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Corporate Motive and Time Warner: Smoke and Mirrors Revisited

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Since the Private Securities Litigation Reform Act of 1995 was passed, the securities bar has focused almost exclusively on arguing the requirements of that statute as it applies to actions arising under Section 10(b) of the Securities Exchange Act. With good reason, the national debate has included important issues – whether the PSLRA permits plaintiffs’ attorneys to conceal the identity of their sources, whether the PSLRA raised the *scienter* standard or merely the pleading standard, and whether a given set of facts have been pleaded with particularity, to name a few. However, while this battle has been fought in the foreground, a change in the landscape has slowly been taking hold in the background. There has been an attempt to expand the *substantive* scienter standard based on a motive theory that has its origins in the Second Circuit’s decision *In re Time Warner Securities Litigation*.¹

In *Time Warner*, the Second Circuit held that the scienter element of a Section 10(b) claim can be plead by alleging that the defendants possessed the motive and opportunity to commit fraud. The motive and opportunity test itself, however, is not the subject of this article. Rather, the purpose of this article is (i) to discuss *Time Warner*’s progeny which have assumed that corporations may possess motives independent of their agents and (ii) to address whether this method of alleging scienter is legitimate.

As discussed more fully herein, we believe that the corporate motive theory contradicts black letter corporate law and is, therefore, not a legitimate basis for alleging the scienter element of a Section 10(b) claim. The scienter requirement of a Section 10(b) claim is a state of *mind*. Corporations may legally be people, but they are also legal fictions and only natural persons can possess states of mind. That is not to say a corporation cannot be held liable as a primary violator of Section 10(b). It is to say, however, that the only way of pleading or proving the scienter element of a Section 10(b) claim against a corporation is by adequately pleading the scienter of one of its directors or officers. The director’s or officer’s scienter is then imputed to the corporation. Although these observations are elementary, the Second Circuit has apparently never considered the conflict. The corporate motive theory has flourished within the Second Circuit where it is now a fairly well-entrenched and accepted theory and the plaintiffs’ bar has begun to include allegations of corporate motive in many complaints filed outside the Second Circuit.

The Beginning – Time Warner

The plaintiffs in *Time Warner* were a putative class of Time Warner shareholders who bought stock during a period of time in which the company was attempting to recover from its 1989 defensive Warner Brothers acquisition.² In 1989, Time had been the target of a hostile takeover by Paramount. Its defensive strategy involved merging

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with Warner. Shareholders sued to prevent the Time Warner merger but were unsuccessful, and in the end the merger saddled Time Warner with a \$10 billion debt.³ In an effort to service that debt, the company embarked on a highly publicized campaign to locate strategic international partners who would infuse the company with capital.⁴ This strategy ultimately failed and Time Warner was forced to raise capital through an extremely unpopular and highly criticized alternative – a dilutive and coercive variable-price shareholder rights offering.⁵ When the rights offering was announced, Time Warner’s stock plummeted and the securities complaint was filed alleging a putative class period beginning with the Company’s announcement of its strategy to raise capital by strategic international alliances and ending the date its price plummeted which was, of course, the day after it announced the alternative rights offering.⁶ The District Court dismissed the complaint with prejudice, concluding that it failed to allege either a false statement of material fact or the defendants’ scienter.

The Second Circuit reversed. The Second Circuit concluded that the company’s failure to disclose its active consideration of the alternative rights plan made its earlier glowing statements about conversations with potential strategic partners materially misleading.⁷ The Court then adopted the motive and opportunity test:

With all inferences drawn in favor of the plaintiffs, it is arguable that the defendants acted in the belief that they could somewhat reduce the degree of dilution by artificially enhancing the price of the stock. This could have happened if (a) the statements about strategic alliances, which became misleading upon nondisclosure of consideration of the rights offering, artificially increased the stock price, and (b) the effect of that increase was not fully dissipated by the announcement of the rights offering. *If some artificial enhancement remained, the defendants would have been able to raise the needed capital at a higher rights offering price, thereby issuing fewer shares and lessening the dilutive effect (or raising more capital by issuing the same number of shares).*⁸

In reversing dismissal and accepting the motive and opportunity test, the Court failed to distinguish between the individual defendants and the corporation. By lumping the corporation and individual defendants together, the Second Circuit laid the foundation for the plaintiffs’ bar to allege and argue a corporation’s motive.

