UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES LITIGATION	:	05 Civ. 8626 (GEL)

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE 144A DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

At issue on this motion is whether investment banks who underwrite an offering of unregistered bonds and distribute those securities to investors, and who then participate directly in the drafting of a registration statement to facilitate the issuance of registered bonds to replace the unregistered bonds, can escape liability under Section 11 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77k, for material untrue statements in the registration statement merely because they did not actually distribute the registered bonds to investors. Because it would violate both the language of the Securities Act and the policy underlying its provisions to allow such a result, the answer must be no, and the 144A Defendants'[1] motion to dismiss Count III of the Second Amended Consolidated Class Action Complaint (the "Second Amended Complaint") must be denied.

Section 11 expressly provides that "underwriters" are subject to liability to investors who purchase securities issued pursuant to a registration statement containing material untrue statements. The Securities Act of 1933 defines "underwriters" to include "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, *or participates or has a direct or indirect participation in any such undertaking* . . . ." 15 U.S.C. § 77b(a)(11) (emphasis added). By participating in the drafting of the registration statement – the very document that enabled Refco's registered bonds (the "Registered Bonds") to be issued – the 144A Defendants clearly "participate[d] or ha[d] a direct or indirect participation" in the offer, sale and distribution of the Registered Bonds. As a result, the 144A Defendants were "underwriters" of Refco's Registered Bonds and should not be

[1] The term "144A Defendants" refers to Defendants Credit Suisse Securities (USA) LLC ("Credit Suisse"), Banc of America Securities LLC ("BAS"), and Deutsche Bank Securities, Inc. (Deutsche Bank").

permitted to escape Section 11 liability for harm caused by false statements in the registration statement they helped draft.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2004, Refco Group Ltd. ("Refco") issued $600 million of 9% Senior Subordinated Notes pursuant to an exemption from registration under Rule 144A of the Securities and Exchange Commission ("SEC"). ¶¶ 102, 107.[2] In their capacity as underwriters of these unregistered bonds (the "144A Bonds"), the 144A Defendants prepared the Offering Memorandum for the 144A Bonds, actively marketed the 144A Bonds to investors – including through road shows organized by the 144A Defendants – and ultimately purchased the 144A Bonds from Refco and resold them to investors including lead plaintiff Pacific Investment Management Company LLC ("PIMCO") and other Class members. ¶¶ 107-09, 115, 158.

From the outset of the 144A Bond offering, it was understood and expected that once the 144A Bonds were issued, Refco would undertake to file a registration statement and would offer to exchange registered bonds for the outstanding 144A Bonds (the "Exchange Offer"). ¶¶ 107, 109. A preliminary registration statement was filed on October 12, 2004, and after several rounds of comments from the SEC and responsive amendments by the Company – which the 144A Defendants participated in preparing – an amended version (the "Bond Registration Statement") became effective on or about April 13, 2005. ¶¶ 165, 166, 170-80. Between that date and May 10, 2005, PIMCO and other 144A Bond investors exchanged their 144A Bonds for Registered Bonds that were issued pursuant to the Bond Registration Statement. ¶ 166.

Investment banks in these two-step offerings often try to avoid liability under the Securities Act by restricting their participation to the offering of the unregistered bonds, and then

[2] Citations to "¶ __" are to the Second Amended Complaint, filed on December 3, 2007.

disclaiming any participation in the Exchange Offer or any responsibility for the contents of the registration statement. The situation at Refco was different, however, because the Bond Registration Statement was being prepared in conjunction with a registration statement for an upcoming initial public offering (the "IPO") on which the 144A Defendants were underwriters. *See* ¶ 170. As the 144A Defendants understood, the Company's ability to consummate the IPO depended on its ability to satisfy the SEC and have the Bond Registration Statement declared effective. *See* ¶ 171 (a senior Credit Suisse banker acknowledged in an email to Merrill Lynch, one of the other IPO underwriters, that the filing of the IPO Registration Statement was dependent on resolution of the SEC's comments on the Bond Registration Statement). To ensure the success of the IPO, the 144A Defendants did not terminate their involvement in the bond offering with the distribution of the 144A Bonds, but rather – as described in more detail below – they participated directly in the preparation and amendment of the Bond Registration Statement in response to the SEC's comments. *See* ¶¶ 170-80.

