UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A.
SECURITIES LITIGATION

02 Civ. 5571 (SAS)
ECF Case

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT VIVENDI, S.A.'S MOTION FOR SUMMARY JUDGMENT

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Defendant Vivendi, S.A. ("Vivendi" or "the Company") respectfully submits this Memorandum of Law in Support of its Motion for Summary Judgment as to Claims for which Claimant Southeastern Asset Management, Inc. ("Southeastern" or "the Firm") made the decision to invest in Vivendi ADSs.[1]

PRELIMINARY STATEMENT

Southeastern, an investment manager, was the single largest institutional investor in `Vivendi. In the third quarter of 2002 it acquired 45.21% of Vivendi's outstanding American Depository Shares (ADSs). After conducting an exhaustive analysis of Vivendi's debt and asset valuations, Southeastern acquired over $148 million of Vivendi ADSs between June and September 2002, the final weeks of the Class Period,[2] when the shares were trading at a historic low. It continued buying and selling Vivendi ADSs and common shares for years after the Class Period and remains one of the largest Vivendi shareholders today. It increased its holdings as the share price dropped because its independent analysis revealed that Vivendi's intrinsic value was significantly higher than its market price. Southeastern's investment strategy paid off: It made a [redacted] *profit* on its Vivendi ADSs.[3] It now seeks to recover an additional $36 million (plus interest) in supposed "damages" it claims it is entitled to as a member of the Class.[4]

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[1] Exhibits ("Ex.") cited herein are attached to the May 15, 2015 Declaration of Miranda Schiller.

[2] The Class Period is the period between October 30, 2000, and August 14, 2002, inclusive. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 109 (S.D.N.Y. 2007).

[3] Southeastern claims the amount of its profit is confidential. However, based on its publicly filed Forms 13(f) and claims forms, it can be discerned that it made an approximate 100% return on its Vivendi investment. *See* Chart #11, Ex. H.

[4] Approximately $20 million of additional claims were filed by clients of Southeastern for whom it acted as the investment advisor. *See* Chart #2, Ex. I.

Southeastern's claim and those of its clients should be disallowed for two reasons: *First*, Southeastern has candidly acknowledged that it was never misled about Vivendi's liquidity risk. It did not base its investment decision on the supposed efficient market price of Vivendi's ADSs but rather its own valuation of Vivendi and its conclusion that the value of Vivendi's assets well exceeded the Company's debt. Southeastern started accumulating ADSs *after* reading four of the nine so-called "corrective disclosures" about Vivendi, none of which Southeastern regarded as corrective or as revealing any new information about the Company. Far from dissuading it from purchasing Vivendi stock, the purported "corrective disclosures" only incentivized Southeastern to purchase more. By its own admission, Southeastern did not regard the market price of Vivendi ADSs as an accurate proxy for Vivendi's true value.

Even with the benefit of hindsight, Southeastern's Rule 30(b)(6) deponent James Thompson still believes that, when Southeastern purchased Vivendi ADSs in 2002, the stock price was being artificially *de*flated by ill-informed analysts, ratings agencies, rumors, and short sellers "gaming" the market. When asked about the nine corrective disclosures that plaintiffs' expert Dr. Blaine Nye identified as revealing Vivendi's fraud, Thompson confirmed that *none* of the information in these disclosures was new or corrective to him—*i.e.*, based on his own research, he already knew the information that was supposedly concealed. [redacted] As Thompson admitted, he was not misled by Vivendi and, still today, does not believe its share price was artificially inflated. Rather, he believes the sum-of-the-parts valuation of Vivendi, which he completed before purchasing the shares and then updated on a quarterly basis, was dead on. It was Thompson's accurate valuation of the Company's assets and liabilities that enabled the Firm to profit so

handsomely when Vivendi's share price ultimately recovered, just as he anticipated. *See infra* Point II.

Second, the Firm did not lose one cent on its Vivendi investment. Rather, it made a [redacted] profit from its investment in the ADSs. It therefore has not sustained any damages. The federal securities laws do not entitle an investor who makes a 100% return on its investment to receive a $36 million windfall for its supposed "losses" simply because it happens to be a member of a securities fraud class action. *See infra* Point III.

FACTUAL BACKGROUND

A. Southeastern and the Longleaf Funds

Southeastern is "an employee-owned, global investment management firm founded in 1975" and headquartered in Memphis, Tennessee. *See* Southeastern Asset Management, About Us, Ex. N. [redacted]. "Slightly over half of . . . total assets under [Southeastern's] management are in separately managed accounts for institutional clients, while the remainder is invested in the Longleaf Partners Funds." Ex. N. At any one time, Southeastern's portfolio includes "18-22 positions of [its] highest-conviction ideas." *Id.*; *see also* Dep. 69:4-5 ("[W]e buy 18-22 names at any one time."). On average, Southeastern holds its investments for a period of five years; it has "never bought anything . . . for an immediate flip." *Id.* 68:23-24; *see also id.* 69:5-7 ("Our typical holding period . . . is five years . . . . ").

