator was, at best, sloppy to the point of recklessness.

In the case of Mr. Parsons, despite being the supposed source for several allegations relating to financial issues, he was not involved in financial projections or planning for Lockheed Martin, and he admittedly has no understanding of financials. Mr. Parsons was not involved in bidding; he listened in on perhaps two telephonic meetings concerning bidding. (Ex. S at 62). He testified that "the talk amongst other people" was that "the management group" usually wanted people to re-work their proposals to come up with a lower bid number, but he rejected the characterization that it was Ms. Gooden's "regular practice to revise bids downward." (Ex. S at 61). Crucially, he also denied saying that Ms. Gooden had a "practice of submitting lowball

[3] As to CW-5 (Kenneth Asbury), his testimony denying the allegations attributed to him, and the extrinsic evidence corroborating those denials, are discussed below at 18-21.

bids." (AC ¶¶ 38, 39; Ex. S at 61, 65; Ex. D at 50-51 (

')). He praised Ms. Gooden's acumen in bidding. (Ex. D (Parsons) at 50). Mr. Parsons admits discussing certain programs with Mr. Keatly (Ex. S at 63-64), but he has no recollection or knowledge concerning whether those programs were "troubled" in April-May 2009 or later in the year (i.e., after the class period). (Ex. S at 74-75). He also clarified that he was talking about underperforming programs in a more general way, stating explicitly,

' at the IS&GS level (much less at the corporate level). (Ex. D (Parsons) at 58-63). At best, Mr. Parsons acknowledged generalized discussions about processes and programs—at some unspecified time that could well be after the class period—based on limited observation and "talk amongst other people."[4]

Thus, as to the key allegations attributed to him, Mr. Parsons denies knowing anything of the sort, as set forth below:

"CW3 . . . stated that Defendant Gooden was told at the beginning of 2009 that the projections for 2009 for IS&GS were overstated." (AC ¶ 36)	"**THE COURT:** Did you say that? **A:** No, sir. That wouldn't be terms that I would use. I wouldn't know whether it was overstated or not. . . **THE COURT:** So did you tell the investigator that the projections were overstated? **A:** No, sir. It's just not a term I would have used. I'm not a financial person. I'm more a manager." (Ex. S at 59-60; accord Ex. D (Parsons) at 39-40)
Per CW3, there was "discussion during the months leading up to July 2009 that IS&GS may underperform relative to its projections." (AC ¶ 36)	

[4] As to "Red Program Review Meetings," Mr. Parsons observed no more than four such meetings and he could not remember when they were. (Ex. D (Parsons) at 53:12-54:17; 58:21-23). Ms. Gooden chaired reviews for programs that she wanted to keep an eye on, including programs for new customers, with new technologies, or programs with a low award fee or customer complaints. (Ex. H (Gooden) at 34:10-21; 39:23-40:8); accord Ex. F (Asbury) at 229:4-6; 230:15-20).

Allegation	Sworn Statements of Mr. Parsons (CW-3)
"CW3 stated that many of the problems with IS&GS's financial performance in 2Q09 (including margins and earnings) were due to Defendant Gooden's practice of submitting lowball bids to win contracts." (AC ¶ 39)	"**THE COURT:** Did you say that? **A:** That's just not something that would be in my terminology, so I don't believe I've said anything like that. **THE COURT:** All right. And forgetting about whether you said it or not, was it true? **A:** Not – I just don't, again, I don't have the expertise to say that that would be true or not true." (Ex. S at 65:10-17; accord Ex. D (Parsons) at 50)

CW-2 (Pamela Hawn) -- Ms. Hawn, upon whom the AC relies for the most pivotal allegations, was a manager who worked on one program at a time (out of more than 5,000 IS&GS programs), and who had no defined role in 2009. (Ex. S at 145:13-24; Ex. H (Gooden) at 23:14-24:2). Given her very low-ranking position, she had virtually no knowledge of financial goals and bidding practices. (See Ex. A at 2). She was completely uninvolved in the programs the AC has her opining about. (Id. at 2-3). She did not participate in "corporate review meetings" to discuss such programs. (Id. at 3). And she was four hierarchical levels away from Ms. Gooden, at par with thousands of other IS&GS employees.[5] (Ex. L (Lerche Aff.) ¶¶ 6, 8). She never communicated with Ms. Gooden about anything. (Ex. A at 3). Ms. Hawn was not in a position to say or know almost anything attributed to her in the AC.

Moreover, as is the case with each CW, much of what Ms. Hawn supposedly told the investigator (concerning programs and functions she was not involved in) is flatly false. The record shows no overlap between Ms. Gooden and Ms. Hawn, no IS&GS programs on the corporate "Red" program list in early 2009, and promising developments through April and May 2009 indicating that IS&GS would meet its 2009 financial targets. (See below at 18-23).

[5] See Steinberg, 2008 WL 5170640, at *13 (discounting allegation where CW was "at least four hierarchical levels away from Defendants").