On October 10, 2005, just six months after the Registered Bonds were issued, Refco publicly admitted that its financial statements "should no longer be relied upon" because the Company had concealed hundreds of millions of dollars in uncollectible receivables owed to the Company by an off-balance sheet entity owned by its Chief Executive Officer. ¶¶ 1, 9. The concealment of these receivables rendered the Bond Registration Statement untrue in a number of material respects. *See* ¶¶ 181-93. The October 10, 2005 announcement set into motion a series of events and subsequent disclosures that caused the price of the Registered Bonds to drop precipitously, culminating in Refco filing for bankruptcy just one week later. ¶ 9.

This litigation was commenced on October 11, 2005, and by order dated February 8, 2006, the Court appointed PIMCO and RH Capital Associates LLC as Lead Plaintiffs. A

Consolidated Class Action complaint was filed on April 3, 2006, followed by a First Amended Consolidated Class Action Complaint on May 5, 2006. In those complaints, Lead Plaintiffs alleged "upon information and belief" that the 144A Defendants had been involved in the preparation of the Bond Registration Statement. The Court ultimately found that allegation to be insufficiently specific to support the Registered Bond purchasers' Section 11 claim against the 144A Defendants, and in an opinion dated April 30, 2007 (the "Opinion") it dismissed that claim against the 144A Defendants.

In the Opinion, the Court rejected Lead Plaintiffs' argument that the 144A Bond offering and the subsequent issuance of Registered Bonds should be viewed as two parts of a single integrated transaction for purposes of Section 11. *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 628 (S.D.N.Y. 2007). Thus, the Court concluded that the 144A Defendants' underwriting activities in connection with the 144A Bonds alone could not give rise to liability under Section 11, as such liability must be based on conduct specifically pertaining to the Registered Bonds. The Court then reviewed Lead Plaintiffs' allegations of the 144A Defendants' role *vis-a-vis* the Registered Bonds, and noted that the allegations of the 144A Defendants' participation in the preparation of the Bond Registration Statement were made "upon information and belief" and lacked specifics "as to the extent of this participation or what actual actions the defendants took." *Id.* at 629. Concluding that these allegations appeared to "refer[] entirely to defendants' participation in the Rule 144A offering - not to actual participation in the creation of the Bond Registration Statement," the Court held that "the plaintiffs' conclusory allegation that [the 144A Defendants] 'participated' in the creation of a registration statement, read in isolation, would likely be insufficient to survive a motion to dismiss." *Id.* at 630. However, the Court left open the possibility that more specific allegations of the 144A Defendants' participation in the

creation of the Bond Registration Statement would suffice to state a Section 11 claim against them. In this regard, the Court stated:

> [I]f the Court has misconstrued the complaint and the plaintiffs intended to allege some other participation in the creation of the Bond Registration Statement, plaintiffs can seek leave to file an amended complaint explaining the participation on which they rely.

Id. at 630 n.15.

Once the motions to dismiss the Amended Consolidated Complaint were resolved, Lead Plaintiffs embarked on extensive discovery, including the review of millions of pages of documents that were not previously available to Lead Plaintiffs. Those documents show that the 144A Defendants participated directly in the preparation of the Bond Registration Statement. Armed with precisely the type of specific facts that the Court found lacking in the prior complaint, Lead Plaintiffs filed the Second Amended Complaint on December 3, 2007, which reasserts the Section 11 claim (Count III) against the 144A Defendants.[3]

As described in the Second Amended Complaint, the drafting of the Bond Registration Statement was an iterative process, involving several rounds of comments from the SEC staff and responsive amendments by Refco. ¶ 170. The 144A Defendants and their counsel received and reviewed the SEC comment letters and the amendments of the Bond Registration Statement that addressed those comments, and they offered specific comments and revisions that were incorporated into the Bond Registration Statement. *Id.* The 144A Defendants' participation in these activities is not surprising, given their significant roles in the preparation of the Offering

[3] In addition to dismissing Count III as against the 144A Defendants, the Court's Opinion dismissed Count III to the extent it was asserted on behalf of class members who acquired Registered Bonds only via the Exchange Offer. While Lead Plaintiffs reserve their appellate rights with respect to that ruling, Lead Plaintiffs do not contend that their amendment of the complaint would alter the Court's dismissal of Count III with respect to that group of class members, since that ruling turned on the Court's interpretation of the law, and not upon the sufficiency of Lead Plaintiffs' pleading.

