UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SLM CORPORATION SECURITIES LITIGATION	Case No. 08 CV 1029 (WHP)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED CLASS ACTION COMPLAINT

Peter A. Wald (*pro hac vice*)
Laurie B. Smilan
Jeff G. Hammel
Abid R. Qureshi (*pro hac vice*)
LATHAM & WATKINS LLP
885 Third Avenue
New York, New York 10022
(212) 906-1200

Counsel for Defendants SLM Corporation, Albert L. Lord and Charles E. Andrews

December 11, 2009

Table of Contents

PAGE

Table of Authorities

CASES

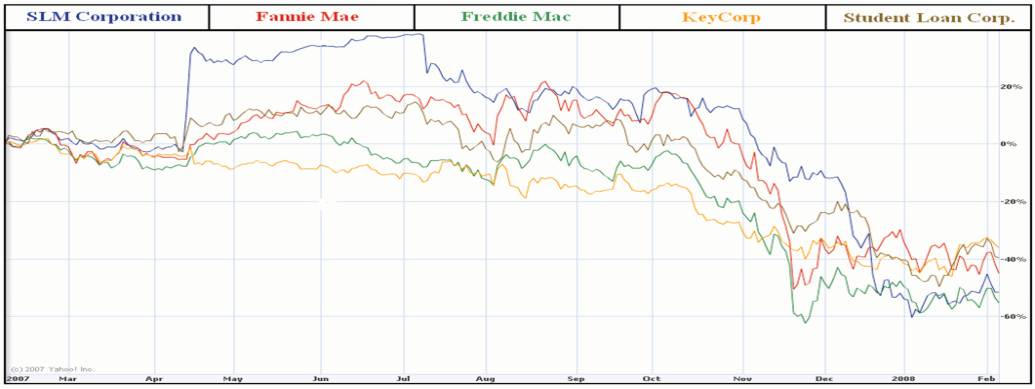
PAGE(S)

STATUTES

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants SLM Corporation, Albert L. Lord, and Charles E. Andrews submit this memorandum of law in support of their motion to dismiss the Second Amended Complaint ("Complaint," cited ¶ _).

Preliminary Statement

Although not recognized at the time, the second half of 2007 marked the start of what became the largest credit crisis since the Great Depression, described by former Federal Reserve Chairman, Alan Greenspan (who did not predict it), as a "once-in-a-century credit tsunami." (Testimony before the House Committee on Oversight and Government Reform, at 1 (Oct. 23, 2008) (attached as Exhibit A to Declaration of Jeff G. Hammel (cited as Ex. _).) During this period, SLM Corporation – the parent company of the leading student loan providers in the nation (collectively, "SLM") – experienced unprecedented defaults by its student borrowers and its stock price declined substantially, on virtually the same downward trajectory as other consumer credit providers:



(¶ 353; Standard & Poor's Stock Price Records.) By the end of 2007, it had become evident that credit and financial markets were in free-fall; consumer defaults were rising as jobs and credit became scarce. (National Bureau of Econ., *Determination of the December 2007 Peak in Economic Activity* (Dec. 11, 2008) (recession began in Q407) (Ex. B).)

In this extraordinary financial environment, SLM substantially increased its allowance

for Private Education Loan ("PEL") losses in accordance with Statement of Financial Accounting Standards No. 5 ("FAS 5"). This controlling accounting standard provides that an allowance for loan losses should represent the calculation of losses that have already been incurred in the loan portfolio, and that are both "probable" and "reasonably estimable" as of the financial statement date. (¶¶ 107-08; FAS 5 ¶¶ 3, 8, 23, and 75 (Ex. C).) SLM also enhanced its underwriting criteria in order to exit market segments that had proven riskier than expected. (¶ 334; 2007 10-K at F-31 (Ex. D).)

On the heals of these unprecedented Q407 events, plaintiffs brought this lawsuit alleging securities fraud. Notably, plaintiffs do not allege that SLM's loan loss reserves were inadequate to cover actual losses in the PEL portfolio – nor could they, as actual losses were always lower than the reserves established by SLM in accordance with FAS 5. Nor do plaintiffs deny that SLM increased its PEL reserves each class period quarter, as events unfolded. (¶¶ 221, 253, 271, 289.) Instead, plaintiffs challenge the *timing* of SLM's PEL reserve increases – contending that, rather than taking a $432 million provision in Q407, SLM should have taken such reserves in earlier quarters. (¶ 179.) These hindsight allegations simply do not support a claim for securities fraud. Indeed, it is well-established that "'[i]f all that is involved is a dispute about the timing of the write-off, based on estimates of the probability that a particular debtor will pay, we do not have fraud; we may not even have negligence.'" *Fadem v. Ford Motor Co*., 352 F. Supp. 2d 501, 512 (S.D.N.Y. 2005) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)).

Background

SLM is based in Virginia. Defendant C.E. Andrews became SLM's CEO in May 2007, in the middle of the class period, having previously served as CFO. (¶ 29.) Defendant Albert L. Lord was Chairman of the Board and became CEO in December 2007 as the class period ended. (¶ 28.) Historically, SLM provided loans guaranteed by the U.S. government pursuant to the

Federal Family Education Loan Program ("FFELP"). (¶ 45.) During the class period, the government significantly reduced FFELP guarantees, increasing lender risk. (¶¶ 57, 326.) Since the late 1990s, SLM has also provided PELs – loans not guaranteed by the government – to cover amounts above FFELP limits and to fund students in alternative learning or career training programs, which do not qualify for FFELP. (¶¶ 45, 326; 2006 10-K at 57 (Ex. E).)

A. Loan Loss Reserves

Like any lender, SLM is required, under generally accepted accounting principles ("GAAP"), to maintain loan loss reserves. In particular, FAS 5 requires companies to accrue a reserve when, based on information available at the time of the financial statements, it is both (i) "probable" that a loss has already occurred, and (ii) the amount of the loss can be "reasonably estimated." (FAS 5 ¶ 8 (Ex. C); ¶¶ 107-08.) The application of FAS 5 requires estimating losses and necessarily involves substantial judgment. As SLM explained in its 2006 Form 10-K:

> The preparation of financial statements in conformity with GAAP requires management to make *estimates and assumptions . . . includ[ing] . . . provisions for loan losses* . . . [which are] an estimate of probable losses inherent in the FFELP and Private Education Loan portfolios at the balance sheet date. . . .