CW-4 (Victor Morrison) -- Much like Ms. Hawn, Mr. Morrison worked on one program during the relevant period and had no involvement in the programs and functions for which the AC cites him as its source. He was not involved in bidding and denies any knowledge about Ms. Gooden's bidding practices. (See Ex. A at 7). The program Mr. Morrison worked on did not have inexperienced personnel assigned to it. (Id.). Mr. Morrison did not work on the programs that the AC has him discussing at length, and he does not know when those programs were having problems. (Id. at 8). In particular, he was not involved in Sentinel and was never on calls with Ms. Gooden as alleged. (Id. at 9). Like Ms. Hawn, Mr. Morrison was quite removed from Ms. Gooden, and was approximately five hierarchical levels below her in the organization. (See Ex. L (Lerche Aff.) ¶ 7). Mr. Morrison has no personal knowledge about the matters attributed to him and cannot support a strong inference of scienter.

CW-1 (Margaret Burns) -- Even Ms. Burns, who had a more senior role than Ms. Hawn and Mr. Morrison, yet was still three hierarchical levels from Ms. Gooden, was not in a position to have personal knowledge concerning a number of allegations attributed to her. She does not know if Ms. Gooden reported the status of IS&GS projects to "Lockheed Martin's other senior executives." (Ex. S at 115; AC ¶ 44). Ms. Burns was not involved in the bidding for the Sentinel program and was not in a position to know whether it was "priced at a very low rate." (See Ex. B (Burns) at 48:4-24). As for the allegation that "the TSA was not satisfied with the work performed by Lockheed Martin" (AC ¶ 49), Ms. Burns acknowledges she "may have said something like that" to Mr. Keatly, but she did not work on the program and only learned about the TSA's dissatisfaction during a "program review" sometime in 2010, which says nothing about whether the TSA was dissatisfied in 2009. (Ex. S at 117; Ex. B (Burns) at 87, 91). Ms. Burns "had heard the [TSA] program described as tough" some time in 2009, but she "did not

know colleagues on the program at the time" (Ex. S at 118-19). Thus, Ms. Burns's knowledge concerning many of the items attributed to her in the AC is second-hand, at best, with no indication that even her second-hand awareness came during the first half of 2009.

In sum, with each of these four particular CWs, the evidence shows that, at most, they may have discussed matters they heard about from co-workers, concerning programs or processes with which they were not involved, and at times that may well have been after the class period. This type of non-specific hearsay cannot possibly suffice under the PSLRA. Ms. Hawn, Mr. Parsons, and Mr. Morrison all are alleged to have communicated or been in direct contact with Ms. Gooden, yet none of them appear on any direct correspondence with her. Of the many organizational charts produced in discovery, none of these CWs or Ms. Burns appears on the same chart as Ms. Gooden (much less Messrs. Stevens or Tanner). It is telling that with fact discovery complete, these witnesses have drawn barely any mention in any deposition.[6] Plaintiff did not ask Ms. Gooden a single question about Ms. Hawn or any of her supposed allegations, such as purportedly changed backlog numbers.[7]

Mr. Keatly seemingly did not make it his practice to explore the basis for any particular CW's knowledge. When asked at deposition why he did not elicit Mr. Morrison's basis for the information he supposedly provided, Mr. Keatly opined: "

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[6] Plaintiff has deposed 17 current or former Lockheed Martin employees, excluding the CWs. The following is a tally of the number of times each CW was mentioned in those depositions: (a) Burns: 13; (b) Hawn: 2; (c) Parsons: 4; (d) Morrison: 0; (e) Asbury: 205; (f) Nimmons: 0. The few references to Ms. Burns, Ms. Hawn, and Mr. Parsons were entirely inconsequential.

[7] Tellingly, plaintiff's counsel has refrained from directly asking any witness whether he or she believed in early 2009 that IS&GS's internal full year targets (much less the substantially lower external guidance) was achievable. Every witness that has expressed a view on that issue has testified that the full year plan was believed to be achievable as of the relevant time frame, as multiple contemporaneous documents confirm. (See, e.g., Ex. H (Gooden) at 100:19-101:2; Ex. I (Bott) at 34:5-14; Ex. W (April CFO Review) at LMC00190892).

" (Ex. N (Keatly) at 235-36). Mr. Keatly's memorandum claims Mr. Morrison spoke about underbidding, yet it contains no information about Mr. Morrison's basis of knowledge, and no indication that Mr. Keatly ever asked Mr. Morrison the obvious follow-up question: "How do you know that?" (Id. at 250-51). As to Ms. Hawn, Mr. Keatly admitted that "[t]he way the conversation had been proceeding I didn't feel I was in a position to ask her as many detailed questions regarding her basis for her assertions." (Ex. S at 204). He had no understanding of what her role was or where she fell in the hierarchy. (Ex. S at 203-05; Ex. O (Hawn Memo) at 2). Basic questioning would have revealed that the allegedly-provided information was nothing more than hearsay and speculation.