Memorandum (which formed the foundation of the Bond Registration Statement), and their ongoing roles as underwriters of Refco's IPO. Indeed, the amendment of the Bond Registration Statement occurred hand-in-hand with the preparation of the registration statement for the IPO (the "IPO Registration Statement"), and the 144A Defendants and their counsel participated in both processes simultaneously, knowing that the filing of the IPO Registration Statement depended upon the Company's ability to address the SEC's comments and have the Bond Registration Statement declared effective. ¶¶ 170-71, 180.

Among the specific factual allegations that discovery has enabled Lead Plaintiffs to add to the Second Amended Complaint regarding the 144A Defendants' role in the Bond registration process are the following:

- The 144A Defendants' own IPO planning documents show that the 144A Defendants intended to be involved in revisions of the Bond Registration Statement. Their "Summary Timetable" for the IPO projected that they would receive the first round of SEC comments on the preliminary Bond Registration Statement in mid-November 2004, whereupon they would review those comments and "address in both S-4 [Bond Registration Statement] and S-1 [IPO Registration Statement]." ¶ 171.

- When the SEC's first round of comments arrived on November 10, 2004, they were circulated to the 144A Defendants. In an email to Merrill Lynch, Joseph Molluso of Credit Suisse said "We received comment letter on s-4 which we need to get through. Haven't seen the full letter but I think comments are fairly extensive so s-1 filing is depending on getting those turned…." ¶ 171.

- On November 29, 2004, the SEC's initial comments were circulated internally at BAS, with a cover note stating: "We will pull the comments relating to the use of EBITDA." ¶ 171. Thus, it is apparent that BAS was involved in responding to the SEC's comments concerning the use of EBITDA.

- Drafts of Refco's response to the SEC's November 10 comment letter and of Amendment No. 1 to the Bond Registration Statement were circulated to the 144A Defendants in early December 2004. ¶ 172.

- In a conversation on December 8, 2004, defendant Scott Jaeckel of Refco told Joseph Molluso of Credit Suisse that Refco's counsel had "tried to marry the s-4 with the s-1 in terms of business description but it looks like a jumble …" ¶ 172.

- On December 8, 2004, representatives of Credit Suisse and the 144A Defendants' counsel at Cravath Swaine & Moore ("Cravath") participated in a telephonic drafting session regarding the Bond Registration Statement during which numerous due diligence topics were discussed. ¶ 173. Cravath had previously participated in at least one other drafting session for the Bond Registration Statement on behalf of the 144A Defendants. *Id.*

- Cravath, acting as counsel for the 144A Defendants, heavily edited the Bond Registration Statement, as evidenced by a December 8, 2004 draft contained in its files. Among other comments, Cravath suggested that the description of Refco's credit risk be supplemented with examples of events that had given rise to the Company's reserves against receivables from customers. ¶ 173. The description of Refco's credit risk was one of the key aspects in which the Bond Registration Statement was materially false and misleading. *See* ¶¶ 147-50, 181.

- A new draft of the Bond Registration Statement was circulated on December 9, 2004, and was again heavily edited by the 144A Defendants' counsel, including revisions of the Management Discussion & Analysis ("MD&A") section. ¶ 174. The MD&A section was one of the sections of the Bond Registration Statement that contained material untrue statements. *See*, *e.g.*, ¶¶ 149-50, 152-53, 181.

- On December 11, 2004, another revision of the Bond Registration Statement was circulated to the 144A Defendants. ¶ 174.

- On January 7, 2005, Credit Suisse informed the other 144A Defendants that Refco had received "moderate comments to their S-4 filing from the SEC" the previous day, and that "[t]he plan is to address the comments and also finalize 3rd quarter financials to include in the S-4 and S-1 filings," with a target of filing the amended Bond Registration Statement early in the week of January 17 and the IPO Registration Statement later the same week. ¶ 175.

- On January 28, 2005, one BAS representative emailed another, stating: "Assuming the S-4 comments are light and financial review is completed early next week, the Company will then file the S-4. The S-1 is being updated in concert with the S-4 …" ¶ 176.