(2006 10-K at F-11, F-12 (Ex. E) (emphasis added).) SLM further cautioned that "[t]he evaluation of the provisions for loan losses is inherently subjective … [and] requires material estimates that may be susceptible to significant changes." *Id.* at 35.[1]

Because of the subjective judgment inherent in the reserving process, SLM repeatedly warned that future events could cause higher charge-offs than currently anticipated, and the concomitant need to increase reserves with corresponding net income affects:

---

[1] Indeed, the U.S. Federal Reserve has emphasized that the setting of loss reserves requires the "exercise [of] significant judgment." (December 13, 2006 Federal Reserve Release, *Interagency Policy Statement on the Allowance for Loan and Lease Losses* ("Fed. Reserve

> The two-year estimate of the allowance for loan losses is subject to a number of assumptions about future borrower behavior that may prove incorrect. For example, we use a migration analysis of historical charge-off experience and combine that with qualitative measures to project future trends. However, *future charge-off rates can be higher than anticipated due to a variety of factors* such as downturns in the economy, regulatory or operational changes in debt management operations effectiveness, and other unforeseeable future trends. If actual future performance in charge-offs and delinquency is worse than estimated, this could materially affect our estimate of the allowance for loan losses and the related provision for loan losses on our income statement.

(2006 10-K at 22 (emphasis added) (Ex. E).)

Over the class period, SLM increased its PEL loan reserves by between $25 and $60 million each quarter based on its updated best estimates of "probable" and "reasonably estimable" losses already incurred in the portfolio. (¶¶ 221, 253, 271, 289.) None of the losses experienced by SLM exceeded these estimates. (1Q 2007 10-Q at 16 (Ex. G); 2Q 2007 10-Q at 16 (Ex. H); 3Q 2007 10-Q at 16 (Ex. I); 2007 10-K at F-29 (Ex. D).)

B. The J.C. Flowers Transaction

On April 15, 2007, SLM entered into a plan of merger in which J.C. Flowers & Co. ("Flowers") agreed to purchase the Company for $60.00 per share, close to 50% over SLM's then-prevailing trading price. (¶ 54.) As a result, SLM's stock price rose to just below $60. (¶ 353.) However, in July 2007, in response to changes in FFELP legislation reducing government guarantees, Flowers backed out of the transaction. (July 11, 2007 8-K (Ex. J).) SLM's stock price fell from $57 to prices in the mid-$40s, where it had traded before the deal was announced. Despite litigation, the merger was not revived. When, in December 2007, SLM announced that the transaction would not go forward, its stock dropped to below $20. (¶ 353.)

C. Late 2007 and Early 2008

These unprecedented swings in SLM's stock price, flowing from the changes in FFELP

Release")(Ex. F).)

legislation, the on-again, off-again Flowers merger, and the developing credit market crisis all occurred well before the so-called "corrective disclosures" of purported fraud alleged in this case. In addition, this stock price volatility had the unfortunate effect of triggering SLM's obligations to redeem certain "equity forward contracts" (a financial instrument, fully disclosed to investors, enabling SLM to raise capital without issuing debt or equity). The triggering of these redemption obligations cost SLM billions of dollars and the announcement of these events caused SLM's stock to spiral down even further. (¶ 68.) SLM's falling stock price caused significant losses to all of its shareholders, including the individual defendants. Mr. Lord lost millions of dollars satisfying a margin call caused by the stock price decline, forcing him to sell most of his stock at prices well below class period highs. (¶¶ 216-7, 353-4.) Mr. Andrews, who increased his holdings during the class period, suffered losses of almost $2 million from class period highs. (Jan. 26, 2007 C.E. Andrews Form 4 (Ex. K).)

In this "perfect storm" of market calamities, SLM took unprecedented action. While SLM had increased its PEL reserves during each quarter of the class period (to a total of $454 million by the end of Q307), SLM further increased its PEL reserve allowance by an additional $432 million in Q407 (to a total of $886 million at year end). (¶¶ 221, 253, 271, 289.) In addition, SLM identified and curtailed further lending in the segments of its relatively new PEL business that had proved riskier than anticipated. (¶¶ 333-4; 2007 10-K at F-30 (Ex. D).) Significantly, however, SLM did not restate any of its prior period reserves. SLM's outside auditor, PricewaterhouseCoopers LLP, issued a clean 2007 audit opinion and continues to stand by that opinion. (2007 10-K at F-3 (Ex. D).)

In January and June 2008, in describing the increase in reserves, Mr. Lord stated that SLM had been "a little too confident" in providing PELs and provisioning for them using

historic performance as a starting point (as GAAP requires). SLM had done so, Mr. Lord noted, "because that's the information that we had." (¶¶ 333, 340.) Based on the new information about how these non-traditional loans (*e.g.*, for vocational schools and other alternative programs) were actually performing as the recession began, Mr. Lord explained that a higher percentage were now "predictably not collectible," and should be written off. (¶¶ 333, 340.) Nothing Mr. Lord (or anyone else) said demonstrated that any prior SLM disclosures were false.

D. This Lawsuit

Plaintiffs brought this lawsuit almost immediately after SLM announced its significant year-end 2007 reserve increases. Relying on anecdotes from low-level confidential witnesses and characterizing Mr. Lord's after-the-fact statements as "admissions," plaintiffs contend that SLM understated its PEL loan loss provisions at year-end 2006 and during the first three quarters of 2007 by manipulating its lending and collection policies. Plaintiffs claim that this was all part of an effort to artificially inflate income, in order to make the Company a more attractive sales target for potential buyers like Flowers. (¶¶ 6-8, 71-95, 113-139.) They assert that this "fraud" was revealed through three "corrective disclosures" in December 2007 and January 2008 – all of which occurred, as Plaintiffs concede, *after* SLM's stock price had decreased 50% from a high of $57.98 in July 2007 to $28.85 (¶¶ 353-54) due to legislated changes in FFELP, collapse of the Flowers transaction, and, most importantly, the unfolding economic crisis, which punished the share prices of consumer credit companies generally (as the above chart shows). Plaintiffs' claims cannot be sustained.