B. Plaintiff's Counsel's Carelessness Undermines The AC

In determining whether the AC allegations here are sufficiently pled, and whether a manifest factual error has resulted from fraud or carelessness, the soundness of Plaintiff's procedure in conducting its investigation and drafting the AC should be examined as well. Robbins Geller was on notice of the risks inherent in conducting an investigation in this fashion and yet took no steps to confirm the accuracy of the allegations. It filed the AC without even verifying whether the CWs held positions that would have afforded them first-hand knowledge, and it ignored numerous other warning signs in the investigator's memoranda.

1. Patently Fabricated Allegations Cannot Stand

Plaintiff cannot deny that there are at least three clearly false allegations in the AC.

- First, the **only** allegation referring to communications to Messrs. Stevens and Tanner is attributed to Ms. Hawn. (AC ¶ 36). Ms. Hawn denies saying it and denies having any knowledge to support it. (Ex. C (Hawn) at 97; Ex. G (CW-2 Aff.) ¶ 23). Mr. Keatly's memorandum states only that Ms. Hawn "surmised" that Messrs. Stevens and Tanner received information from Ms. Gooden and Mr. MacLauchlan, and that "[i]t did not seem as if [Ms. Hawn] actually knew what either Stevens or Tanner knew, but in her opinion, they probably did." (Ex. N (Keatly) at 267-68). Mr. Keatly's notes say even less than

that. (See Hillebrecht Supp. Dec. [Dkt. No. 83] ¶¶ 12-13). This is a clear misrepresentation to the Court. (See Ex. I (7/25/12 Hrg.) at 17) ("It is an important sentence. It's the one the court relied on in its opinion dismissing the motion to dismiss.").

- Second, AC ¶ 24 reads: "CW2 had regular interactions with Defendant Gooden and other Business Area Managers." Mr. Keatly's memorandum does not describe the frequency of her interactions with Ms. Gooden as "regular" or otherwise. (Ex. O (Hawn Memo) at 4).[8] This allegation is another embellishment to give the appearance that Ms. Hawn was in a position to know about Ms. Gooden's conversations with Messrs. Stevens and Tanner. Without this allegation, a manager working on one program—out of the more than 5,000 IS&GS programs—could not reasonably be viewed as having direct knowledge of conversations among senior management.

- Third, AC ¶ 36 alleges that CW-3 "stated that Defendant Gooden was told at the beginning of 2009 that the projections for 2009 for IS&GS were overstated." Plaintiff now admits this statement should not be attributed to Mr. Parsons, and claims it "discovered" this "inadvertent drafting or editing error" only "[d]uring their preparation for [Parsons's] deposition" (Pl.'s SJ Opp. Br. [Dkt. No. 75] at 20), which took place on June 22, 2012. Plaintiff did not inform the Court of this error for weeks. During that delay, the Court issued its opinion denying the motion to dismiss, relying explicitly on Plaintiff's false allegation. (See 7/16/12 Mem. Op. at 16, 21, 34).

A more insidious dichotomy between the interviews conducted by the investigator and the allegations in the AC goes to the heart of the Plaintiff's theory of the case. At its core, the AC alleges that "Lockheed Martin provided financial projections for 2009 . . . to investors," knowing "that these projections were overstated." (AC ¶ 34). The AC then purportedly fleshes out that specific allegation by ascribing to Asbury (CW-5), Hawn (CW-2), and Parsons (CW-3) the essential predicate to this lawsuit: that Ms. Gooden knew in February 2009 that the "projections for 2009" were overstated. (AC ¶ 36). Left unsaid in the AC is the fact that even according to the investigator, the CWs never discussed the "financial projections" that were "provided … to investors" (otherwise known as the external guidance) but only discussed the more ambitious internal Long Range Plan or "LRP." (See Ex. S at 187-89). This is a crucial

[8] Of course, as a matter of fact, Ms. Hawn had no interactions with Ms. Gooden whatever.

distinction ignored, or intentionally obfuscated, in the AC.[9]

2. Plaintiff's "Investigation" Was Flawed And Careless

Plaintiff's investigation fell woefully short of what one might consider "best practices." Plaintiff filed its bare-bones original complaint on the last day of the limitations period without conducting any investigation whatever. These facts alone should end the analysis and result in dismissal with prejudice. Mr. Keatly was engaged months later, assigned with the task of finding enough allegations to survive a motion to dismiss. (See Ex. PP). Mr. Keatly conducted the interviews by telephone, without any witness. (Ex. S at 152). He intentionally did not ask crucial "How do you know that?" questions and failed to independently verify what he claims he was told. (See Ex. N (Keatly) at 250-51). He has no investigation training or experience outside of L.R. Hodges, and his firm employs no former law enforcement personnel. (Ex. S at 193-94).