- On February 2, 2005, the 144A Defendants received the SEC's comment letter on Amendment No. 2 to the Bond Registration Statement, and on February 16, 2005 they received "the latest SEC accounting comments." ¶ 177.

- On February 17, 2005, certain representatives of Thomas H. Lee Partners received Refco's mark-ups of the MD&A section of the Bond Registration Statement, and Jaeckel stated: "I think we should send to [Credit Suisse] for comment." The draft was then sent to the 144A Defendants and/or their counsel, and on February 18, the 144A Defendants' counsel sent Refco's counsel "comments on the MD&A section for the S-4 / S-1," including significant revisions and edits. ¶ 177.

- Credit Suisse took issue with one of the comments sent by its counsel on February 18, as reflected in an email expressing Credit Suisse's disagreement with the "suggestion to move part of the expanded discussion on principal transactions back to the risk section" because "[f]rom a marketing perspective, it's important to highlight the fact that Refco doesn't take the risk." ¶ 178.

- On or about February 23, 2005, Refco filed an amendment to the Bond Registration Statement, incorporating the comments received from the 144A Defendants' counsel, as further modified by Credit Suisse. ¶ 178.

The 144A Defendants have responded to the Second Amended Complaint by moving to dismiss Count III once again, on the grounds that they are not "underwriters" of the Registered Bonds and are therefore not subject to liability under Section 11. As set forth below, however, the 144A Defendants' participation in the preparation of the Bond Registration Statement qualifies them as underwriters of the Registered Bonds, and their motion to dismiss should be denied.[4]

ARGUMENT

Section 11 of the Securities Act provides a private right of action to persons who acquire securities that have been registered pursuant to a registration statement containing materially untrue statements. 15 U.S.C. § 77k(a). There is no question that Lead Plaintiffs have alleged that the Bond Registration Statement contained materially untrue statements, and that PIMCO and other members of the putative class acquired Registered Bonds pursuant thereto. Nor is there any dispute that Count III of the Second Amended Complaint states a claim pursuant to Section 11 against Grant Thornton LLP and certain individual defendants. The only question for

[4] In response to the 144A Defendants' motion to dismiss the prior complaint, Lead Plaintiffs argued that the 144A Defendants' participation in the Rule 144A Bond offering also qualified them as underwriters of the Registered Bonds, since the 144A Bonds and the Registered Bonds were issued pursuant to a single plan of financing and constituted a single integrated transaction. In the Opinion, the Court rejected that argument as a matter of law. While Lead Plaintiffs respectfully disagree with that ruling and reserve their right to appeal, they will not reargue the point here because the basis for that ruling was not one that could be cured through repleading. Instead, Lead Plaintiffs will focus their arguments on whether their allegations of the 144A Defendants' participation in the Bond registration process itself are sufficient to create Section 11 liability.

purposes of this motion is whether the 144A Defendants may be held liable under Section 11 as "underwriters" of the Registered Bonds.

Section 11 defines the persons who are subject to liability thereunder to include "every underwriter with respect to [the] security" at issue. 15 U.S.C. § 77k(a)(5). The term "underwriter" is defined in Section 2(a)(11) of the Securities Act to include "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, *or participates or has a direct or indirect participation in any such undertaking* . . . ." 15 U.S.C. § 77b(a)(11) (emphasis added). Thus, according to the express language of the statute, a defendant need not actually purchase, offer, sell, or distribute securities, as long as it "participates or has a direct or indirect participation in" such activities. *Id. See also Special Situations Fund, III, L.P. v. Cocchiola*, No. 02-3099 (WHW), 2007 WL 2261557, at *5 (D.N.J. Aug. 3, 2007) ("To be an underwriter under the Securities Act, it is not necessary for a person to undertake the risk that they will be left holding the shares…. Nor must a party actually sell shares to the public to be an underwriter under the Securities Act, mere participation in an offering is enough.") (citations omitted).

In light of Section 11's remedial purpose of protecting purchasers from misstatements and omissions in registration statements,[5] as well as Congress's express creation of liability on the part of "participants,"[6] courts have "interpreted broadly the phrases 'participate in' and 'participation'" when applying the definition of an "underwriter." *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392, 1400 (7th Cir. 1995) (citing *Pinter v. Dahl*). *See also Special*

[5] *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

[6] *See Pinter v. Dahl*, 486 U.S. 622, 650 n.26 (1988) ("Congress knew of the collateral participation concept and employed it in the Securities Act…. Liabilities and obligations expressly grounded in participation are found elsewhere in the Act, *see, e.g.*, 15 U.S.C. § 77b(11) (defining 'underwriter' … as including direct and indirect participants…)").