In dissenting, Judge Winter agreed that the defendants’ failure to disclose the rights offering was a material nondisclosure given their earlier glowing statements about potential strategic alliances but criticized the majority’s self-serving and disingenuous attack on the efficient market theory. He noted that the majority assumed an efficient market when concluding that the defendants’ positive statements about strategic alliances raised Time Warner’s stock, but denied that very same hypothesis when speculating that disclosure of the truth might not have eliminated all the inflation.⁹ Judge Winter also discussed the majority’s anti-dilution theory – the market would recognize that anyone willing to infuse Time Warner with cash would also demand and receive equity, also causing dilution.¹⁰ Finally, Judge Winter rejected the majority’s “corporate” motive approach:

Neither Time Warner nor its shareholders, who must pay the costs of defending and settling this action, profited from any delay in announcing the variable-price rights offering. The argument regarding a motive for such delay posits a scenario that is inconsistent with assumptions underlying securities law, statements in the complaint, and any plausible understanding of the operation of capital markets. I would affirm the dismissal of the complaint.¹¹

While Judge Winter’s conclusion that neither Time Warner nor its shareholders profited from a delay in announcing the variable-price rights offering was sensible, he made the error of assuming a central premise of the majority’s opinion – that a corporation could possess a motive.

The breadth of *Time Warner* was tested, repeatedly, and in several ways it was limited. As the Eighth Circuit observed in *Florida State Board of Administration v. Green Tree Financial Corp.*,

Within a year after *Time Warner*, the Second Circuit held that allegations of commonly held motives, even powerful ones such as the desire to stay CEO of a company, would not supply scienter under Rule 9(b):

If motive could be pleaded by alleging the defendant’s desire for continued employment, and opportunity by alleging the defendant’s authority to speak for the company, the required showing of motive and opportunity would be no realistic check on aspersions of fraud, and mere misguided optimism would become actionable under the securities laws.¹²

Indeed, in *Shields v. Citytrust Bankcorp, Inc.*,¹³ Judge Winter’s more conservative view prevailed and the Second Circuit seemed to raise the motive and opportunity pleading bar significantly. In affirming dismissal, the Circuit made three significant rulings. First, the Court held that “[m]otive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.”¹⁴ Second, the Court ruled that “[i]n looking for a sufficient allegation of motive, we assume that the defendant is acting in his or her informed economic self-interest.”¹⁵ Finally, the *Shields* Court held “[i]t is hard to see what benefits accrue from a short respite from an inevitable day of reckoning. There is no claim here that false statements were made in an effort to sell off shares held by management, or to delay a criminal prosecution.”¹⁶

As a result of *Shields*, motives that can be viewed as “universal” are routinely rejected as insufficient to plead an individual defendant’s motive.¹⁷ Thus, Courts routinely reject as legally insufficient motives such as: the desire to increase the market value of a company stock to avoid hostile takeovers;¹⁸ the desire to raise capital, to successfully bring a public offering to fruition, to protect one’s own executive position, forestall lenders and improve business relations;¹⁹ and the desire to retain access to financing and maintain the corporation’s reputation in the capital markets.²⁰ None of these motives are preposterous, but none fairly state a motive for fraud against an individual defendant or officer either. *Shields* also began the limitation on what is required to plead a motive, and has been used to defeat alleged motives that are economically irrational.

Unfortunately, the *Shields* panel, like the panel in *Time Warner* before it, simply assumed the premise that a corporation could possess a corporate motive. As a result, the premise has flourished in the Second Circuit without challenge.

Corporate Motive – Duncan v. Pencer

There was nothing in the *Shields* decision to expressly thwart Plaintiffs pleading scienter by alleging a corporate motive and two years after *Shields* was decided, the District Court for the Southern District of New York issued its decision in *Duncan v. Pencer*.²¹ Relying on *Time Warner* as authority, the *Duncan* District Court assumed, without discussion, that a corporation can possess a motive independent of its agents. However, there was a critical difference between *Time Warner* and *Shields* and the *Duncan* decision. In *Duncan*, the District Court expressly concluded that the complaint failed to allege the scienter of any of the individual defendants and dismissed the §10(b) claims against them. The *Duncan* District Court referenced no allegations in the complaint from which a personal and concrete benefit to any of the individual defendants could be inferred. However, the District Court refused to dismiss the corporate defendant, Cott, finding that the complaint alleged Cott possessed a motive to commit fraud.²² The sufficient allegations were deemed to be:

‘to ... keep Cott’s stock price high and complete two large public offerings of Cott stock in the spring and fall of 1993.’