Within days after receiving the last of Mr. Keatly's call memoranda, Robbins Geller drafted and filed the AC, incorporating information from the memoranda, no questions asked. Neither Mr. Keatly nor the CWs saw the AC before it was filed. (Ex. N (Keatly) at 253-55). There was no effort to determine whether the witnesses were in a position to know the things alleged or to ascertain the basis for their supposed knowledge. In numerous instances, Mr. Keatly's own memoranda cast doubt on the witnesses' reliability and basis of personal knowledge, but that did not deter counsel. For example, Mr. Keatly wrote in his Hawn memorandum that "the interview followed a somewhat tentative track, so we were not able to

[9] IS&GS prepares an internal LRP, which represents projections of future performance. The LRP is not given to investors as guidance. Rather, guidance is a different number that may be lower than the LRP. For example, the guidance range given to investors for IS&GS's 2009 EBIT was $1,170 to $1,195 million. However, IS&GS's internal EBIT target in the LRP was $1,202 million, a target it was on pace to reach until on or about July 8, 2009. (See Ex. J (Mollard) at 71:10-73:4; Ex. W (April CFO Review) at LMC00190892; Ex. X (May CFO Review) at LMC00281299; Ex. Y (June CFO Review) at LMC00281032).

fully determine the nature of Ms. Hawn's role at Lockheed Martin." (Ex. O at 2). Despite that red flag about their central "witness," counsel seemingly made no further inquiry concerning Ms. Hawn's role, adopted the memorandum wholesale, and added counsel's own embellishments to make it appear that Ms. Hawn—a low-level manager with a position held by literally thousands of other employees—had "regular interactions" with Ms. Gooden. Simply ascertaining that Ms. Hawn was one of thousands of similar managers working on thousands of discrete programs would have put counsel on notice that a claim that she was responsible for $2.5 billion worth of sales backlog was preposterous on its face.

Perhaps as egregiously, Mr. Keatly's memorandum regarding Ms. Burns expressly warned that her comments were based on pure hearsay. The memo repeats Ms. Burns's warning that she only:

(Ex. P at 4 (emphasis added)). Robbins Geller ignored those blatant disclaimers of personal knowledge as well. Counsel also ignored the parts of Mr. Keatly's Burns memorandum that directly contradict the AC, namely that: (a) Ms. Burns was unaware of any programs " that had been designated "Red" (id. at 2); and (b) Ms. Burns stated that IS&GS's outlook as of April 2009 was ' with problems that " " becoming apparent only in June 2009 (id. at 3)—months after the supposedly false statements to the market.

One hears the same blaring alarm bells in the memorandum regarding Mr. Parsons, which flagged the fact that " f" the programs to which he had some passing exposure. (Ex. Q at 2 (emphasis

added)). Mr. Parsons apparently warned Mr. Keatly that a Corporate "Red" designation is not the same as a business level "red" designation. Mr. Keatly paraphrases him saying, "

." (Ex. Q at 6). Despite those disclaimers, counsel drafted the AC to allege that Mr. Parsons provided substantive information about various programs, and to allege that he "

." (AC ¶ 45). In fact, counsel was aware that Mr. Parsons simply did not know if any programs had been designated "Red" at the Corporate level but still relied on him as support for the allegation that Mr. Tanner falsely stated during the July earnings call that no IS&GS program had ever been designated "Red" at the Corporate level until the second quarter of 2009. The interview memorandum made explicit that Parsons could not support that allegation—and all evidence shows that, in fact, no IS&GS programs were designated "Red" until well into the second quarter. (See Ex. V).

Mr. Keatly also expressed doubt about Mr. Morrison, noting that he spoke "; " and " ." (Ex. R at 1). The memorandum warned counsel that Morrison stated explicitly that he did not know what information got reported upward to executives, and he was unable to say when the alleged problems became known within IS&GS or to senior management. (Id. at 2). Despite those warnings, counsel did nothing.[10]

[10] An additional red flag noted by the Court (see Ex. U (6/20/12 Hrg.) at 20), of course, was the fact that Plaintiff retained Mr. Keatly's firm after the court in City of Livonia Emps. Ret. Sys. v.

The rushed nature of the investigation and the implausible information provided by Mr. Keatly should have given counsel pause before accusing Defendants of fraud, especially given the red flags in Mr. Keatly's own memoranda and Robbins Geller's prior experience with supposed CWs who deny making allegations attributed to them. At best, counsel was careless in filing the AC with significant factual errors.

II. RECONSIDERATION IS APPROPRIATE TO CURE MANIFEST FACTUAL ERROR

The CWs have repeatedly sworn that the most significant allegations attributed to them were never uttered by them and are largely untrue or relate to topics about which they lack personal knowledge. During oral argument on July 25, 2012, the Court entertained the possibility of reconsideration of the motion to dismiss in light of the new facts that had emerged concerning the CW allegations. (Ex. T at 19, 22). The Court plainly has the authority to dismiss this action on reconsideration or on summary judgment.

The Second Circuit and other courts have authorized dismissal in securities class actions precisely in circumstances like those found here: where discovery has revealed that the CWs cited in the complaint deny making the statements attributed to them, or the allegations are otherwise rendered wholly unreliable. Affirming Judge Kaplan's decision in Campo v. Sears Holdings Corp., 635 F. Supp. 2d 323, 335-36 (S.D.N.Y. 2009), the Second Circuit explained why consideration of sworn testimony would be entirely appropriate here.