The Longleaf Partners Funds ("the Longleaf Funds") are mutual funds. *See id.* 10:25-11:8. Southeastern "created the Longleaf Partners Funds in 1987 to enable [its] employees to invest alongside [its] clients." Ex. N. Formally, Southeastern and Longleaf are distinct entities,

[5] The deposition transcript excerpts of Southeastern Rule 30(b)(6) Deponent James E. Thompson (Feb. 25, 2015) are cited herein as "Dep. __" and are Exhibits A-D to the Schiller Declaration.

with separate boards of directors and shareholder lists, although Southeastern's employees own approximately 10% of each Longleaf Fund. *See* Dep. 10:16-20, 12:11-24, 12:25-13:9. Southeastern serves as the investment advisor to the Longleaf Funds. *See id.* 10:9-20.

B. Southeastern's Vivendi Investment During the Corrective Disclosure Period

Southeastern's Rule 30(b)(6) corporate representative James Thompson was "the primary person responsible for the Vivendi investment" from 2002, when Southeastern began purchasing Vivendi ADSs, to 2007. *Id.* 15:18-21. During the 2001-2002 period, Thompson was an analyst, vice president, and partner at Southeastern. *Id.* 9:22-10:5.

Thompson began following Vivendi's stock some time in late 2000 or early 2001, following the dot-com crash. *Id.* 18:6-17. Before investing in Vivendi, Southeastern conducted an exhaustive analysis of Vivendi's debt and the values of its assets. Ex. L SAM 20-27. Thompson was impressed by the strength of Vivendi's component businesses and its ability to reduce debt, if necessary, through asset sales. *See* Dep. 17:13-19 ("[A]s it came down, I want to say like in the $50 range, you know, we started getting very interested because we knew a lot of the components."); [redacted]

[redacted].

Thompson spoke and met with Vivendi insiders such as its CEO, CFO and investor relations representatives. Dep. 47-48, 51-57; 236-237. *See* SAM236, Ex. E.

Thompson was familiar with the value of Vivendi's assets dating back from before Vivendi even acquired some of them: certain of its assets had been stand-alone publicly-traded companies and therefore information about them could be derived from sources other than Vivendi. *See id.* 18:6-19:7. Other Vivendi business lines, such as SFR or Vivendi Environmental, were part-owned by other public companies with independent financial reporting

obligations about the jointly owned business or had a separate tracking stock,

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In May 2002, when Vivendi's stock dropped to an acceptably low "price point" below its intrinsic value, Thompson recommended a purchase of Vivendi ADSs to Southeastern's investment committee (*id.* 17-19), comprised of its CEO, Mason Hawkins, Staley Cates, Andrew McDermott, John Buford, and C.T. Fitzpatrick. *Id.* 19:8-21:1. Thompson explained that Southeastern viewed Vivendi as an attractive investment (and continued to buy Vivendi shares throughout June, July, and August 2002, and beyond) because it met the three pillars of Southeastern's investment philosophy: (1) Business (the conglomerate included companies in good industries); (2) People (good management, especially after Jean-René Fourtou replaced Jean-Marie Messier as CEO in early July 2002); and (3) Price (the market price of the stock is 60% or less than its intrinsic value, as calculated by Thompson). *See id.* 37:4-39:5, 75. To support his investment recommendation, Thompson drafted and distributed to the Southeastern investment committee a "written case' or memo, with "a lot of attachments." *Id.* 22:9-23:24.

[6]

Following extensive discussions among investment committee members, Southeastern began purchasing Vivendi ADSs in earnest starting on June 25, 2002—after four of the nine purportedly "corrective disclosures" had been disseminated to the market. *See id.* 172:19-25; Ex.

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[6] Vivendi reserves its right to compel the production of these documents. The majority of documents produced by Southeastern were not produced until *after* Thompson's deposition. Plaintiffs still have not produced other analyses that where prepared during the Class Period. As of the filing of this Motion, a large number of responsive documents are still missing.

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G. At his deposition, Thompson explained that Southeastern did not anticipate [REDACTED] *See* Dep. 69:10-23; [REDACTED]; 102:3-13; 219:22-23; Chart 6, Ex. H. Southeastern did not purchase any Vivendi ADSs until after four corrective disclosures; most of its purchases were made immediately following "corrective disclosure" days; and it continued buying Vivendi up to the very end of—and after—the Class Period. *See* Ex. G; Chart #5, Ex. H.