Situations Fund, III, L.P., 2007 WL 2261557, at *4 ("it is apparent Congress defined broadly the term 'underwriter' in the Securities Act"). Thus, "[a]n underwriter is commonly understood to [include] a person who … performs some act (or acts) that facilitates the issuer's distribution" of the securities to investors and thereby "participates in the transmission process between the issuer and the public." *In re WorldCom, Inc. Securities Litigation*, 308 F. Supp. 2d 338, 343 (S.D.N.Y. 2004) (citation and internal quotation marks omitted).

The 144A Defendants, having participated in the preparation of the Bond Registration Statement by which the Registered Bonds were issued and sold to the public, facilitated Refco's distribution of those securities to investors and should therefore be subject to liability as underwriters under Section 11. *See Harden*, 65 F.3d at 1396 (holding that the term "underwriter" includes "a party retained solely to make minimum interest rate recommendations and participate in the preparation of a registration statement but which does not purchase or sell securities, solicit orders, take part in the actual distribution, assume any risk of sale of the securities or do other things commonly associated with an underwriter's role."). *See also In re Activision Sec. Litig.*, 621 F. Supp. 415, 424 (N.D. Cal. 1985) ("Professionals and underwriters who participate in the preparation of the registration statement are liable [under § 11] subject to due diligence and reasonable investigation defenses.").[7]

The 144A Defendants' participation in preparing the Bond Registration Statement readily distinguishes them from other investment banks who have avoided Section 11 liability in Exxon

[7] Although the defendants in *Activision* were held not to be underwriters, that situation was different from that of the 144A Defendants in this case. The defendants in *Activision* were not investment banks that participated in the preparation of a registration statement, but merely venture capital firms who sold shares to the underwriters, which the underwriters then sold to investors. 621 F. Supp. at 424. The language of *Activision* suggests that, had the defendants been involved in the preparation of the registration statements as the 144A Defendants were in this case, they may have been deemed to be underwriters. *See id.* ("In their capacity as selling shareholders they do not participate in the registration statement process. On these facts no purpose is served in holding them liable under § 11.").

Capital exchange transactions by remaining uninvolved in any activities surrounding the registration process. *See In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 432 (S.D.N.Y. 2001) (Section 11 "does not apply to initial purchasers of unregistered securities who were not directly involved in the preparation of the registration statement or in the subsequent exchange for registered securities …") (emphasis added); *American High-Income Trust v. Alliedsignal*, 329 F. Supp. 2d 534, 542 (S.D.N.Y. 2004); (dismissing Section 11 claim against investment bank where plaintiffs "do not allege that [the banks] were involved in the preparation of the Registration Statement, or that any Plaintiff purchased registered Bonds from [the banks]"); *In re Safety-Kleen Corp. Bondholders Litig.*, No. 00-1145-17, 2002 WL 32795850, at **2-3 (D.S.C. Sept. 9, 2002) (dismissing Section 11 claims against investment banks who were not alleged to have participated directly in the preparation of the registration statement). By participating in the preparation of the Bond Registration Statement, the 144A Defendants assumed the role of underwriters of the Registered Bonds and should be subject to liability under Section 11 if they cannot satisfy their statutory affirmative defenses.

The 144A Defendants acknowledge that the Second Amended Complaint "asserts that the 144A Defendants, or their counsel, participated in the drafting of the Bond Registration Statement," but they contend that such allegations are insufficient to state a Section 11 claim. *See* 144A Defs.' Mem. at 4. The 144A Defendants' argument effectively reads out of the statutory definition of "underwriter" the provision that an underwriter includes anyone with an "indirect participation" in the offering, sale and distribution of securities. 15 U.S.C. § 77b(a)(11). Such construction would run afoul of the well-settled rule that a court should "'give effect, if possible, to every clause and word of a statute.'" *Triestman v. United States*, 124 F.3d