‘[I]f Cott’s stock price could be driven higher, then Cott could sell large amounts of its stock to the public at prices vastly in excess of Cott’s book value — providing monies to fund its expansion and providing capital to the Company at high per share prices.’

‘On August 9, 1993, Cott completed a 3 million share public offering at \$31 per share.’²³

These motives certainly seemed to comply with the “concrete benefit” definition of motive that the Second Circuit pronounced in *Shields*. And yet, it appears that *Duncan* was the first decision in which a Court upheld a complaint against a corporation based exclusively on the corporation’s motives. *Shields* and *Time Warner* had lumped all the defendants together, leaving the Circuit’s intention somewhat unclear. Because the *Duncan* District Court dismissed the Section 10(b) claims against the individuals, however, it made acceptance of the separate corporate motive theory explicit. For the first time a corporation was explicitly held to have acted independently of its Board of Directors, officers and agents.

While the *Duncan* court’s scienter holding was troubling enough, it was made more disturbing by the court’s denial of the individual defendants’ motion to dismiss the Section 20(a) claim against them. The existence of a Section 10(b) claim is one of the essential prerequisites of a Section 20(a) claim. The Section 20(a) claim did not require the alleging of any of the individual defendants’ scienter or culpability; rather, the defendant’s good faith is an affirmative defense. The court had already ruled that plaintiffs had failed to bear the burden of pleading the individual defendants’ scienter for purposes of a Section 10(b) claim. If, at that point, it had properly dismissed the

Section 10(b) claim against the corporation, the Section 20(a) claim would have failed as well. Instead, by dismissing the Section 10(b) claim and upholding the Section 20(a) claim against the individual defendants, the *Duncan* District Court improperly shifted the burden of pleading – and proof — from plaintiffs to defendants.

Like *Time Warner* before it, *Duncan* also has been narrowed by the district courts and the Second Circuit.²⁴ Several courts facing allegations of corporate motive have gone to great lengths to avoid finding a corporate motive. Sometimes *Time Warner* and *Duncan* are distinguished on questionable grounds,²⁵ other times these cases are ignored.²⁶ For example, when *Duncan* District Court Judge Preska was presented with corporate motive allegations in *Glickman v. Alexander & Alexander Services, Inc.*,²⁷ he rejected them as insufficient under both *Duncan* and *Time Warner*. The distinctions, however, seemed to lie mostly in the court’s characterization of them. In *Glickman*, Judge Preska described the alleged motive to “engage in transactions ‘on highly favorable terms’ because [the company] could finance its purchases with stock trading at ‘artificially inflated’ prices” as generic.²⁸ By comparison, in *Time Warner* and *Duncan*, the alleged fraud was “necessary to realize important corporate goals.”²⁹ The distinction was that in *Duncan* and *Time Warner* there was a “coherent nexus between the alleged fraudulent conduct and its alleged purpose” whereas in *Glickman* there was none. The distinction is not one easily followed.

Similarly, at times, *Time Warner* and *Duncan* have simply been ignored. When the Second Circuit considered the corporate motive allegations in *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris*,³⁰ reference to *Time Warner* was nowhere to be found. This was not likely accidental. The court had previously cited *Time Warner* for numerous other propositions. Not only did the Second Circuit ignore *Time Warner*’s motive analysis, it specifically rejected as insufficient the allegation that Philip Morris was motivated “to maximize the marketability of the \$700 million of debt securities issued in [during the class period] and minimize the interest rate on those securities.”³¹ Despite the fact that the allegation seemed rather particular and demonstrated a logical nexus between motive and alleged fraud, in *San Leandro*, the Second Circuit characterized the motive as the universal desire to “maintain a high bond or credit rating.”