Argument

I. PLAINTIFFS FAIL TO ESTABLISH THAT THE CHALLENGED STATEMENTS WERE FALSE

To state a claim for securities fraud under the Private Securities Litigation Reform Act

("PSLRA"), plaintiffs must, *inter alia*, plead particularized facts demonstrating "the reason or reasons why" each challenged statement is false. *See* 15 U.S.C. § 78u-4(b)(1); *ATSI Comms., Inc. v. Shaar Fund, Ltd.*, 4932 F.3d 87, 99 (2d Cir. 2007). Here, plaintiffs assert that SLM's PEL loss reserves were false but fail to provide the particularized facts necessary to sustain such a claim. Under FAS 5, SLM was required – and only *permitted* – to book loan losses that had "already been incurred" as of the relevant balance sheet dates, based on evidence *then appearing in their models* that the losses were both "probable" and "reasonably estimable." (FAS 5 ¶¶ 8, 23, 67, 75 (Ex. C).) SLM was not permitted to increase its loan loss reserves based on uncertain risks of future non-performance in the PEL portfolio – that is the function of equity capital, not the loan loss allowance:

> *[T]he purpose of the ALLL [allowance for loan losses and leases] is not to absorb all of the risk in the loan portfolio*. . . . Institutions that have high levels of risk in the loan portfolio or are uncertain about the effect of possible future events on the collectibility of the portfolio should address the concerns by maintaining higher equity capital *and not by arbitrarily increasing the ALLL in excess of amounts supported by GAAP*.

(Fed. Reserve Release, at 3 n.7, 12 (emphasis added) (Ex. F).)

Reserve estimates, like other GAAP judgments, "tolerate[] a range of 'reasonable' treatments." *Thor Power Tool Co. v. Comm'r of Internal Revenue*, 439 U.S. 522, 544 (1979); FAS 5 ¶¶ 8, 23, 75 (Ex. C). In order to support their contention that SLM's financial statements were "false" during the relevant times, plaintiffs must plead particularized facts demonstrating that SLM's loss reserves fell outside the reasonable range permitted by GAAP at each of the relevant balance sheet dates. They fail to do so and dismissal is therefore warranted. *See, e.g., Caprin v. Simon Transp. Servs.*, 112 F. Supp. 2d 1251, 1256 (D. Utah 2000) (dismissing claims where plaintiffs failed to plead facts demonstrating that reserves employed "impermissible judgment" and fell outside the "range of reasonable treatments" tolerated by GAAP).

Plaintiffs assert that SLM's increase of its reserves significantly at the end of the class period somehow demonstrates that its earlier reserves were false. (¶¶ 123, 127, 135, 139.) This contention is consistently rejected. *See, e.g.*, *Coronel v. Quanta Capital Holdings Ltd.*, 2009 WL 174656, at *29 (S.D.N.Y. Jan. 26, 2009) ("later announcements about reserve losses differed from earlier ones … [does not establish that prior] reserve estimates were false"); *City of Sterling Heights Police & Fire Ret. Sys. v. Vodafone Group Public Ltd.*, 2009 WL 1456846, at *7 (S.D.N.Y. May 20, 2009) ("plaintiff … failed to assert … how the accounting standards should be applied to determine the points in time when additional impairment charges should have been incurred and why the impairment charges were required"); *Fadem*, 352 F. Supp. 2d at 512.

Nor can plaintiffs establish that SLM's reserves were false merely by "throw[ing] out numbers" (¶ 179) they would have preferred. *See In re Hutchinson Tech. Inc. Sec. Litig.*, 502 F. Supp. 2d 884, 895 (D. Minn. 2007); *AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 254 F. Supp. 2d 373, 385 (S.D.N.Y. 2003). Instead, plaintiffs must explain how they computed the allegedly understated reserves based on information available to SLM at relevant times, which SLM should have considered but instead ignored. *Id.* Without these details, the complaint offers nothing but a bare allegation of reserve inadequacy, which is clearly insufficient under the PSLRA.

Unable to plead specific facts showing that SLM's reserves were misstated, plaintiffs fall back on three attenuated theories, none of which is adequately supported by particularized factual allegations or sufficient to meet their pleading burden under the PSLRA:

- Two Year Loss Emergence Period. Plaintiffs contend that by using a two year loss emergence period for measuring defaults, SLM erroneously included periods when a borrower was in school (and had no repayment obligations), and thus could not default. (¶¶ 113-23.) However, as SLM expressly disclosed, it *did* consider whether a borrower was out of school and had repayment obligations when calculating its loss reserves – by segregating the PEL portfolio into separate categories and assigning

different default rates to each category.[2] *Steinberg v. Ericsson LM Tel. Co.*, 2008 WL 5170640, at *9 (S.D.N.Y. Dec. 10, 2008) (rejecting allegations of concealment contrary to public disclosures). Plaintiffs also rely on decade old FFELP data (¶¶ 119-22) to allege that SLM should have used life-of-loan default rates to calculate its PEL reserves. But because FAS 5 requires that reserves reflect only those losses already incurred in the loan portfolio as of the balance sheet date, and not losses that might occur sometime over the remaining life of the loans, use of life-of-loan default rates is not proper. (FAS 5 ¶ 8 (Ex. C).)

- Underwriting Standards. Plaintiffs contend that SLM's reserving methodology was backward-looking and failed to take into account its decision to tighten underwriting standards in the future. (¶¶ 124-35.) However, utilization of a retrospective analysis based on historical experience is precisely what FAS 5 requires. (See FAS 5 ¶ 23 (reserves should be based on "the experience of the enterprise.") (Ex. C)); *Hutchinson*, 502 F. Supp. 2d at 894 ("FAS No. 5 indicates that estimating the amount of loss contingencies . . . 'will normally depend on the experience of an enterprise or other information.'" (quoting FAS 5)). Moreover, after-the-fact acknowledgements that SLM may have "violated" its "lending *philosophy*" are irrelevant to determining whether underwriting *standards* were violated. (¶¶ 124-35.) Changes to underwriting standards after the class period are similarly irrelevant. *In re Omnicom Group, Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 552 (S.D.N.Y. 2008) (Pauley, J.) ("A decision to reverse course . . . does not imply that the earlier business strategy was a subterfuge.").
- Loan Forbearance. Plaintiffs contend, based on anecdotes from certain low-level employee confidential witnesses ("CWs"), that SLM failed to account for its allegedly improper forbearance practices when calculating reserves. (¶¶ 81-95, 136-39.) This theory fails because anonymous assertions from individuals with no involvement in SLM's reserve-setting processes cannot establish a failure to consider forbearance when setting reserves, much less that the reserves were materially understated. *In re American Express Co. Sec. Litig.,* 2008 WL 4501928, at *7-8 (S.D.N.Y 2008) (Pauley, J.) (must plead facts establishing that un-named witness was in position to "'possess the information alleged.'" (citation omitted)); *Cal. Pub. Employees Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 148 (3d Cir. 2004). In any event, SLM expressly disclosed that it *did* consider "the potential impact of forbearance in the determination of the loan loss reserves." (2006 10-K at 22, 71 (Ex. E).)