As a result of the purchases it made during and immediately following the Class Period, Southeastern became the single largest outside institutional investor in Vivendi. *See* Dep. 45:6-17. As such, it had regular access to Vivendi insiders, including its Investor Relations representatives. Thompson had a private meeting in July or August 2002 with Vivendi's then-CEO Jean-René Fourtou and CFO Jacques Espinasse. These communications with Vivendi representatives in 2002 reassured Thompson that Vivendi was still a good investment, despite the negative information about the Company in the market. *See id.* 236:25-237:19; *see also* 51-57, 44-48. Notes from Thompson's meetings with Vivendi insiders reflect that he continued to meet with the CEO and CFO (including in Paris), but since the notes were not produced until after his deposition, there was no opportunity to question him about them. *See* SAM225-SAM235, Ex. E. The notes underscore that Thompson was never misled about Vivendi's liquidity. Even with the benefit of hindsight after the Class Period, Thompson's colleague at Southeastern described his valuations as "dead right." *Id.* at SAM 234, Ex. E; *see also infra* at Point II.A.

Thompson's view (both in 2002 and to this day) was that *none* of the nine disclosures identified by Class Plaintiffs' expert Dr. Nye "corrected" any misunderstanding by Thompson

concerning the value of Vivendi. *See* Dep. 167:16-169:20 (corrective disclosure #1), 169:21-171:13 (corrective disclosure #2), 171:14-172:18 (corrective disclosure #3), [REDACTED]. Thompson testified that he appraised Vivendi's intrinsic value in the range of $29-$33/ADS. *Id.* 240:11-14. None of the "corrective disclosures" impacted this valuation.

Thompson's views about the "corrective disclosures" were not based on a lack of contemporaneous knowledge of Vivendi's financial condition in 2002, when Southeastern purchased the Vivendi ADSs for which it is now seeking to recover damages. Thompson read every single news article and public analysis about Vivendi from May to December 2002 and confirmed that none of them contained corrective disclosures altered Southeastern's valuation of Vivendi. *See*, *e.g.*, *id.* 216:17-217:4 ("You should assume that I read everything that was in the Wall Street Journal or on Bloomberg or any piece of media."); *id.* 217:12-16 ("Q. And you

didn't view this Wall Street Journal article as a corrective disclosure, did you? A. No. It's just a bunch of people talking."). Nor did any of these news articles dissuade Thompson from continuing to buy Vivendi. *See id.* 216:23-217:4 ("[What] is happening here is that the stock price is coming down. We feel very good about our value. So it's meeting our criteria . . . . ").

When asked to explain why Southeastern continued to purchase Vivendi ADSs for several consecutive days after the last day of the Class Period (as illustrated by the chart in Exhibit G), Thompson explained

Thompson admitted that Southeastern achieved its investment objectives with respect to its Vivendi investment over the whole holding period (2002-2008). *See id.* 74:20-75:7. In total, Southeastern profited from this investment by approximately . Owing to the success of its initial Vivendi investment, Southeastern proceeded to assume a significant position in Vivendi ordinary shares again after 2008, which it holds to this day. *See id.* 33:13-34:25.

C. Prior Proceedings

On January 29, 2010, a jury returned a verdict against Vivendi on plaintiffs' liability claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 520-21 (S.D.N.Y. 2011). The verdict, however, addressed class-wide common issues only, leaving the issue of individual class members' reliance as well as damages, for post-trial proceedings. *See id.* at 586 ("Here, it seems clear that all parties were on notice that individual reliance issues might require resolution in separate proceedings after the class trial."); *id.* at 532 ("the damages phase of this case has yet to occur"). This Court established procedures for a post-trial claims administration whereby class members could submit claims against Vivendi and Vivendi could interpose challenges, including on the basis of a claimant's lack of reliance. *See In re Vivendi Universal, S.A. Sec. Litig.*, 284 F.R.D. 144, 155 (S.D.N.Y. 2012) (July 5, 2012 order); ECF No. 1197 (Nov. 12, 2012 order). The Court's order contemplated the use of discovery devices to test claimants' individual reliance. *See id.*

In 2013, Southeastern submitted claims in the post-trial claims administration on behalf of current clients, and two of its own funds—the Longleaf Funds. *See* Chart #1, Ex. I. Several other clients for whom Southeastern purchased ADSs submitted claims as well, bringing the total amount of Southeastern-advised claims to approximately $57 million. *See id.*

Thompson conceived of and proposed the Vivendi investment to Southeastern's investment committee. *See* Dep. 17:5-10.