In its most recent corporate motive decision, *Kalnit v. Eichler*,³² the Second Circuit limited *Time Warner* to cases in which the allegations demonstrate defendants’ motive was to benefit themselves at the shareholders’ expense. The complaint in *Kalnit* alleged that defendants’ nondisclosure of alleged material facts was motivated by defendants’ desire to achieve a “superior agreement” with a merger target.³³ The court rejected this proffered motive as defying “economic reason” because “[a]chieving a superior agreement with [a merger target] does not demonstrate defendants’ intent to benefit themselves *at the expense of the shareholders* because the shareholders themselves would benefit from a superior transaction.”³⁴ This limitation – that the corporate motive must demonstrate defendants’ intent to benefit themselves at the shareholder’s expense – may have obliquely overruled *Time Warner* and the corporate motive theory. Although it does not appear to have been argued yet, it is difficult to imagine a motive that would benefit the corporation, but not its shareholders — let alone a motive that could benefit the corporation at the shareholders’ expense. How the district courts within the Second Circuit respond to *Kalnit*, however, remains uncertain. At least one district court completely ignored *Kalnit* and denied a motion to dismiss on the grounds that plaintiffs had plead a corporate motive.³⁵

While the district courts within the Second Circuit have accepted the corporate motive premise, they have not yet been willing to allow the plaintiffs’ bar to take the theory to its logical extreme. The district courts have uniformly rejected plaintiffs’ attempts to plead an independent corporate motive and then use it to vicariously attribute scienter to the individual defendants.³⁶ Unfortunately, none of these courts expressed the principled reason for their refusal to attribute a corporation’s motive to its directors and officers.

More importantly, plaintiffs have taken their Second Circuit successes on the road. Most securities complaints filed now contain some allegation of a corporation’s motive. Whether the plaintiffs intend to simply use these allegations to bolster other, weak allegations of scienter,³⁷ or as a stand alone, independent ground for stating a Section 10(b) claim against the corporate defendant, the threat of expansion is real and defendants need to address the theory.

The corporate motive theory can and should be challenged on a principled basis. Indeed, a corporate motive was explicitly alleged and pursued by plaintiffs and explicitly and successfully challenged in the *In re Century Business Services, Inc. Securities Litigation* (“*CBIZ*”).³⁸

Rejecting the corporate motive - CBIZ

The *CBIZ* litigation was filed on behalf of a putative class of *CBIZ*'s shareholders against the company and certain of its current and former officers and directors. Plaintiffs alleged Section 10(b) claims against all the defendants and Section 20(a) claims against the individual defendants. The defendants moved to dismiss the complaint on several grounds, including that the complaint failed to allege facts giving rise to the strong inference of scienter required under the PSLRA and Sixth Circuit precedent.

The *CBIZ* complaint was short on facts demonstrating that any of the individual defendants possessed a motive to commit fraud or were reckless, and the defendants successfully demonstrated to the District Court that the few facts alleged gave rise to no inference of scienter. However, the complaint also alleged the company possessed a motive to inflate its stock price because it was using its stock as currency for approximately thirty acquisitions it consummated during the class period.³⁹ Plaintiffs' opposition to defendants' motion to dismiss emphasized the corporate motive and relied exclusively on Second Circuit case law.

Rather than argue about the adequacy of plaintiffs' corporate motive allegations, defendants argued that the *CBIZ* District Court should reject plaintiffs' corporate motive because it conflicted with black letter corporate law. The defense theory was rather simple and direct. Corporations are inanimate entities.⁴⁰ As such, they "literally cannot have a 'mind' or 'state of mind'."⁴¹ They can act only through their agents.⁴² Because corporations can only act through their agents, "any liability faced by ... a corporate entity under rule 10b-5 requires a demonstration that at least one agent of the corporation ... possessed the requisite scienter."⁴³

Although the argument was simple, it required the District Court to reject substantial Second Circuit authority. Indeed, because the cases plaintiffs relied on were not readily distinguishable factually, defendants were left with no choice but to directly assert that *Time Warner* and its progeny were wrongly decided. The defendants criticized *Time Warner* on the grounds that (i) the Second Circuit adopted the theory without considering, let alone discussing, the applicable legal principles, (ii) the corporate motive theory directly contradicts corporate law, (iii) the contradiction cannot be reconciled, and (iv) black letter corporate law should not be rejected in favor of an erroneous theory accepted nowhere outside the Second Circuit.