The Complaint fails to establish that SLM's reserves were materially understated at the relevant

---

[2] "When calculating the allowance … we divide the portfolio into categories of similar risk characteristics based on loan program type, loan status (*in-school*, grace, repayment, forbearance, delinquency), underwriting criteria, existence or absence of a co-borrower, and aging … *Our higher education Private Education Loan programs (90 percent of the Managed Private Education Loan portfolio at December 31, 2006) do not require the borrowers to begin repayment until six months after they have graduated or otherwise left school. Consequently, our loss estimates for these programs are minimal while the borrower is in school*." (2006 10-K at 35 (emphasis added) (Ex. E).)

balance sheet dates (*i.e.*, fell outside GAAP's range of reasonableness). This is no surprise since no one – including those with access to far greater information, like SLM's auditors – ever reached that conclusion. *See In re* 2007 *Novastar Fin., Inc., Sec. Litig.*, 2008 WL 2354367, at *3 (W.D. Mo. 2008) ("nobody – the SEC, … auditors, or anyone else – has suggested" the need for restatement of reserve allowances). Plaintiffs' FAS 5 claim should be dismissed.

To the extent plaintiffs allege other misstatements – regarding delinquency rates, credit risk concentrations, trends and uncertainties, and internal controls (*see* ¶¶ 140-183) – those allegations are all made in service of plaintiffs' principal contention that SLM understated its PEL loan reserves. Because that contention fails, these related and ancillary allegations fail as well. Even considered independently, these other allegations are insufficient under the PSLRA. Plaintiffs simply allege that delinquency rates were misstated, but offer no explanation of how or by what amount. (¶ 149.) Plaintiffs provide no details on how or why a PEL loan category developed by SLM *at the end* of the class period ("non-traditional loans") could result in a concentration of credit risk it was required to disclose *during* the class period. (*See* ¶ 159; 2007 10-K at 68 ("we have not measured or reported the performance of our [PELs] in terms of traditional and non-traditional loans in the past").) Plaintiffs simply have not alleged specific facts establishing the "reasons why" the challenged statements are false, as the PSLRA requires.[3]

II. PLAINTIFFS FAIL TO ESTABLISH SCIENTER AS TO ANY DEFENDANT

The PSLRA also requires plaintiffs to plead, *inter alia*, particularized "facts giving rise to a strong inference" of "scienter," *i.e.*, fraudulent intent. *See* 15 U.S.C. § 78u-4(b)(2). As the

---

[3] Plaintiffs also assert that SLM improperly relied on "operational challenges" relating to SLM's collections center to understate reserves. (¶¶ 99, 242, 279, 291, 310.) However, the anonymous witnesses on which they rely for this theory (¶ 99) offer nothing to call into question the legitimacy of the operational challenges or any effect they had on SLM's reserves. *See American Express*, 2008 WL 4501928, at *7-8.

Supreme Court and this Court have confirmed, a "strong inference" of scienter must be more than merely plausible or reasonable – it must be "cogent and at least as compelling as any opposing inference" of nonfraudulent intent. *American Express,* 2008 WL 4501928, at *5 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007)). Where the challenged statements are forward-looking or predictive, the PSLRA sets the scienter standard even higher – "[p]laintiffs must plead specific facts that support a strong inference that the Defendants had actual knowledge of the [forward looking] statement's falsity" (*e.g.*, that it would not come true). *In re Aegon N.V. Sec. Litig.,* 2004 WL 1415973, at *12 (S.D.N.Y. Jun. 23, 2004) (citing 15 U.S.C. § 78u-5(c)(1)(B)(ii)). Plaintiffs establish no inference of scienter here.

A. The Second Circuit Rejects Fraud-by-Hindsight Pleading

The PSLRA's rigorous pleading standards do not permit *any* (much less the requisite "strong") inference of scienter to be satisfied by conclusory, "fraud-by-hindsight" allegations. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994) (affirming dismissal of loan loss reserve claims as impermissible "'alleg[ations of] fraud by hindsight'" (citation omitted)). As Judge Sweet explained, in rejecting such allegations:

> Juxtaposing Aegon's future earnings projections during the Class Period, on the one hand, with its subsequent announcement that it would be accelerating … amortization and bolstering its reserves for … defaults … on the other hand, does not in itself establish the inference that Aegon's reserves must have been inadequate throughout the entire Class Period, that the Defendants' economic assumptions must have been unjustified throughout the entire Class Period and that the Defendants purposely concealed this information from the public in order to defraud investors.

Aegon, 2004 WL 1415973, at *7. This is exactly what plaintiffs attempt here.

As noted above, plaintiffs contend that reserves must have been false – and known to be false – because the PEL loss provision taken by SLM in Q407 was larger than the provisions taken in prior quarters. (¶¶ 123, 127, 135, 139.) Plaintiffs similarly allege that during the class

period, SLM's loan loss reserves were understated because the Company failed to disclose and account for allegedly relaxed underwriting standards and the manipulation of forbearance practices. (¶¶ 225, 235, 301). They then point to SLM's post-class period decisions to stop originating certain PELs in the future (¶ 321) and to increase PEL loss reserves at the end of Q407 (¶¶ 320, 331) as evidence that SLM's reserves during the class period were materially misstated, and that defendants knew of and concealed such understatements. Such conclusory, hindsight pleading will not support a claim of securities fraud. *See Aegon*, 2004 WL 1415973, at *7 (hindsight comparison of actual earnings to earlier projections does not establish the projections as false); *In re CIT Group, Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004) (dismissing claims because the allegation that "defendants [three weeks] later decided to revise the amount of loan loss reserves that it deemed adequate [three weeks earlier] provides absolutely no reasonable basis for concluding that defendants did not think [the] reserves were adequate at the time"). Fraud-by-hindsight tactics are particularly unavailing in cases involving reserves, which are inherently judgmental estimates requiring predictions of future performance based on past experience. *See Id.*; *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 567 (S.D.N.Y. 2004) (dismissing GAAP claims, even where company restated financial statements – unlike SLM – because "application of [the relevant accounting] principle to the facts is complex" and "'involves … complex judgments'") (citation omitted).