ARGUMENT

I. LEGAL STANDARD

Section 10(b) prohibits "(1) the 'use or employ[ment] . . . of any . . . deceptive device'; (2) 'in connection with the purchase or sale of any security,' and (3) 'in contravention of' Securities and Exchange Commission 'rules and regulations.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (quoting 15 U.S.C. § 78j(b)). To prevail on a § 10(b) claim, plaintiff must establish reliance on the defendant's alleged misrepresentations or omissions. *See Dalberth v. Xerox Corp*., 766 F.3d 172, 182-83 (2d Cir. 2014). Plaintiffs may, under certain circumstances, avail themselves of a "presumption, created by the fraud-on-the-market theory . . . that persons who had traded [in defendant's] shares had done so in reliance on the integrity of the price set by the market, but because of petitioners' material misrepresentations that price had been fraudulently depressed [or inflated]." *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). This presumption, however, is rebuttable. *See id.* at 250. Specifically, "'[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance because the basis for finding that the fraud had been transmitted through market price would be gone.'" *Halliburton Co. v. Erica P. John Fund, Inc*., 134 S. Ct. 2398, 2415-16 (2014) ("*Halliburton II*") (*quoting Basic*, 485 U.S. at 248).

Summary judgment shall be granted on a claim "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Dalberth v. Xerox Corp.*, 766 F.3d at 182; *see also id.* at 189 (affirming "district court's grant of summary judgment in favor of [Section 10(b)] Defendants").

II. SOUTHEASTERN WAS NOT MISLED

The *Basic* presumption of reliance in favor of Southeastern has been rebutted for two independent reasons: *First*, Southeastern has admitted that at the time it purchased Vivendi ADSs it was aware of the facts that were supposedly concealed by Vivendi's alleged misstatements or omissions. Indeed, Southeastern candidly conceded that it did not view any of the nine "corrective disclosures" identified by Dr. Nye as corrective of any misinformation it had concerning Vivendi. The disclosures only confirmed Southeastern's independent understanding of Vivendi's actual liquidity position—an understanding formed from detailed research and analysis of Vivendi's assets and debt which it undertook prior to its first purchase and reconfirmed on a quarterly basis. *Second*, Southeastern did not regard the market price of Vivendi ADSs as a proxy of the Company's intrinsic value at or around the time it acquired Vivendi shares. Rather, it concluded that the market had *undervalued* Vivendi and made its investment on the basis of that conclusion—an investment that yielded a [redacted] profit. Moreover, its continuous post-disclosure purchases confirm that Vivendi's declining market price was irrelevant to Southeastern's valuation of the Company. Instead of relying on the alleged misinformation, Southeastern purchased following each corrective disclosure because the ensuing price drop made the stock more undervalued. *See* Ex. G.

A. Southeastern Admits that It Was Aware of All the Facts Purportedly "Hidden" by Vivendi's Alleged Misstatements or Omissions

The fraud-on-the-market presumption announced by the Supreme Court in *Basic* assumes that "most investors . . . will rely on [a] security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013). That presumption is rebutted when an investor knew the true facts—the ones supposedly concealed by the defendant's misrepresentation—before entering into the stock transaction: "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 284.

Southeastern did not rely on the integrity of the market price under *Basic*. In *Basic*, the Court distinguished between investors who transact in face-to-face transactions and those who rely on the market in the valuation process:

> In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally *transmits information to the investor* in the processed form of a market price. Thus *the market is performing a substantial part of the valuation process* performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

485 U.S. at 244 (emphasis added). Vivendi's market price did not transmit information to Southeastern concerning Vivendi's liquidity risk.

, 119:22-121:4 (explaining and reaffirming contemporaneous statement that "we are confident that even the most conservative asset appraisals comfortably exceed Vivendi's liabilities"), ; 217:19-10 ("there's ample assets to sell"). Thompson further confirmed that he chose to purchase because the market was *not* correctly pricing Vivendi's assets and liabilities. Informed by a detailed understanding of Vivendi's actual liquidity position, Southeastern bought almost $150 million in Vivendi ADSs in the final weeks of the Class Period because it concluded—correctly, it turned out—that the market had *undervalued* the shares.

Southeastern could not have relied on the alleged misrepresentations because Thompson—who conceived of and oversaw the Firm's Vivendi investment—admitted that he knew the full "truth" about the Company's financial condition before Southeastern purchased the stock and before the final "corrective disclosure" on August 14, 2002. Thompson testified that he did not view any of the statements identified by Class Plaintiffs' damages expert, Dr. Nye, as "corrective disclosures" because *he knew that information previously from his own research and analysis*.[7] *See, e.g.*, Dep. 172:11-18 (regarding the June 21, 2002 corrective disclosure: "Q. [Y]ou didn't think that was what we call a corrective disclosure? In other words, putting, you know information out there that corrected some kind of misinformation about Vivendi that was

[7] The Second Circuit defines a "corrective disclosure" as one that "reveals to the market the falsity of the [defendant's prior statements]." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005).