361, 372 (2d Cir. 1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); *accord Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Moreover, the 144A Defendants' case citations do not compel the conclusion they urge this Court to reach. Most of those cases are wholly inapposite because they do not involve defendants who were alleged to be liable under the "underwriter" prong of Section 11, and thus they did not address the definition of "underwriter." *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 n.22 (1983) (noting in *dicta* that there are categories of individuals – such as corporate officers – who may assist in preparing a registration statement yet be beyond the reach of Section 11 because they do not fall within the statutory categories of potential defendants); *In re N.Y. City Shoes Sec. Litig.*, No. 87-4677, 1988 WL 80125, at **2-3 (E.D. Pa. July 9, 1988) (plaintiffs did not adequately allege that the defendant attorney fell within a statutory category of defendants or that it was an "expert" within the meaning of Section 11); *In re Flight Transp. Corp. Sec. Litig.*, 593 F. Supp. 612, 615-16 (D. Minn. 1984) (plaintiff did not adequately allege that attorney was an "expert" for purposes of Section 11); *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 683 (S.D.N.Y. 1968) (same). Those opinions neither address nor have any relevance to the question presented here: whether investment banks that participate in the preparation of a registration statement are "underwriters" for purposes of Section 11(a)(5), which expressly provides for underwriter liability.

The few cases the 144A Defendants cite that address the definition of an "underwriter" also are not controlling here, because none of them involved defendants who were alleged to be "underwriters" by virtue of their participation in the preparation of a registration statement. *See Ingenito v. Bermec Corp.*, 441 F. Supp. 525, 535-37 (S.D.N.Y. 1977) (plaintiff did not allege that insurance firm played any role in a securities offering or otherwise met the statutory definition of

"underwriter," but instead claimed that it was an underwriter merely because it loaned money to the issuer; court stated that "[a]n underwriter buys securities directly or indirectly from the issuer and resells them to the public, *or he performs some act (or acts) that facilitates the issuer's distribution*," and therefore "to prove that someone is a creditor cannot in and of itself suffice to establish a claim that someone is an underwriter") (emphasis added); *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 644-46 (N.D. Cal. 1980) (defendant warrantholders sold their warrants to underwriters who then exercised the warrants and distributed the stock to investors; where warrantholders were not alleged to have any role in the distribution of any securities, or any control over the content of the registration statement, they "lack[ed] the qualifying indicia of underwriters"); *Ackerberg v. Johnson*, 892 F.2d 1328, 1335 (8th Cir. 1989) (court did not focus on defendant's role in transaction, but rather on nature of transaction itself, finding that there had been no "distribution" of securities and that "[a]bsent a distribution, no party to the transaction can be an underwriter"); *SEC v. North American Research & Dev. Corp.*, 280 F. Supp. 106, 128 (S.D.N.Y. 1968) ("isolated sales efforts" by certain individuals did not convert them into underwriters). Those cases simply provide no guidance in the present case, where the 144A Defendants participated in the distribution of the Registered Bonds through their role in preparing the Bond Registration Statement, and they influenced the content of the Bond Registration Statement.

Given the broad language of Section 11 and the Securities Act's definition of "underwriter," the Court should find that the 144A Defendants subjected themselves to Section 11 liability when they undertook to participate in the preparation of the Bond Registration

Statement.[8] The 144A Defendants had the ability to (and did) influence the content of that document, and the document as filed contained material untrue statements. Accordingly, Lead Plaintiffs have stated a Section 11 claim against the 144A Defendants as underwriters of the Registered Bonds.

[8] The 144A Defendants' invocation of the Supreme Court's recent opinion in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta Inc.*, 128 S. Ct. 761 (2008), should be rejected. *See* 144A Defs.' Mem. at 10. Unlike the Section 10(b) claim at issue in *Stoneridge*, Section 11 claims do not require proof of reliance. Accordingly, it is irrelevant for purposes of this motion whether the 144A Defendants held themselves out to the public as experts or scriveners with regard to the contents of the Bond Registration Statement. The fact that they participated in preparing that document is sufficient for the imposition of Section 11 liability.

CONCLUSION

For all these reasons, Lead Plaintiffs respectfully submit that the 144A Defendants' motion to dismiss Count III of the Second Amended Consolidated Class Action Complaint should be denied.

Dated: February 29, 2008

Respectfully submitted,

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