The District Court dismissed the *CBIZ* complaint with prejudice, in part, on the grounds that the complaint failed to demonstrate any of the individual defendants' scienter. The District Court also rejected plaintiffs' corporate motive theory. In doing so, the District Court concluded that *Time Warner* "appears to reflect an isolated trend within the Second Circuit," and it noted that even in the Second Circuit, there was a trend away from this position.⁴⁴ Instead, the District Court correctly concluded that the "weight of cases from other jurisdictions draws on the traditional wisdom that 'a corporation . . . must act through its agents.'"⁴⁵ Thus, the *CBIZ* District Court agreed:

with the legal principles cited by defendants and agrees that the alleged motive to inflate the share price in order to complete acquisitions is insufficient. The Complaint does not adequately allege that it would be in the interest of the individual defendants for the company to pursue its aggressive acquisition strategy. To the extent that the defendants were motivated by a desire to increase the overall worth of the company, such allegations merely would set forth 'motives possessed by virtually all corporate insiders,' which are insufficient to demonstrate a particularized motive to commit fraud.⁴⁶

Plaintiffs have appealed *CBIZ* and the corporate motive issue is now squarely before the Sixth Circuit.

The plaintiffs' use of the corporate motive theory is on the rise for a number of reasons particularly in that it has the potential to reduce the burden on plaintiffs to come up with concrete allegations of scienter against individual defendants. The defendants should attack this theory directly and ask courts to hold plaintiffs to the burden of pleading scienter as set forth in the PSLRA.

Notes

1 9 F.3d 259 (2d Cir. 1993).

2 9 F.3d at 262.

3 *Id.*

4 *Id.*

5 *Id.* at 262, 273.

6 *Id.* at 262.

7 *Id.* at 268.

8 *Id.* at 270 (emphasis added).

9 *Id.* at 272.

10 *Id.* at 272.

11 *Id.* at 275.

12 270 F.3d 645, 656 (8th Cir. 2001) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir.1994)).

13 *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124 (2d Cir.1994).

14 *Id.* at 1130.

15 *Id.*

16 *Id.*

17 270 F.3d 645, 656 (8th Cir. 2001); *Malin v. Ivax Corp.*, 17 F. Supp. 2d 1345, 1358 (S.D. Fla. 1998) (“preventing hostile takeovers ... [is a] common, day-to-day goal[] of corporate management. ... Clearly [the PSLRA] ... require[s] a more exacting standard” to plead motive). Even pre-PSLRA jurisprudence required more to plead scienter. See *In re Goodyear Tire & Rubber Co. Sec. Litig.*, Civ. A. No. 88-8633, 1993 WL 130381, at *16 (E.D. Pa. Apr. 22, 1993) (“[P]laintiffs’ contention that Goodyear wanted to increase the market value of its stock, in part, to avoid a hostile takeover, falls woefully short of demonstrating scienter under federal securities law. ... Most, if not all publicly traded companies are interested in maintaining high stock prices and avoiding hostile takeovers.”); *Coates v. Heartland Wireless Communications, Inc.*, 55 F. Supp. 2d 628, 644 (“assertions that would almost universally be true, such as the desire to raise capital, ... or successfully to bring a public offering to fruition, ... economic self-interest, ... and the desire to maintain good relationships with suppliers, encourage retailers, forestall lenders, and protect one’s executive position, ... are inadequate of themselves to plead motive.”); *In re First Union Sec. Litig.*, 128 F. Supp. 2d 871, 896 (W.D.N.C. 2001) (rejecting as insufficient abstract motives of company to enhance its ability to finance acquisitions and of individual defendants to enhance their executive positions or increase compensation); *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000) (plaintiffs could “not proceed based on motives possessed by virtually all corporate insiders,” which includes “the desire to sustain the appearance of corporate profitability.”); *In re Next Level Sys., Inc.*, No. 97 C 7362, 1999 WL 387446, at *9 (N.D. Ill. Mar. 31, 1999) (rejecting as insufficient, motive to “maintain [the corporation’s] reputation in the capital markets and retain access to financing”) (citation omitted); *In re K-Tel Int’l., Inc. SEC Litig.*, 300 F.3d 881, 894 (8th Cir. 2002).

18 *In re Goodyear Tire & Rubber Co. Sec. Litig.*, Civ. A. No. 88-8633, 1993 WL 130381, at *16 (E.D. Pa. Apr. 22, 1993) (“Most, if not all publicly traded companies are interested in maintaining high stock prices and avoiding hostile takeovers.”).

