

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE OMNICOM GROUP, INC.
SECURITIES LITIGATION

02 Civ. 4483 (WHP)

**LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

John P. Coffey (JC-3832)
C. Chad Johnson (CJ-3395)
J. Erik Sandstedt (JS-9148)
Salvatore J. Graziano (SG-6854)
Wallace A. Showman (WS-0881)
David R. Hassel (DH-0113)
BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

*Counsel for Lead Plaintiff
and the Class*

August 20, 2007

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	6
A. Omnicom’s E-Service Assets Fail	6
B. Defendants Remove Impaired Assets From Omnicom’s Books Through The Fraudulent Seneca Transaction and Lie to Their Auditors About It	8
1. Pegasus Never Invested any Money in Seneca.....	10
2. Omnicom Always Controlled Seneca.....	12
3. Omnicom’s Preferred Stock Interest In Seneca Was Not Worth What Omnicom Claimed	15
C. Defendants Avoid Write-Downs and Operating Losses Through Other Fraudulent Transactions in Fiscal 2000 and the First Quarter 2001	17
1. The Chaucer Transaction	17
2. The Organic Parking Arrangement.....	19
3. The Agency Warrant Parking Arrangement	20
D. Callander Resigns from the Audit Committee.....	21
F. Defendants Mislead the SEC	22
G. Pegasus Holdings Sells Its Seneca Common Stock for \$100	23
ARGUMENT	23
I. A REASONABLE JURY WOULD HAVE NO DIFFICULTY CONCLUDING THAT DEFENDANT’S ACTED WITH SCIENTER	24
A. Assuming Omnicom Applied FAS 140 ¶ 10, Defendants’ Accounting for the Seneca Transaction was Fraudulent.....	25
1. The Application of FAS 140 Requires the Surrender of Control – a Requirement Defendants Knew Was Not Satisfied	26

2.	The Evidence Shows Defendants Concocted the Seneca Transaction to Avoid Losses Associated with their E-Service Assets at 1Q2001	27
3.	Even if FAS 140 ¶ 10 was an Appropriate GAAP Provision to Apply to This Deal, Defendants Improperly Avoided Reporting a Material Loss	29
4.	Regardless of How Defendants Accounted for the Transaction, Omnicom was Required to Record Seneca’s Losses After the Deal	29
B.	The Manner in Which Omnicom Accounted for the Seneca Transaction is itself a Material Issue of Fact.....	30
C.	The Evidence of Additional Fraudulent Transactions Orchestrated By Defendants Further Supports a Finding of Scienter.....	31
D.	Defendants’ Lies to their Auditors and the SEC Are Additional Compelling Evidence of Scienter	32
II.	A REASONABLE JURY WOULD HAVE NO DIFFICULTY FINDING A CAUSAL LINK BETWEEN DEFENDANTS’ FRAUD AND LOSSES SUFFERED BY THE CLASS.....	34
A.	Defendants Do Not Challenge Loss Causation With Respect to the Corrective Disclosures on June 6, 7, 13, 14, 24 or 25	34
B.	Defendants’ Arguments Regarding the June 12, 2002 Disclosures Raise Triable Issues of Fact.....	35
1.	Substantial Evidence Demonstrates that the Drops in June 2002 were “Fraud-Related”	35
2.	The June 12, 2002 Disclosures Constituted Corrective Disclosures of the Instant Fraud	38
3.	The June 12 th Disclosures Revealed New Facts to the Market.....	38
	CONCLUSION.....	40