At best, fraud-by-hindsight allegations may suggest that defendants, in setting their reserves, "should have been more alert and more skeptical," or were guilty of "misguided optimism," or even "wrong" in some of their judgments. *Shields,* 25 F.3d at 1129-30. But being "misguided" or "optimis[tic]" or "wrong" when they made these judgments – for which there is no evidence alleged here, *see supra* – "is not a cause of action, and [even before the PSLRA, did]

not support an inference of fraud." *Id.* On the contrary, far from giving rise to any inference of scienter (much less of actual knowledge), the far more "cogent" and "compelling" inference (which, under *Tellabs*, must be considered) is that wholly unprecedented historic events – the onset of a once-in-a-lifetime credit crisis that caught every financial institution and economist off guard and hit consumer lenders particularly hard – caused SLM to further increase its PEL loss reserve estimates in real time, as events unfolded, consistent with GAAP. *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 376 (S.D.N.Y. 2004) (dismissing claims that Citigroup did "not properly create loan loss reserves" regarding Enron.). As another court recently stated: "an even stronger inference is that Defendants were simply unable to shield themselves … from the drastic change in the [economic] markets." *Tripp v. Indymac Fin. Inc*., 2007 WL 4591930, at *4 (C.D. Cal. Nov. 29, 2007); *In re Gildan Activewear, Inc. Sec. Litig.*, 636 F. Supp. 2d 261, 273 (S.D.N.Y. 2009) (rejecting claims that defendants did not prepare adequately for unforeseen problems at a manufacturing plant). SLM's attempt to stay current with the rapidly evolving credit crisis by increasing reserves as events unfolded does not support a claim that SLM's reserves were "wrong" in prior periods (before those events unfolded), and certainly does not give rise to a strong inference of scienter. *Sterling Heights,* 2009 WL 1456846, at *4 ("allegations that defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim of securities fraud").

B. Defendants' After-the-Fact Statements Do Not Establish Scienter

Nor may plaintiffs establish a strong inference of scienter from the fact that Mr. Lord, in hindsight, candidly acknowledged that SLM had failed to foresee the wholly unprecedented levels of charge offs experienced at the end of 2007. (¶¶ 72-73, 79, 168.) This is especially true of Mr. Lord's acknowledgement that SLM had "got[ten] a little sloppy" and "too confident" in granting loans that were now "predictably not collectible" – none of which suggests that prior

period reserves (or underwriting practices), based on information available at the time, were wrong – let alone "knowingly wrong." (¶¶ 333, 340, 342.) This is just another species of fraud-by-hindsight. *See, e.g.*, *Caiafa v. Sea Containers Ltd.*, 525 F. Supp. 2d 398, 412-14 (S.D.N.Y. 2007) (CEO's statements after the class period about the problems plaguing the company during the class period did not establish scienter); *Coronel*, 2009 WL 174656, at *18-19 (post-class period statements characterized as "admissions" do not render prior statements false).

Similarly, SLM's "tighten[ing]" of its underwriting standards and forbearance policies and application of "a different reserving methodology" after the class period (s*ee* ¶¶ 71-95, 124-27, 136-62, and 228-37, 331-49), in the face of a historic economic crisis fostering unprecedented defaults, hardly constitutes an "admission" that earlier statements about prior practices were fraudulent. *In re Nokia Oyi (Nokia Corp.) Sec. Litig.*, 423 F. Supp. 2d 364, 406 (S.D.N.Y. 2006); *Coronel*, 2009 WL 174656, at *18-19; *Aegon*, 2004 WL 1415973, at *14-15; *cf. Omnicom Group*, 541 F. Supp. 2d at 552.

C. Plaintiffs Cite No Contemporaneous Evidence Demonstrating That The Reserves Were – and Were Known to Be – False

1. No Internal Documents Support Scienter

The Second Circuit has explained that in order to establish knowingly false reserves, plaintiffs must show that the defendants' "disclosures were incompatible with what the most current reserve reports showed at the time the disclosures were made." *Shields*, 25 F.3d at 1129; *accord San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 812 (2d Cir. 1996) ("unsupported general claim of the existence of confidential company sales reports that revealed the larger decline in sales is insufficient to survive a motion to dismiss."); *Gildan*, 636 F. Supp. 2d at 272 (plaintiffs "must specifically identify the reports … containing this information to indicate how it was inconsistent with the statements made.").

Here, plaintiffs cannot point to *any* contemporaneous internal reserve documents evidencing that the loan loss reserves were wrong – let alone that defendants knew of such falsity. CW 13's statements that defendants received reports regarding the "number of loans, their dollar amounts, and the number of days the loans were past due" as well as "levels of charge-offs and delinquencies" (¶ 188) proves nothing. One would hope that a commercial lender would prepare such reports. However, these allegations fail to demonstrate that anything in these unidentified reports was "inconsistent" with SLM's then-current reserves or reserve disclosures – and that defendants knew of such inconsistencies. Plaintiffs leave unanswered all of the critical questions: Who authored the reports? During what periods? What were the levels of charge-offs and delinquencies? How did these results compare with then-current expectations and reserve levels? Why should this information have caused the defendants to understand that their published reports were false?

Without such details, these reports do nothing to demonstrate that SLM's reserves, or its statements about those reserves, were fraudulent. *Shields*, 25 F.3d at 1129; *Aegon,* 2004 WL 1415973, at *11 (dismissing challenges to reserve estimates where "there is no contemporaneous report, memorandum or other document that demonstrates that [the] assumptions were not reasonable when made or that [defendants] knew that to be the case"). Indeed, even if these unidentified "reports" were received by the defendants and revealed the existence of risks – neither of which plaintiffs allege with the requisite particularity – "allegations that [the Individual Defendants] were warned of the risks … show only that [they] may have been made aware of the risks[,] … not that [SLM] was not properly valuing the [reserve exposure] or monitoring its risk." *American Express*, 2008 WL 4501928, at *7.

2. The Statements of Low Level "Confidential Witnesses" Do Not Support Scienter

Nor do plaintiffs surmount this pleading shortfall through their CW allegations. In order for CW accounts to be credited, the plaintiff must plead facts establishing "'the probability that a person in the position occupied by the [CW] would possess the information alleged.'" *American Express*, 2008 WL 4501928, *7-8. Moreover, assessing the sufficiency of CW allegations is even more important where (as here) there is no contemporaneous documentary support. *Chubb Corp*., 394 F.3d at 148. Here, the low-level employees cited as CWs do not come close to establishing that any challenged statements were false, or that defendants knew of such falsity.

First, *none* of the CWs even claims to have had any involvement in the calculation of reserves, and most never worked in SLM's financial reporting group at company headquarters. The CWs were all low-level employees – and all but two were from branch offices (CWs Nos. 2, 3, 4, 5, 6, 7, and 8 were all collection employees located thousands of miles away from SLM's headquarters (¶¶ 82-95, 99)).[4] Such employees would not be "privy to how delinquent accounts would be reserved for." *Alaska Electrical Pension Fund v. Addeco S.A.*, 434 F. Supp. 2d 815, 825 (S.D. Cal. 2006) (discounting allegations about adequacy of reserves based on anecdotes from collection employees); *Chubb Corp*., 394 F.3d at 148. These snippets of gossip and hearsay about SLM's lending and forbearance policies are not sufficient to support plaintiffs' allegations of materially understated reserves.