previously out there? . . . A. Yeah, I don't see that."), [REDACTED][8]

Indeed, Thompson's view was that these disclosures were only "corrective" because the market itself—and especially the rating agencies—had previously *mis*interpreted the data on Vivendi. *See id.* 170:6-22 ("We have typically not been big fans of Moody's or the major rating agencies. They tend to lag too much, and I can go into that, but we tend to do our own analysis. . . . [G]enerally, they don't have the best analysts. They generally are slow to do anything. Usually, the cat's out of the bag by the time they do anything."). By contrast,

[8] Thompson specifically confirmed Southeastern knew about Vivendi's true debt levels (including when different obligations were coming due), and it also understood that the values of Vivendi's assets were more than sufficient to cover its liabilities. *See, e.g.,* Dep. 224:20-21 ("[W]e believed that [Vivendi] had ample liquidity by selling assets."). [REDACTED].

Thompson believed—and, even with the benefit of hindsight, continues to believe—that his own research into the Company had been rock solid and incorporated information that was purportedly only first disclosed in Dr. Nye's "corrective disclosures."

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Southeastern's knowledge and trading behavior firmly rebut the presumption of reliance: it knew the truth about Vivendi's financial condition; it was not misled by any statements or omissions by the Company or the market prior to the corrective disclosures—none of which it viewed as corrective even with the benefit of hindsight; and, for this reason, Southeastern continued to invest in the Company even after the last corrective disclosure in August 2002. The soundness of Southeastern's analysis and valuation was borne out by the profit it made on its Vivendi investment, confirming Thompson's thesis that the market price of the ADSs was *de*flated—not inflated—when Southeastern purchased the shares.

B. Southeastern Believed That the Market Had Undervalued Vivendi ADSs

Even if Southeastern had not known the truth regarding Vivendi's liquidity position, it still could not avail itself of *Basic*'s presumption because it concededly believed that Vivendi's market price did not reflect its intrinsic value: "[I]n the Second Circuit's formulation, the presumption [of reliance] is rebutted if the plaintiff did not 'rely on the market price of [the] securit[y] *as an accurate measure of [its] intrinsic value*.'" *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 100 (S.D.N.Y. 2013) (Scheindlin, J.) (emphasis added) (quoting *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 234 n.3 (2d Cir. 2012)).

Southeastern's investment philosophy—which Thompson employed with respect to Vivendi—belies any reliance on market price as an accurate measure of intrinsic value:

> Under Southeastern's investment philosophy, superior long-term performance can be achieved when positions in financially strong, well-managed companies are acquired at prices *significantly below their business value and are sold when they approach their corporate worth*. Using this approach, stocks are viewed as ownership units in a business enterprise which has *an unrecognized business or "intrinsic" value subject to determination through careful securities analysis and the use of established disciplines consistently applied over long periods of time*.

SAM102, Ex. F (emphasis added); *see* Dep. 73:10-75:7 (confirming that [REDACTED] [REDACTED]).

Thompson made clear that the market price of Vivendi ADSs was irrelevant to Southeastern's investment decision. He acknowledged that Southeastern invested in Vivendi during the Class Period, notwithstanding its falling stock price, because it believed that the market price was not an accurate proxy for the stock's intrinsic value. Indeed, it was the decline in stock price relative to intrinsic value that made Vivendi an attractive investment for the Firm. *See id.* 75:8-76:12 (confirming that Southeastern applied to Vivendi its strategy to "purchase

when the common stock is available at 60 percent or less of our conservative appraisals").[9] When the ADSs were at a historic low, Southeastern purchased approximately 45% of Vivendi's outstanding ADSs in the third quarter of 2002, with full knowledge of the Company's liquidity needs, *see* Dep. 48:19-54:13, based on a well-founded belief that the value of its net assets was at least $30 a share, in Thompson's words, "we're happy to buy at $18 and below." *Id.* 79:20-22; *see* Chart #5, Ex. H; Dep. 50:3-11. Even *after* the Class Period, Thompson appraised Vivendi's intrinsic value in the range of $28-$33 per share, well above the market price when it purchased the shares at the end of the Class Period. *See id.* 240:11-14; SAM 184, Ex. K. [redacted] [11]

As in *GAMCO*, the declining price of Vivendi ADSs did not dissuade Southeastern from purchasing. [redacted]

[9] Notes produced after his deposition further reflect that Thompson's assessment of Vivendi's liquidity was not based on its stock price but his own valuations of its assets and the regular calls and meetings he had with Vivendi's CFO: "I wrote all of the above this morning to collect my thoughts as I had the last in a series of calls (one a week) to the CFO while we were working on the liquidity issue." SAM 226 (10/30/02 notes), Ex. E; *see also* SAM 182 (10/16/02 notes) ("I went back and updated my model and it tends to bear out Vivendi's values (it implies that fair value is 6.8 B or so)."), Ex. K.