Boeing Co., criticized the conduct of Mr. Keatley's firm and raised the possibility that its investigator (not Mr. Keatly) was "lying" to the court. 2011 WL 824604, at *4 (N.D. Ill. Mar. 7, 2011). See also Belmont Holdings, 2012 WL 4096146, at *17. (criticizing Robbins Geller for failing to "ever meet with or interview[]" the key CW and raising question of "whether the decision to rely on an investigator was merely careless or whether it was a self-serving calculation" designed to provide "the cover of plausible deniability"). The investigator in Belmont Holdings recently advised the court that "Plaintiff's counsel were involved in the interviews" in which the CW "made clear that he did not have any knowledge" concerning certain allegations. The court has scheduled a hearing for November 9, 2012. (Ex. QQ).

> Because Fed.R.Civ.P. 11 requires that there be a good faith basis for the factual and legal contentions contained in a pleading, the district court's use of the confidential witnesses' testimony to test the good faith basis of plaintiffs' compliance with Tellabs was permissible. The court made no credibility determinations, nor did it weigh competing testimony. To the contrary, it relied upon the deposition testimony for the limited purpose of determining whether the confidential witnesses acknowledged the statements attributed to them in the complaint. Under these circumstances, we identify no error.

Campo, 371 F. App'x at 216 n.4 (citations omitted); accord Livonia, 2011 WL 824604, at *5.

Most recently, the Northern District of Georgia also granted a motion to reconsider, based on declarations provided by a supposed CW. Belmont, 2012 WL 4096146, at *14. The CW swore under oath that he "never had discussions with" certain individual defendants and had "no personal knowledge" concerning certain allegations central to the complaint. Id. at *7-8. Following the leads of Campo and Livonia, the court held that in a securities fraud action governed by the PSLRA, "even where the defendant relies upon extrinsic evidence outside the pleadings, when a manifest factual error was made by the court based on 'fraud [by the plaintiff], carelessness by [plaintiff's] counsel [in making its factual allegations], or by the court's own misperception of the facts," a court may reconsider its prior order denying a motion to dismiss. Id. at *10 (alterations in original; quoting Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1247 (11th Cir. 2008), and citing Livonia, 2011 WL 824604, at *3-5). The court dismissed the complaint with prejudice, holding that the CW's declarations were "new key evidence of a manifest factual error caused, at best, by Plaintiff's counsel's carelessness." Id. Dismissal was necessary to "ensure justice is done." Id. So too here.[11] See Campo, 371 F. App'x at 216 n.4.

[11] Of course, the pending summary judgment motion is also amply supported by the evidence. The question of the relative credibility of the various witnesses who testified at the October 1 Hearing is an important one, but it is largely beside the point as respects that motion. As Defendants argued, the only "evidence" supporting the allegations in the AC are the interview memoranda and testimony of Mr. Keatly—plain hearsay that simply cannot defeat summary judgment given the admissible evidence of record. (*See* Def.'s SJ Reply [Dkt. No. 81] at 1-2).

A. Claims Based On Undisputedly Fabricated Allegations Must Be Dismissed

As noted above, Paragraph 36 of the AC contains the only allegation concerning Messrs. Stevens's and Tanner's alleged receipt of pertinent information. The Court expressly relied on this allegation to hold that "as to the scienter of Stevens and Tanner, the Court is faced with what is effectively a tie." (7/16/12 Mem. Op. at 27-28). Now that Plaintiff has admitted it had no reasonable basis to make that allegation, the "tie" is broken. The AC fails to allege scienter as to Messrs. Stevens and Tanner and those defendants, at the very least, should be dismissed from this lawsuit. This is especially so because the evidence makes plain that each of the Individual Defendants was "surprised" when events developed in late June indicating that the full year projections could not be achieved. (See, e.g., Ex. HH ("a huge surprise."); Ex. II (same)).

B. New Evidence Reveals Plaintiff Lacked Sufficient Basis To Allege Scienter

The AC relies entirely on five categories of alleged deliberate misconduct, identified in the AC under separate headings: (1) overstatement of financial projections (AC ¶¶ 34-36); (2) underbidding to win contracts at the expense of margins (AC ¶¶ 37-39); (3) failure to disclose "substantial execution problems" with several projects (AC ¶¶ 40-57); (4) inappropriate forecasting of revenues from contracts under protest (AC ¶¶ 58-63); and (5) overstatement of sales "backlog" (AC ¶¶ 64-66). Defendants incorporate by reference their prior submissions detailing the CWs' sworn denials of these allegations.[12] Here, Defendants focus on the CWs' lack of personal knowledge, in light of the legal principles relating to hearsay set forth above. The admissible evidence of record demonstrates that the AC allegations were insufficient to raise a strong inference of scienter. Each category of alleged misconduct is addressed in turn.