Second, none of the CWs' accounts are probative of defendants' scienter because plaintiffs do not allege that any CW had contact with any individual defendant. "A reasonable person could not infer [scienter when] … none [of the CWs] had any contact with either"

---

[4] Of the two confidential witnesses supposedly based at SLM's headquarters, CW 1 provides only second hand information (¶ 49, n.2) that, without further description, is "unreliable and … insufficient" to plead scienter sufficiently. *In re Bally Total Fitness Sec. Litig.*, 2007 WL 551574, at *7 (N.D. Ill. Feb. 20, 2007). And as discussed above, CW 13's allegations regarding reports are insufficient.

defendant. *Campo v. Sears Holding Corp.*, 635 F. Supp. 2d 323, 335 (S.D.N.Y. 2009); *American Express*, 2008 WL 4501928, at *8 (same); *In re Elan Corp. Sec. Litig.*, 543 F. Supp. 2d 187, 221 (S.D.N.Y. 2008) ("data entry clerk … does not ordinarily participate in discussions with … executives").[5] The CWs do not salvage plaintiffs' claim.

3. Plaintiffs Allege No Other Circumstantial Evidence of Scienter

Finally, this Court and many others have rejected "must have known" allegations "'based solely on [defendants'] board membership or executive position'" – a tactic that plaintiffs seek to employ here (¶¶ 188-96). *See American Express*, 2008 WL 4501928, at *5 (citation omitted). Nor is it sufficient to allege defendants' "access to information" in a supposed "core business." Instead, plaintiffs must allege with particularity defendants' actual access to specific information, which is inconsistent with the challenged statements (¶¶ 184-7). *See Aegon*, 2004 WL 1415973, at *18 (rejecting core business allegations absent evidence that there was "particular and concrete information … contrary to public statements"). Allegations regarding the lack of internal controls (*see* ¶¶ 169-76) are equally insufficient to establish scienter. *See City of Brocton Ret. Sys. v. Shaw Group Inc.*, 540 F. Supp. 2d 464, 473 (S.D.N.Y. 2008) (rejecting scienter inference based on allegations that "knowledge of weaknesses in the accounting department was 'widespread'").

In sum, plaintiffs offer no contemporaneous, reliable evidence sufficient to support any inference other than that defendants were unsuspecting victims of a consumer credit tsunami that caused unprecedented numbers of its student borrowers to default. What they do offer –

---

[5] Only four CWs even reference defendants. CW 13 discusses providing reports to the defendants (¶ 188), which, as discussed above in Section II.C.1, is not sufficient. *San Leandro*, 75 F.3d at 812. CW 15 is not described at all (¶ 188). *American Express*, 2008 WL 4501928, at *7. And CWs 4 and 16 only provide conclusory allegations that Mr. Lord and Mr. Andrews

unsupported and impermissible fraud-by-hindsight conclusions – does not and cannot give rise to the required strong inference of scienter. *Shields*, 25 F.3d at 1129.

D. The Complaint Fails To Plead Any Motive Sufficient to Establish Scienter

Only rarely can scienter be inferred solely from "motive and opportunity." *ATSI*, 493 F.3d at 99. Certainly, generic corporate motives – *e.g.*, the desire to remain profitable, to obtain credit cheaply, to avoid cost and expense – that apply to any corporate entity are insufficient. *See In re Yukos Oil Co. Sec. Litig.,* 2006 WL 3026024, at *18 (S.D.N.Y. Oct. 25, 2006) (Pauley, J.). Moreover, the alleged motives of a corporation do not establish the motives of individuals; instead, motive sufficient to establish scienter for an individual must involve specific benefits that are "concrete and personal" to the individual. *See South Cherry St., LLC v. Hennessee Group LLC,* 573 F.3d 98, 110 (2d Cir. 2009) (citations omitted). Here, plaintiffs attempt to allege "motive" based on (i) consummating the Flowers transaction (¶¶ 197-202), (ii) avoiding triggers on the equity forward contracts (¶¶ 203-9), and (iii) maximizing profits on Mr. Lord's stock sales (¶¶ 210-7). None is sufficient, alone or in the aggregate, to establish scienter.

1. The Flowers Transaction

"[T]he desire to satisfy conditions and complete a merger is a motive that could be attributed to any corporation, and therefore, is insufficient to plead motive." *Segatt v. GSI Holding Corp*., 2008 WL 2971519, at *7 (S.D.N.Y. Aug. 1, 2008), *rev'd on other grounds*, 2008 WL 4865033 (S.D.N.Y. Nov. 3, 2008) (Pauley, J.). This is especially true where, as here, the transaction price is fixed in the merger contract – because once agreed, there is no incentive to inflate the stock price. *See Campo,* 635 F. Supp. 2d at 334 (inference that company would commit fraud to increase its stock price after "[h]aving already negotiated these transactions at

---

conducted quarterly visits to Nevada and Arizona (¶ 189), without any discussion of what was discussed during those visits. *Campo*, 365 F. Supp. 2d at 336.

[a] fixed price[]" was illogical).[6] Plaintiffs' theory that the merger agreement required SLM to meet "a number of conditions … tied to SLM's financial performance" (¶ 55) adds nothing, since it too is general and conclusory. *See Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001) (recognizing, before *Tellabs*, that motivation to "obtain … [merger] agreement [is] too conclusory to support scienter"); *Campo*, 635 F. Supp. 2d at 332-33. Allegations that the individual defendants would have financially benefited from the merger are equally insufficient; although defendants might benefit from such a transaction, so too would all shareholders. *See Yukos*, 2006 WL 3026024, at *18; *Kalnit*, 264 F.3d at 140 ("Achieving a superior [merger] agreement … does not demonstrate defendants' intent to benefit themselves at the expense of shareholders because the shareholders themselves would benefit from a superior transaction.").