[10] In a June 2003 letter to its investors, Southeastern boasted about its Vivendi investment being "up over 30% . . . .some of our most undervalued businesses have the strongest rallies during the quarter." Dep. 95:12-15. Even after the close of the Class Period, Southeastern wrote to its investors in 2002 that its Vivendi investment was "capable of double digit value growth." *Id.* 127:19-23; Longleaf Partners Fund Annual Report (Dec. 31, 2002) at 5, Ex. M.

[11] One reason Thompson had such confidence in his appraisals is that "We have owned many of Vivendi's assets previously, first at MCA and then at Seagram, and we are confident that even the most conservative asset appraisals comfortably exceed Vivendi's liabilities." Dep. 120:7-12. Southeastern was confident that "the value of the company's entertainment, publishing, environmental and other businesses remained intact." *Id.* 122:20-23.

Yet while GAMCO merely "doubled or tripled their holdings in Vivendi securities" during the Corrective Disclosure Period, *GAMCO*, 927 F.Supp.2d at 102, *all* of Southeastern's ADS purchases took place during and after the Corrective Disclosure Period—starting after four of the nine "corrective disclosures" had already been disseminated to the market. *See* Chart #2, Ex. H. Far from relying on the accuracy of the market price of Vivendi ADSs, Southeastern believed that the price was inaccurate and saw the market's inability to recognize Vivendi's intrinsic value as an opportunity to profit from a significant investment in the Company over a standard five-year holding period—which it did.

The record here is even more compelling than in *GAMCO*

. This belief is at odds with

the Class Complaint's market inflation theory, which was the fundamental assumption of Dr. Nye's damage analysis.[12]

The Supreme Court's decision in *Halliburton II* is not to the contrary. *Halliburton II*, like *Basic*, involved the question whether a presumption of reliance should be afforded at the class certification phase. It did not address the means by which individual reliance may be later rebutted by evidence of an investor's actual knowledge, investment strategy, valuations, access to information, and the other indicia of non-reliance present here. Where, as here, a sophisticated investor like Southeastern freely admitted that it was not misled; achieved its investment objective; bought at historic lows at the end of the Class Period with a plan to hold for five years; admittedly possessed all information necessary to accurately value the Company's debt and assets; was aware that the Company would have to sell assets to cover its liquidity needs; and profited by [REDACTED]—nothing in *Halliburton II* suggests that the investor can recover damages based on a presumption that it relied on a concealed liquidity risk.

Halliburton II's reference to "the value investor . . . [who] believ[es] that the market price will incorporate public information within a reasonable period," does not describe Southeastern. 134 S. Ct. at 2411. For one thing, Southeastern admittedly knew Vivendi's debt levels and asset valuations before purchasing the stock, so it could not have relied on a concealed liquidity risk when making those purchases. Moreover, Southeastern understood that Vivendi's share price would not reach its valuation "overnight" and that is why it always intended to—and did—hold

[12] The First Amended Consolidated Class Action Complaint alleges that plaintiffs purchased the Vivendi securities in reliance on the "artificially inflated prices." *See* Complaint ¶¶ 194-96 (Nov. 24, 2003, ECF No. 93). Dr. Nye merely "assumed" stock price inflation for purpose of his loss causation analysis. *See* Class Action Trial Tr. (Nov. 17, 2009) 3466:8-14 ("I have been asked to *assume* that Vivendi engaged in a number of activities as part of a scheme to conceal their liquidity risk . . . . The only trouble was the market wasn't aware of this increasing liquidity risk and, as a result, the share price became inflated." (emphasis added)).

its Vivendi ADSs for approximately five years.[13] *See* Dep. 68:5-9 ("We just know how it works, and things just generally don't go to our valuation overnight."). Nor was Southeastern's valuation of Vivendi in any way "skewed by a market price tainted by fraud." *Halliburton II*, 134 S. Ct. at 2411. [REDACTED] Market price played no role in that valuation; it was simply "the numerator" in the fraction (market price divided by intrinsic value) that Southeastern used to calculate the "upside" of its investment. *See id.* 240:15-241:19.

In fact, Southeastern knew that Vivendi's market price could not be relied upon to determine Vivendi's valuation because the market (unlike Southeastern) had not yet appreciated that Vivendi's asset values far exceeded its debt. Describing the Firm's investment on November 2, 2002, months after the Class Period closed, Thompson reported:

> Yesterday and today, V[ivendi] held (is holding) analysts meetings (I was not invited for some reason) to explain Cegetel. I am not claiming to fully understand every nuance at V[ivendi] but I am blown away by people who are writing big pieces on V[ivendi] and don't have a clue. The stock reaction yesterday and today is largely due to people finally getting the numbers, which have never been a secret. They are stunning, better than I would have ever thought.