[12] See Def.'s SJ Br. [Dkt. No. 70] at 17-25; Declaration of John M. Hillebrecht, dated June 25, 2012 [Dkt. No. 69], Exs. Q, R, S, T, U.

1. Overstated Financial Projections.

Paragraph 36 of the AC states that Ms. Gooden was told in early 2009 that IS&GS could not make its full year 2009 "financial projections." This allegation is attributed to Mr. Parsons, Ms. Hawn, and Mr. Asbury. Plaintiff belatedly concedes that Mr. Parsons said no such thing. (Ex. S at 59-60). Because Plaintiff cannot credibly dispute that Ms. Hawn was not in a position to have any such discussion with Ms. Gooden (see Ex. S at 149-50), this allegation rests entirely on Mr. Keatly's account of what Mr. Asbury allegedly said in February 2009.

Mr. Asbury flatly denies telling Mr. Keatly that he told Ms. Gooden in February 2009 that the IS&GS 2009 projections were unachievable. (Ex. S at 7; Ex. F (Asbury) at 40-41). He has also testified repeatedly under oath that the statement is not true, and that in fact he believed at the time that IS&GS would make its year end projections. (Ex. F (Asbury) at 41:15-16). He has been corroborated by the deposition testimony of Ms. Gooden (Ex. H (Gooden) at 122:9-22), Richard Bott (his CFO for IS&GS Civil) (Ex. I (Bott) at 33:11-34:14), and John Mollard (the Vice President of Financial Planning and Analysis) (Ex. J (Mollard) at 71:10-72:7), among others.

Contemporaneous documents and events from early 2009 support Mr. Asbury's testimony, making it beyond incredible that he would have said any such thing to Ms. Gooden in February 2009—because it simply was not true at the time. On February 16, 2009, Mr. Asbury and other business heads gave "tactical plan" presentations to Ms. Gooden concerning "why we felt we had a way of tacking in, a plan essentially for executing" to meet the full-year targets. (Ex. S at 46). This involved a "risk and opportunity analysis" against the year-long forecast to determine what needed to be done to make the plan. At that meeting, Mr. Asbury presented a plan for meeting the Civil division's $365 million EBIT target for the 2009 LRP, and he

informed Ms. Gooden that the plan was achievable. (Id. at 51-52; Ex. LL at 9-10 (detailing IS&GS Civil Division plan to meet $55 million EBIT challenge)). The next day, Mr. Asbury commented by email to Mr. Parsons that the tactical plan presentation to Ms. Gooden "went very well." (Ex. MM). The other person in perhaps the best position to comment on Mr. Asbury's state of mind in February 2009 and the then-current thinking on whether the LRP was achievable was Mr. Asbury's CFO, Richard Bott. Mr. Bott testified repeatedly that as of February he and Mr. Asbury had "a road map to closure" on the 2009 LRP, denied any knowledge of Mr. Asbury telling "Ms. Gooden in February 2009 that Civil would not be able to make the 2009 fiscal year challenge," and explained that it was not until "we got halfway through the year" that "it was getting more difficult to" achieve what they had planned to achieve for the year. (Ex. I (Bott) at 33:11-34:14). Also supporting the mind-set that the 2009 LRP was achievable are two salient facts—the Civil division exceeded its first quarter 2009 LRP target (Ex. S at 54-55; Ex. NN), and was only $3 million shy of its second quarter target and on plan for the half year. (Ex. Z at LMC00652452).

Mr. Asbury was not operating in a vacuum. Through the spring of 2009 there were many reasons to believe that IS&GS would meet its second quarter and full-year 2009 LRP. At the time of the April 13, 2009, CFO Financial Review meeting—the most in-depth review of IS&GS's financial performance—IS&GS was well on track to exceed its external guidance of $1,170-$1,195 million and achieve its internal LRP target of $1,202 million EBIT. (Ex. W). On April 17, just four days before the earnings call, Ms. Gooden gave a presentation to Messrs. Stevens and Tanner that showed that IS&GS was well-positioned for a strong second quarter, noting, for instance, that IS&GS had no "Red" programs, IS&GS's quarterly EBIT outlook exceeded the target set in the LRP by $1 million, and that IS&GS was off to a "Strong Start" for

the quarter, with "Significant Growth" and "Sustained Rigor." (Ex. AA).

Through May and even into mid-June 2009, all of IS&GS's financial returns indicated that it was indeed on track for a strong second quarter. On May 7, 2009, Ms. Gooden emailed each IS&GS division leader, including Mr. Asbury, to request an update, to which each replied with principally positive news. (Exs. BB - GG). Mr. Asbury responded that Civil was "ahead of plan for Orders, EBIT and cash through Q2" (Ex. CC; Ex. S at 55-56)—news that Ms. Gooden exulted was "Outstanding." (Ex. CC).[13] As of May 13, IS&GS remained on track to exceed its external guidance and achieve its internal LRP target of $1,202 million EBIT. (Ex. X). Even as late as June 11, IS&GS still remained on track. (Ex. Y).