2. The Equity Forward Contracts

Prior to the class period SLM regularly entered into equity forward contracts, a corporate financing program that allowed SLM "to raise money without taking out a loan or issuing debt or equity." (¶ 64; 2006 10-K at F-55 (Ex. E).)[7] Plaintiffs' allegations that SLM was motivated to maintain its stock price in order to avoid triggering the contracts' redemption provisions are insufficient to support a claim of scienter. (¶¶ 64-70.) First, this generic corporate motive cannot establish scienter as to either individual defendant. *South Cherry,* 573 F.3d at 109. Second, courts routinely reject allegations of scienter based on a company's supposed "desire to

---

[6] Here, the transaction price of $60.00 per share (almost a 50% premium over the then-prevailing market price) was agreed upon eight months prior to the end of the class period. (¶ 54.)

[7] These fully disclosed contracts (*see, e.g.*, 2006 10-K at F-55 (Ex. E)) provided that at a specific point in time, or upon certain triggers, SLM would repurchase shares from the contract holders at agreed-upon strike prices; if the strike price was below the market price, Sallie Mae (and all of its shareholders) benefited by the reduction of outstanding debt at discount prices. (¶ 65, 2006 10-K at F-55-56 (Ex. E).) If the strike price was above the market price, SLM had to pay the difference in cash or shares. *Id.*

… maintain compliance with … financial covenants … [as] inadequate to support an allegation of intent to commit fraud." *In re Cross Media Marketing Corp. Sec. Litig*., 314 F. Supp. 2d 256, 265 (S.D.N.Y. 2004); *accord In re Tarragon Corp. Sec. Litig.*, 2009 U.S. Dist. LEXIS 60160, at *33, 40 (S.D.N.Y. Mar. 27, 2009) (rejecting inference of scienter based on allegations that "defendants misrepresented financial statements 'to assure compliance with various financial covenants'").

3. Mr. Lord's Stock Sales

In order to show motive through insider stock sales, plaintiffs must allege trading that was "unusual or suspicious." *In re Axis Capital Holdings Ltd. Sec. Litig*., 456 F. Supp. 2d 576, 595 (S.D.N.Y. 2006). The allegations concerning Mr. Lord's trading do not suffice.

As an initial matter, "[t]he fact that the other defendants did not sell their shares during the relevant class period undermines plaintiffs' claim" of scienter as to all defendants. *Acito v. IMCERA Group, Inc.,* 47 F.3d 47, 54 (2d Cir. 1995); *In re DRDGOLD Ltd. Sec. Litig*., 472 F. Supp. 2d 562, 570 (S.D.N.Y. 2007) ("significant stock sale by [one defendant] is insufficient to support such an inference."). Here, any inference of scienter is fully undermined (as to all defendants) because Mr. Andrews *increased* his SLM holdings during the class period, a fact completely inconsistent with scienter. (*See* Jan. 26, 2007 C.E. Andrews Form 4 (showing increase of 11,297 shares in Company stock) (Ex. K).) *See Bristol-Myers*, 312 F. Supp. 2d at 561 (finding an increase in holdings "wholly inconsistent" with scienter.).

In any case, the three trades by Mr. Lord were not unusual or suspicious in any way:

- February 2007 Sale. There can be no inference of scienter where, as here (¶¶ 210-12), "the trades occurred weeks before the principal allegation of material misstatement, and many months before the release of any negative information," *Gildan*, 636 F. Supp. 2d at 271 – especially because Mr. Lord was an outside director at the time of the sales, not a member of management. *Acito*, 47 F.3d at 54.

- August 2007 Sale. There can be no inference of scienter where, as here (¶¶ 213-15), sales were made to exercise expiring options, *Bristol-Myers*, 312 F. Supp. 2d at 561, especially where total holdings were increased (August 9, 2007 Albert Lord Form 4 (showing increase of 523,938 shares) (Ex. L)). Such facts are "wholly inconsistent with fraudulent intent." *Bristol-Myers*, 312 F. Supp. 2d at 561.

- December 2007 Sale. There can be no inference of scienter where, as here (¶¶ 216-18), the sale was made to prevent a margin call. *See Tarragon*, 2009 U.S. Dist. LEXIS 60160, at *38-9 (sale "to satisfy margin calls, does not raise a 'strong inference' of scienter").

Taken alone or together, none of plaintiffs' theories establishes a motive to commit fraud by any defendant. *See City of Brocton*, 540 F. Supp. 2d at 475 ("zero plus zero plus zero" still equals zero). Plaintiffs' failure to allege facts giving rise to a strong inference of scienter is a second basis for dismissal.

III. SLM'S FORWARD LOOKING STATEMENTS ARE IMMUNIZED FROM LIABILITY UNDER THE PSLRA SAFE HARBOR

"Under the PSLRA, a safe harbor exists for forward looking statements if (1) they are identified as forward-looking and are accompanied by meaningful cautionary language; (2) the statements are immaterial; or (3) the plaintiff fails to prove that the statements were made with actual knowledge of their falsity." *Aegon*, 2004 WL 1415973, at *11; 15 U.S.C. §§ 77z-2(c), 78u-5(a) & (c)(l). Forward looking statements include "projection[s] of … financial items," "management's plans and objectives for future operations, statements of future economic performance and assumptions underlying either." *Aegon*, 2004 WL 1415973, at *11-12. The Safe Harbor is meant to be applied expansively: "statements whose truth cannot be ascertained until sometime after the time they are made are 'forward-looking statements.'" *Id.*

Here, plaintiffs challenge numerous forward-looking statements, such as statements that PELs "*will continue to be* an important driver of *future* earnings growth" (¶ 232), and "*we anticipate* the negative trends caused by the operations-related issues *will steadily improve over the remainder of 2007 and the first half of 2008*" (¶ 281 (emphasis added)). (The challenged

forward-looking statements are set forth in Appendix A (Ex. M).) None of these statements is actionable under the PLSRA Safe Harbor. As an initial matter, as discussed above, plaintiffs have not even attempted to plead facts establishing that any defendant had "actual knowledge" that the statements were false (*e.g.*, could not come true). *Aegon*, 2004 WL 1415973, at *11. Additionally, these forward-looking statements are also immunized from liability because they were accompanied by meaningful cautionary statements (*see* Appendix A (Ex. M).) These statements identified risks, and highlighted the predictive and judgmental nature of SLM's loan loss calculations and the uncertainty of future borrower performance. For example:

- [P]ast charge-off rates on our Private Education Loans may not be indicative of future charge-off rates because of, among other things, the use of forbearance and the effect of future changes to the forbearance policies. (2006 10-K at 22 (Ex. E).)
- [W]e use a migration analysis of historical charge-off experience and combine that with qualitative measures to project future trends. *However, future charge-off rates can be higher than anticipated due to … downturns in the economy, regulatory or operational changes in debt management operations effectiveness, and other unforeseeable future trends … this could materially affect our estimate of the allowance for loan losses and the related provision for loan losses on our income statement.* **(***Id.* (emphasis added).)