19 *Coates*, 55 F. Supp. 2d at 644.

20 *In re Next Level Sys., Inc.*, No. 97 C 7362, 1999 WL 387446, at *9 (N.D. Ill. Mar. 31, 1999).

21 *Duncan v. Pencer*; No. 94 Civ. 0321 (LAP), 1996 WL 19043 (S.D.N.Y. Jan. 18, 1996).

22 *Id.* 1996 WL 19043 *14.

23 *Id.* (internal citations omitted)

24 See *Florida State Board*, 270 F.3d at 656; *Kalnit v. Eichler*, 264 F.3d 131, 140 (2d Cir. 2001).

25 See, e.g., *Kalnit v. Eichler*, 264 F.3d at 140; *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris*, 75 F.3d 801, 808-809 (2d Cir.1996) (Philip Morris’ alleged delay in disclosing adverse information to maximize marketability of a \$700 million offering of debt securities and minimize the interest rate on those securities held insufficient to establish motive); *Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir.1996) (holding insufficient as too general a motive allegations that “GE’s interest in justifying to its shareholders its over \$1 billion investment in [its subsidiary] gave GE a motive to willfully blind itself to facts casting doubt on [the subsidiary’s] purported profitability.”) *Fant v. Perelman*, Fed. Sec. L. Rep. ¶ 99,477, No. 97 Civ. 8435 (LAP), 97 Civ. 8436 (LAP), 1999 WL 199078 (S.D.N.Y. April 9, 1999).

26 See, e.g., *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris*, 75 F.3d 801 (2d Cir. 1996).

27 Fed. Sec. L. Rep. ¶ 99,101, No. 93 Civ. 7594 (LAP) 1996 WL 88570 (S.D.N.Y. Feb. 29, 1996) (J. Preska).

28 1996 WL 88570 *9.

29 1996 WL 88570 *12.

30 75 F.3d 801 (2d Cir. 1996).

31 75 F.3d at 813.

32 264 F.3d 131 (2d Cir. 2001).

33 *See, e.g., Kalnit*, 264 F.3d at 140.

34 *Id.* at 140 (emphasis added).

35 *Burstyn v. Worldwide Xceed Group, Inc.*, No. 01 Civ. 1125 (GEL), 2002 U.S. Dist. LEXIS 18555, at *17 (S.D.N.Y. Sept. 30, 2002)

36 *In re Twinlab Corp. Sec. Litig.*, 103 F. Supp. 2d 193, 206-07 (E.D.N.Y. 2000) (refusing to attribute corporate acquisition motive to individual defendants); *Fant v. Perelman*, Fed. Sec. L. Rep. ¶ 99, 477, No. 97 CIV 8435(LAP), 97 CIV 8436(LAP), 1999 WL 199078, at *11 (S.D.N.Y. Apr. 9, 1999) (rejecting as insufficient allegation that “a driving force and motivation for the challenged transaction was to preserve 80% or more ownership of Marvel which was possessed by [controlling shareholder Defendant] Perelman and his affiliates”); *In re Health Mgmt., Inc. Sec. Litig.*, 970 F. Supp. 192, (E.D.N.Y. 1997) (refusing to attribute motive to use inflated stock value to obtain financing and as consideration for mergers to individual defendants); *Duncan v. Pencer*, No. 94 Civ. 0321 (LAP), 1996 WL 19043, at *12 (S.D.N.Y. Jan. 18, 1996) (refusing to attribute motive to make public offerings of corporate stock at high prices to individual defendants).

37 *See, e.g., In re Boeing Sec. Litig.*, 40 F. Supp. 2d 1160, 1176-77 (W.D. Wash. 1998) (corporate acquisition motive coupled with other allegations of scienter held sufficient to plead scienter).

38 *In re Century Business Services, Inc. Sec. Litig.*, No. 1:99 CV 02200, (N.D. Ohio, June 27, 2002) (C.J. Matia) (“*CBIZ* Dismissal Order”), *appeal pending*, No. 02-3784 (6th Cir.).

39 *CBIZ* Dismissal Order at 18.

40 *Commodity Futures Trading Com’n v. Weintraub*, 471 U.S. 343, 348 (1985) (“As an inanimate entity, a corporation must act through agents.”);

41 *In re Centennial Tech. Litig.*, 20 F.Supp.2d 119 (D. Mass. 1997).