Certain key events and financial metrics during the early part of 2009 also helped to create optimism that IS&GS would meet its full-year goals. For example, when calculating the 2009 LRP, IS&GS estimated a new contract "win rate" of 60 percent. (Ex. KK at 6; Ex. H (Gooden) at 114, 243-44). Through the end of 1Q09, however, IS&GS was experiencing an impressive 77 percent win rate —substantially outpacing, by more than a quarter again, the 60 percent figure that was the basis for the LRP, while scoring an even more impressive 99 percent win rate by dollar value. (Ex. AA at 3; Ex. H (Gooden) at 243-44).[14] Moreover, orders were $330 million ahead of the first quarter 2009 LRP target, clocking in at $2.33 billion as opposed to the $2 billion set forth in the LRP. (Ex. AA at 3). High orders was a good indicator for

[13] Mr. Asbury confirmed at the October 1 Hearing that he in fact believed when he sent this email on May 7 that Civil was ahead of plan. (Ex. S at 55-56).

[14] Although the 77 and 99 percent win rates were a very promising start, an anomalous number and duration of protests by losing competitors led to the 2Q09 shortfall. (Ex. H (Gooden) at 244); see also LMT Reports Q2:09, Equity Research (Morgan Keegan), July 21, 2009, at 2 ("IS&GS had weakness as a result of programs being delayed by protests (three of the programs expected to be among the top ten largest in 2009 were protested, one of which will not be settled until 2010)."); A Mildly Disappointing Qtr Spooks the Market, Lockheed Martin Equity Research (Credit Suisse), July 21, 2009, at 2 (attributing problems to protests).

revenue and EBIT generation later in the year. IS&GS had also made "significant progress on [its] cash collection" in 2009 compared to the prior year. (Ex. I (Bott) at 232).

In addition, correspondence at the end of June 2009—well after the utterance of the alleged misstatements—further demonstrates that the Individual Defendants were taken unawares by the shortfall. In one email exchange, Mr. Tanner informed Mr. Stevens that he "would rather that [Mr. Stevens] not be surprised at the preliminary second quarter data I will be showing tomorrow," which would include, for the first time, financial figures indicating that IS&GS was short of its quarterly EBIT target. (Ex. HH). On June 28, 2009, Ms. Gooden also informed Mr. Stevens for the first time that "this is going to be a disappointing quarter," adding that neither she nor Mr. Stevens should have been "surprised like this." (Ex. II; see also Ex. JJ).

In sum, Mr. Asbury's testimony, and his contemporaneous documents and correspondence from February through May 2009, reflect his state of mind (shared by every witness asked) that Civil—which was only one of IS&GS's six product lines—would make its full-year 2009 LRP target. Other promising events and metrics also indicated that IS&GS was on track to meet the 2009 LRP targets (which substantially exceeded the external guidance given to the investing public), and the second quarter shortfall only became apparent late in the quarter. There is no admissible evidence indicating that Mr. Asbury believed in February 2009 that IS&GS would not make its full-year targets, or that he or anyone else conveyed such a pessimistic belief to Ms. Gooden at that time. Indeed, the evidence is all to the contrary.

2. Deliberate Underbidding.

The only detailed allegations concerning deliberate underbidding were those attributed to Ms. Hawn and Mr. Morrison. (AC ¶¶ 37-39). Neither witness is aware of any such strategy, they were not involved in bidding, and both denied that such a strategy was employed in connection

with the programs on which they worked in 2009. (Ex. S at 128:17-24; Ex. E (Morrison) at 60:9-61:9; 62:7-15). All that remains are the claims attributed to Mr. Parsons, which contain no allegations relating to Ms. Gooden's scienter at all. (AC ¶¶ 38-39). Under oath, Mr. Parsons acknowledged not having any involvement in bidding and based his understanding on general "talk amongst other people." (Ex. S at 61; Ex. D (Parsons) at 50). In any event, even if Ms. Gooden wanted to conduct her business in a way guaranteed to lose money (as the AC contends), she simply could not have done so. The bidding process is tightly controlled, with an independent arm of Lockheed Martin—which does not report to and cannot be countermanded by Ms. Gooden—responsible for an independent assessment of every bid to ensure that, at the time of the bid, the Company expects to make a profit. (See Ex. H (Gooden) at 64:25-65:23; Ex. K (Auletto) at 19:22-20:15; Ex. F (Asbury) at 44, 45:23-46:21). The alleged "lowball" bidding has been disclaimed by the CWs who supposedly alleged it, is not supported by any other witness, and could not have been implemented by Ms. Gooden even if she had wanted.