SAM229, Ex. E. Notes from a meeting with Vivendi's CEO, CFO and COO, confirm (based on hindsight) that Thompson's valuations were "dead right": "Jim [Thompson] has been dead right on almost every aspect of this. Asset disposals in the second half with total €7 Bn, most at our above appraisal." *Id.* at SAM234. Even with the benefit of a decade of hindsight, and the comfort gained from multiple calls and meetings with Vivendi insiders, and having read

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[13] *See* Dep. 69:4-7 ("Our typical holding period, we say, is five years publicly . . . ."), [REDACTED].

everything that was published about the Company, Thompson believed that market commentators didn't "have a clue" (SAM 229, Ex. E) [redacted] This is hardly the testimony of a defrauded investor who relied on an inflated share price and was disappointed when the revelation of new material information caused the stock price to decline. Having disclaimed that the market price was an accurate measure of Vivendi's intrinsic value, reliance under the *Basic* presumption is rebutted. *GAMCO*, 927 F. Supp. at 98 & n.74. In *GAMCO*, this Court recognized that sophisticated institutional investors and value-based investors are "entitled to the fraud in the market presumption in general" and limited its holding to the unusual facts of that case. *Id.* at 102. The facts here – including the Firm's extraordinary profit – are far more unusual.

Confident in its investment hypothesis, Southeastern continued to purchase long after the Class Period ended as well as when it believed there was a liquidity issue. *See* Dep. 53:4-25; Chart #5, Ex. H. Southeastern's post-Class Period purchases further confirm that Southeastern's valuation was "completely independent of . . . market price." *GAMCO*, 927 F.Supp.2d at 101-02. In acquiring 45% of the total ADS float, Southeastern placed $148 million of its and its clients' money at risk. *See* Dep. 107:21-110:15; Chart #9, Ex. H. It had tremendous incentive to conduct an in depth, real time analysis of Vivendi every day that the market was open. *Basic*'s presumption is rebutted when the investor candidly admits that his analysis resulted in buying shares at a historic low, at the end of the Class Period, with the intention of holding for five years

and getting a 100% investment return. This profit confirmed that the liquidation values Thompson ascribed to the Company's assets far exceeded its liabilities.[14]

III. SOUTHEASTERN HAS NO LEGALLY COGNIZABLE DAMAGES

Southeastern also cannot recover from Vivendi for an independent reason—it has no legally cognizable damages. When asked why Southeastern filed a claim in this action when it made an extraordinary [redacted] profit, Thompson responded: [redacted] [redacted] This is hardly the testimony of a defrauded purchaser whom the securities laws were intended to protect.

"Section 28(a) of the 1934 Act provides that 'no person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages on account of the act complained of.'" *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1049 (2d Cir. 1995) (quoting 15 U.S.C. § 78bb). The statute, on its face, "limits recovery for violations of the Exchange Act to 'actual damages.'" *Mazuma Holding Corp. v. Bethke*, 21 F. Supp. 3d 221, 236 (E.D.N.Y. 2014) (citing 15 U.S.C. § 78bb (a)(1)). Securities fraud damages are 'ordinarily . . . based on out-of-pocket losses[.]'" *Id.* at 235 (citations omitted). "Under that measure, a defrauded buyer of securities is entitled to recover only the excess of what he paid over the value of what he got." *Levine v. Seilon, Inc.*, 439 F.2d 328 (2d Cir. 1971) (citations omitted) (plaintiff lost nothing from the alleged fraud. "This does not constitute 'actual damages,' *see* §28(a), compensable under §10(b)"). By definition, a plaintiff "has sustained no out-of-pocket loss" where any of its "shares [are] sold after the corrective disclosure at a price higher than or equal to the initial purchase price." *In re Veeco*

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[14] The Firm acquired 45% of the ADSs because "[Thompson] felt very good about [his] valuations" (Dep. 55:7-8), and anticipated a five-year holding period, *see id.* 67:20-69:14, 73:12-16, the declining price—far from deterring Southeastern from continued investment in the Company—spurred more buying, consistent with its long-term plan. Ex. G.

Instruments, Inc. Sec. Litig., No. 05–MD–01695 (CM)(GAY), 2007 WL 7630569, at *6 (S.D.N.Y. June 28, 2007).