Furthermore, the forward looking statements are protected under the "bespeaks caution" doctrine, which provides that "alleged misrepresentations … are immaterial as a matter of law if it cannot be said that any reasonable investor could consider them important in light of the … [accompanying] cautionary language." *Zirkin v. Quanta Capital Holdings Ltd.*, 2009 WL 185940, at *13 (S.D.N.Y. Jan. 23, 2009).

IV. PLAINTIFFS FAIL TO ESTABLISH LOSS CAUSATION

Finally, the complaint should be dismissed because plaintiffs have failed to plead "loss causation" – *e.g.*, that their losses were actually caused by defendants' alleged misstatements. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005); *see also* 15 U.S.C. § 78u-4(b)(4). The "logical link between [an] inflated share purchase price" resulting from an alleged

misstatement "and any later economic loss is not invariably strong" because "that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Dura*, 544 U.S. at 342-43.

In this case, all of these non-fraud factors exist – *e.g.*, the impact of the FFELP legislation, the failed Flowers merger, and most significantly, the largest credit crisis since the Great Depression. Indeed, as shown above, SLM's stock price declined on approximately the same trajectory as that of other consumer lenders during the relevant period. Plaintiffs cannot point to any "corrective disclosures" of the alleged fraud, and make no effort to show how much (if any) of the decline in SLM's stock price was attributable to the supposed revelation of SLM's "fraud" as opposed to these other obviously relevant market factors.

A. Plaintiffs Cannot Point To Any "Corrective Disclosure"

Plaintiffs fail to plead loss causation because they have not alleged facts showing that "the market reacted negatively" to a disclosure revealing the falsity of a prior representation. *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005). This is "fatal under Second Circuit precedent." *Id.*

1. December 19, 2007 Shareholder Conference Call

Plaintiffs cite as a "corrective disclosure" the December 19, 2007 conference call in which Mr. Lord announced an increase in loan loss provisions for Q407 and failed to respond to certain questions about SLM's strategy in the midst of a tough economic environment. (*See* Dec. 19, 2007 Call Tr. (Ex. N); ¶¶ 320.) As shown above, the disclosure of increased current period loan loss provisions does not reveal the falsity of prior period reserves. (*See supra,* Section I.) Moreover, unanswered questions are far from a corrective disclosure. *See In re AOL Time Warner, Inc. Sec. Litig.*, 503 F. Supp. 2d 666, 678-80 (S.D.N.Y. 2007) (speculation that stock

declines were "'spurred by concerns about the company's accounting'" insufficient to demonstrate loss causation).

2. January 3, 2008 8-K and Press Release

The January 3, 2008 disclosure does not even say what plaintiffs claim. Rather than disclosing that PELs would increase "as the 'economic engine' of the Company," SLM said it would continue along the same course with respect to PELs. (¶¶ 326-27.) *See Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 613 (S.D.N.Y. 2008) (disclosure that integration continued as expected did not reveal allegedly concealed increase in integration expenses). Moreover, a statement about future plans for PELs fails to demonstrate the falsity of prior statements regarding the PEL portfolio. *Omnicom Group,* 541 F. Supp. 2d at 552 ("[W]here a disclosure does not reveal the falsity of the alleged misstatements, it does not qualify as 'corrective.'").

3. January 23, 2008 Press Release and Conference Call

Plaintiffs' assertion that the January 23, 2008 press release and conference call were corrective disclosures (¶¶ 331-38) fails because the stock price actually *rose* in the wake of these events – opening at $17.55 and closing at $18.69, and then rising again to close at $19.70 the next day. It is a fundamental principle of loss causation that plaintiffs must show they suffered loss as the result of an alleged disclosure. *Lentell*, 396 F.3d at 173 (a plaintiff must allege "that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security"). Plaintiffs fail to allege how any statement in the January 23 press release or conference call reveals the falsity of prior statements.

B. Plaintiffs Failed to Show That the Alleged Misstatements Caused SLM's Stock Decline

Plaintiffs' also fail to separate out the "tangle of [other] factors" that affected SLM's stock price. *Dura*, 544 U.S. at 343; *Lentell*, 396 F.3d 177; *Lattanzio v. Deloitte & Touche LLP*,

476 F.3d 147, 158 (2d Cir. 2007). Here, plaintiffs completely ignore the steady decline in SLM's stock price over the five-month period prior to the first alleged corrective disclosure. (*See* ¶¶ 268-318.) Plaintiffs concede that the value of SLM's stock price decreased 50% from a high of $57.98 in July 2007 to $28.85 prior to the first so-called corrective disclosure. (¶¶ 353-54.) Yet, they fail to allege any facts demonstrating how the decline in value after December 19 is "attributable to the alleged fraud, rather than simply a continuation of the loss in value" that preceded the disclosure. *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 364 (S.D.N.Y. 2008). A complaint should be dismissed for failure to plead loss causation where it fails to account for the fact "that by the time of the disclosures which allegedly caused the economic loss … the stock had already lost almost all its value." *60223 Trust v. Goldman, Sachs & Co*., 540 F. Supp. 2d 449, 461 (S.D.N.Y. 2007).

Plaintiffs also ignore the impact of the credit industry's market-wide downturn, which by then was well known to the world and mentioned prominently in each alleged corrective disclosure. (*See* Dec. 19, 2007 Call Tr. at 4 ("credit crunch re-emerged") (Ex. N); ¶ 326, Jan. 3, 2008 8-K at 3 ("current challenges in capital markets") (Ex. O); Jan. 23, 2008 Press Release at 1 ("weakening credit markets") (Ex. P).) "'[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases.'" *Lentell*, 396 F.3d at 174 (citation omitted); *see also Merrill Lynch*, 568 F. Supp. 2d at 364 (dismissing claims based on failure to show that losses were attributable to the alleged fraud rather than the market-wide collapse of Internet stocks). Dismissal is appropriate for plaintiffs' failure to allege loss causation.

Conclusion

For the foregoing reasons, defendants' motion to dismiss should be granted.

Dated: December 11, 2009
New York, New York

Respectfully submitted,

LATHAM & WATKINS LLP

By: /s/ Jeff G. Hammel
Jeff G. Hammel

Peter A. Wald (*pro hac vice*)
Laurie B. Smilan
Jeff G. Hammel
Abid R. Qureshi (*pro hac vice*)
885 Third Avenue
New York, New York 10022
(212) 906-1200

Counsel for Defendants SLM Corporation,
Albert L. Lord and Charles E. Andrews