42 *Commodity Futures*, 471 U.S. at 348; *see also Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 955, 963 (7th Cir. 1995) (“a corporation still must act through its agents”); *In re Centennial Tech. Litig.*, 20 F.Supp.2d 119, 126 (D. Mass. 1997) (recognizing that other than “natural persons” legal entities such as corporations and partnerships “literally cannot have a ‘mind’ or ‘state of mind’” and holding the scienter of controlling persons can be imputed to the entity); *In re Cylink Sec. Litig.*, 178 F. Supp.2d 1077, 1087(N.D. Cal. 2001) (“Understandably, the ACC contains no allegations specifically regarding the state of mind of the company. This is no surprise given the fact that corporations are incapable of acting except by and through their agents and employees. . . . As a result, plaintiffs allege scienter with respect to the individual defendants and assert that Cylink’s scienter is derived there from.”) (internal citations omitted).

43 *Piper Jaffray Cos., Inc. v. Nat’l Union Fire Ins. Co.*, 38 F. Supp. 2d 771, 779-780 (D. Minn. 1999) (rejecting argument that a corporation’s scienter existed independent of its agents, concluding that “the inclusion of allegations against individual defendants to support allegations of corporate scienter is simply a demonstration of the well-established principle that a corporation must act through its agents, and therefore, also faces corporate liability arising from the actions of said agents”) (internal quotations and citations omitted). *See Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1436 (9th Cir. 1995) (rejecting the possibility of finding corporate scienter without finding any of the individual defendants possessed the requisite intent to defraud); *see also Owens Corning v. Nat’l Union Fire Ins. Co.*, 257 F.3d 484, 493 (6th Cir. 2001) (affirming district court’s holding that “any general corporate motives were not distinct from the motives of the directors”); *Angell Invs., L.L.C. v. Purizer Corp.*, No. 01 C 6359, 2002 WL 23822, at *5 (N.D. Ill. Jan. 7, 2002) (rejecting corporate defendant’s argument and holding: “reading Central Bank to preclude agency liability would result in an exclusion from liability of corporations under Rule 10b-5, since those entities can only act through their agents”); *Cylink*, 178 F. Supp. 2d at 1088 (“A corporate entity can be vicariously liable under section 10(b) for the fraud of its officers. . . . So long as scienter is appropriately alleged for the officers and directors of a company, then it is appropriately alleged for the company itself.”) (internal citations omitted); *Holmes v. Baker*, 166 F. Supp.2d 1362, 1376 (S.D. Fla. 2001) (“The scienter of a corporation’s officers may be imputed to the corporation itself under general agency and corporate law principles.”) (citations omitted); *Cheney v. Cyberguard, Corp.*, Fed. Sec. L. Rep. ¶ 91,258, No. 98-6879-CIV-GOLD 2000 WL 1140306 *7 (S.D.Fla. July 31, 2000) (“the scienter of a corporation’s officers can be imputed to the corporation itself under general principals of agency and corporate law”); *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 270-71 n. 16 (5th Cir.1981) (the knowledge of individuals who exercise

substantial control over a corporation's affairs is properly imputable to the corporation); *In re Sunbeam Sec. Litig.*, 80 F. Supp.2d 1326, (S.D. Fla. 1999) ("knowledge of individuals who exercise substantial control over a corporation's affairs is properly imputable to the corporation. ... Accordingly, consistent with the general principles of agency and corporate law, the scienter of Sunbeam's officers is properly imputed to Sunbeam itself.") (internal citations omitted). The Securities Exchange Commission apparently agrees that an officer's scienter is properly attributable to the corporation. *In the Matter of PictureTel Corp. et al.*, No. 3-10743 2002 WL 471715 at 8 (S.E.C. Release No. 45665) (March 28, 2002) (holding CFO's scienter is attributable to corporation); *In the Matter of Gintel Asset Mgmt, Inc.*, 2002 WL 31499839 *5 (S.E.C. Release No. 25798) (November 8, 2002) (same).

⁴⁴ *CBIZ* Dismissal Order at 19-20.

⁴⁵ *Id.* at 20, quoting *Piper Jaffray*, 38 F. Supp.2d at 779 (further citations omitted).

⁴⁶ *Id.* at 20, citing *Novak*, 216 F.3d at 307.



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