3. "Substantial Execution Problems" With Certain Programs

As to seven of the nine programs identified in the AC as having "undisclosed" problems, Plaintiff relies entirely on statements attributed to Ms. Burns, Ms. Hawn, and Mr. Morrison. Remarkably, Ms. Hawn and Mr. Morrison never even worked on any of the seven programs during the pertinent time. (Ex. E (Morrison) at 24-25, 49-51; Ex. M (Valore Aff.) ¶ 4-5, 7). Ms. Burns had limited involvement in one of the programs in early 2009 and acknowledged discussing certain programs with Mr. Keatly, but she denied the characterizations in the AC, could not tie her limited knowledge about those programs to the first half of 2009, and revealed that her knowledge about those programs was second-hand, at best. (Ex. B (Burns) at 48-49, 87-88). Moreover, whatever "struggles" certain programs may have had, Plaintiff's allegation that

Defendants actively concealed various "Red" programs at the time of the April 21, 2009, earnings call is demonstrably false. (See Exs. V, W; Def.'s SJ Reply [Dkt. No. 81] at 9).

4. Contracts Under Protest.

None of the AC paragraphs discussing contracts that were protested by competitors attribute any allegations to the CWs. (AC ¶¶ 58-63). Nor do those paragraphs even mention the Individual Defendants, much less allege a basis for inferring that any of them acted with scienter. As a matter of fact, there was an anomalous spike in protests in 2009, substantially delaying certain significant projects unexpectedly. (Ex. H (Gooden) at 68-15-69:8, 241:4-14). The pleadings and the facts belie any inference of scienter with respect to these allegations.

5. Overstated Backlog.

The AC's most direct allegation of supposed wrongdoing is that Ms. Gooden "pressured" Ms. Hawn to change certain reporting related to backlog to "grossly overstate[] the actual backlog for IS&GS." (AC ¶ 65). Ms. Hawn had no interaction with Ms. Gooden. (Ex. S at 149:23-150:9.) The record—more than 930,000 pages of documents and dozens of depositions—lacks any evidence placing Ms. Gooden and Ms. Hawn within earshot or otherwise suggesting that Ms. Gooden ever changed backlog figures. As discussed above, the backlog allegations attributed to Ms. Hawn are preposterous. (See Ex. M (Valore Aff.) ¶ 6).

III. THE RECORD DEMONSTRATES THAT THE CWs TESTIFIED TRUTHFULLY

The five CWs have testified consistently that they did not make the most important allegations attributed to them. As the conceded errors in the AC and the October 1 Hearing testimony made clear, the process followed by Plaintiff and Mr. Keatly was a poor one, fraught with risk and reliant on hearsay. Mr. Parsons and Ms. Burns—both of whom the Court indicated it found credible—have, as set forth above, denied key allegations attributed to them and demonstrated (without challenge) that if they had made those allegations, it would have been

baseless speculation or surmise because they lacked first-hand knowledge. The same goes for Mr. Morrison, and especially for Ms. Hawn, who undisputedly was such a low-ranking figure, wholly uninvolved with the topics about which she allegedly spoke, that if she had said what she purportedly said, she would have been making it up out of whole cloth.

The Court, quite understandably, has expressed concern that Ms. Hawn and Mr. Asbury testified initially "that they had very short conversations [with Mr. Keatly] when in fact they had conversations of 50 and 60 some minutes." (Ex. S at 213). Such a discrepancy, however, is hardly unprecedented after a lapse of many months and several phone calls with Mr. Keatly (some of which were very abbreviated) and would not seem standing alone to provide a basis to entirely discredit their testimony—especially where multiple other witnesses without any such discrepancy also dispute large portions of what Mr. Keatly claims the witnesses told him. As explained by Mr. Asbury's counsel in a letter submitted to the Court, the reasons for Mr. Asbury's initial tentative and equivocal testimony that the call at issue was a short one is clear. (See Ex. OO). In a word, as the Court has recognized (Ex. S at 31-32), Mr. Asbury was sandbagged. Knowing that Mr. Keatly's log indicated a 50-minute call with Mr. Asbury, Plaintiff's counsel withheld that log and that fact from Defendants and the witness, misrepresented the incomplete telephone record it did provide to the witness, and badgered Mr. Asbury into agreeing with the duration shown on that record, knowing full well that that was not the correct phone record. Counsel falsely represented to Mr. Asbury that the phone records he was shown "reflect conversations with you" (Ex. F (Asbury) at 19:6-8), knowing full well that their own undisclosed records made explicit that the phone record that Mr. Asbury was shown (reflecting a six-minute phone call on September 22) related to a call between Mr. Keatly and

Mr. Asbury's receptionist, not Mr. Asbury. (See Ex. PP; Ex. S at 161 (six minute call was with receptionist)).

More significant than the length of the calls or whether any of these former employees "said all sorts of nasty things about the company" (Ex. S at 213), is whether they made the specific allegations set forth in the AC. All five of them fairly uniformly say they did not, and that the underlying allegations are untrue or not within their purview or personal knowledge. (See Ex. A). Those denials on the substance are mutually reinforcing and corroborating and consistent with the other evidence in the case, which belies Plaintiff's entire theory.

CONCLUSION

For the foregoing reasons, and for those argued in Defendants' motion to dismiss and pending motion for summary judgment, Defendants respectfully request that the Court dismiss the AC with prejudice, and grant such other relief as the Court may deem just and proper.

Dated: October 15, 2012
New York, New York

Respectfully submitted,

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