Neither §28(a) of the Exchange Act nor anything in Federal Rule of Civil Procedure 23, allows for an award of damages to an absent class member who sustained no loss and was not himself defrauded, merely because other investors established a §10(b) violation and did sustain actual losses. In construing the damage formula in the Securities Act of 1933 governing §11 claims, and contrasting it to §28(a) in the Exchange Act, the Second Circuit in *McMahan* held: "It is axiomatic that the starting point in every case involving the construction of a statute is the language itself." *McMahan* 65 F.3d at 1048 (citation omitted). Here, the statute could not be clearer: "no person" shall " recover . . . a total amount in excess of his actual damages on account of the act complained of." *Id* at 1049 (quoting 15 U.S.C. 78bb). The breadth of the words "no person" covers absent class members such as Southeastern who have no actual losses – only profits.

In *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 606 (2d Cir. 1999), the Second Circuit reversed an award of "windfall" damages to defrauded plaintiffs who "recouped 114.6 percent of their investment and continued to hold their partnership interests. Thus, while [the court had] no difficulty in finding that plaintiffs' causes of action might subject defendants to liability, plaintiffs can prove no damages": "[B]uyers who purchase stock that is allegedly overvalued due to the seller's misrepresentations and subsequently sell the stock suffer no legally compensable damages where the proceeds from that sale exceed the price paid for the stock." *Id* at 605.

Just like Southeastern, "[b]ecause Carlisle recognized a profit from the sale of Banesto stock, Carlisle did not suffer compensable damages entitling it to recover the difference between

the purchase price and the 'true value' of the Banesto stock at the time of purchase." *Id.*[15] In *Carlisle*, the Second Circuit noted that it was unaware of any court that has "awarded a purchaser of shares the difference between the purchase price and the actual 'true value' of the shares at the time of purchase when the purchasers had already sold the shares at a profit." *Id.* at 607.[16] Here, Southeastern recouped a 100% return on its investment.

The PSLRA's "look-back period," which limits damages when a stock price recovers soon after a corrective disclosure, does not eliminate the requirement that a § 10(b) plaintiff must prove its actual losses. *See Veeco*, 2007 WL 7630569, at *6 ("[T]here is no question that Section 21(D) of the PSLRA does not provide a measure of damages, but rather imposes a cap on the damages available to a plaintiff.").[17]

Acticon AG v. China N. E. Petroleum Holdings Ltd., 692 F.3d 34 (2d Cir. 2012)—which abrogated a separate holding of *Veeco*—is not to the contrary. It held that a §10(b) plaintiff is not precluded from pleading economic loss merely because it *failed to sell its shares* following the corrective disclosure period on dates when the price rebounded to or exceeded the original (inflated) purchase price. *See* 692 F.3d at 39. Thus, *Acticon* addressed an investor who *could*

[15] Although *Carlisle Ventures* involved a breach of contract claim, cases involving damages arising under the federal securities laws were "appropriate to consider" because the "Carlisle's breach of contract claim arises from a contract for the sale of securities." 176 F.3d at 605.

[16] *See also Dura Pharm.*, 544 U.S. at 344 ("Given the common-law roots of the securities fraud action (and the common-law requirement that a plaintiff show actual damages), it is not surprising that the other Courts of Appeals have rejected the Ninth Circuit's 'inflated purchase price' approach to proving causation and loss.").

[17] In *Veeco*, the defendant successfully moved *in limine* to preclude lead plaintiff's damages expert from "including in his calculations any shares sold after the corrective disclosure at a price higher than or equal to the initial purchase price." 2007 WL 7630569, at *6. Specifically, defendant argued—and the court agreed—that such trading activity did not "present the rare set of circumstances in which courts of this Circuit will award a plaintiff the benefit of his bargain even if he has sustained no out-of-pocket loss." *Id.* (citing *Barrows v. Forest Labs., Inc.*, 742 742 F.2d 54, 56 (2d Cir. 1984); *Carlisle*, 176 F.3d at 606).

have profited from a securities transaction. This case, in contrast, involves an investor who *actually did* profit (by [redacted]), a situation *Acticon* never considered. *Acticon*, moreover, addressed the sufficiency of a pleading on a motion to dismiss, not a claims proceeding in which an investor confirmed, under oath, the intention to hold for approximately five years at which point he expected that the Company's successful asset sales would drive up its share price by 60%, to its true intrinsic value, and where the investor more than realized the benefit of his bargain by making a 100% return on its investment.[18]

CONCLUSION

For the foregoing reasons, Vivendi respectfully requests that the Court grant its motion for summary judgment and deny Southeastern's claims as well as claims submitted on behalf of its clients whose investment decisions were made by Southeastern.

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[18] The court in *Action* rejected the argument that damages are measured simply by demonstrating price inflation. *Id*. at 40. A "securities fraud plaintiff who purchased stock at an inflated price must still prove that she suffered an economic loss, and that the loss was caused by defendant's misrepresentation." *Id*. ("The *Malin* court correctly noted that the fact that the price rebounded does not, at the pleading stage, negate the plaintiff's showing of loss causation.") Discovery has established that Southeastern sustained no pecuniary loss.