TABLE OF AUTHORITES

<u>Cases</u>	<u>Page</u>
<i>Acito v. IMCERA Group, Inc.</i> , 47 F.3d 47 (2d Cir. 1995)	34
<i>AUSA Life Ins. Co. v. Ernst & Young</i> , 206 F.3d 202 (2d Cir. 2000).....	33
<i>Bank of India v. Subramanian</i> , 2007 WL 1424668 (S.D.N.Y. May 15, 2007)	23
<i>Byrnie v. Town of Cromwell Bd. Of Educ.</i> , 243 F.3d 93 (2d Cir. 2001).....	24
<i>Curry v. City of Syracuse</i> , 316 F.3d 324, 333 (2d Cir. 2003).....	24
<i>Dura Pharm., Inc. v. Broudo</i> , 544 U.S. 336 (2005).....	37
<i>Ganino v. Citizen Utils. Co.</i> , 228 F.3d 154 (2d Cir. 1985).....	31
<i>Gordon Partners v. Blumenthal</i> , 2007 WL 1438753 (S.D.N.Y. May 16, 2007)	37
<i>Harris v. Provident Life & Accident Ins. Co.</i> , 310 F.3d 73 (2d Cir. 2002).....	24
<i>Herman & MacLean v. Huddleston</i> , 459 U.S. 375 (1983)	24
<i>Howard v. Everex Sys., Inc.</i> , 228 F.3d 1057, 1064 (9th Cir. 2000)	33
<i>In re Alparma Inc. Sec. Litig.</i> , 372 F.3d 137 (3d Cir. 2004)	34
<i>In re AOL Time Warner, Inc. Securities & ERISA Litig.</i> , 381 F. Supp. 2d 192 (S.D.N.Y. 2004).....	24
<i>In re Bradley Pharm., Inc. Sec. Litig.</i> , 421 F. Supp. 2d 822 (D.N.J. 2006)	38

<i>In re Bristol-Myers Squibb Sec. Lit.</i> , 2005 WL 2007004 (D.N.J. Aug 17, 2005)	34
<i>In re Columbia Sec. Litig.</i> , 155 F.R.D. 466 (S.D.N.Y. 1994)	39
<i>In re eSpeed, Inc. Sec. Litig.</i> , 457 F. Supp. 2d 266 (S.D.N.Y. 2006);	38
<i>In re ICG Comm., Inc. Sec. Litig.</i> , 2006 WL 416622 (D. Colo. Feb. 7, 2006)	38
<i>In re Initial Public Offering Sec. Litig.</i> , 383 F. Supp. 2d 566 (S.D.N.Y. 2005).....	35, 38
<i>In re Initial Public Offering Sec. Litig.</i> , 399 F. Supp. 2d 298 (S.D.N.Y. 2005).....	36
<i>In re Livent, Inc. Sec. Litig.</i> , 78 F. Supp. 2d 194 (S.D.N.Y. 1999)	24
<i>In re Merck & Co. Sec. Litig.</i> , 432 F.3d 261 (3d Cir. 2005).....	40
<i>In re Motorola Sec. Litig.</i> , 2007 WL 487738 (N.D. Ill. Feb. 8, 2007)	37
<i>In re Northern Telecom Ltd. Sec. Litig.</i> , 116 F. Supp. 2d 446 (S.D.N.Y. 2000).....	33
<i>In re Phar-Mor, Inc. Sec. Litig.</i> , 900 F. Supp. 784 (W.D. Pa. 1995).....	33
<i>In re Raytheon Co. Sec. Litig.</i> , No. 99-12142-PBS, electronic order (D. Mass. April 20, 2004)	4
<i>In re Refco, Inc. Sec. Litig.</i> , 2007 WL 1280649 (S.D.N.Y. April 30, 2007)	24
<i>In re Retek Inc. Sec. Litig.</i> , 2005 WL 3059566 (D. Minn. Oct. 21, 2005)	38
<i>In re Worldcom Sec. Litig.</i> , 346 F. Supp.2d 628 (S.D.N.Y. 2004).....	23

<i>Kalnit v. Eitchler</i> , 264 F.3d 131 (2d Cir. 2001)	34
<i>Lattanzio v. Deloitte & Touche LLP</i> , 476 F.3d 147 (2d Cir. 2007).....	37
<i>Lendino v. Trans Union Credit Info. Co.</i> , 970 F.2d 1110 (2d Cir. 1992).....	24
<i>Lentell v. Merrill Lynch & Co. Inc.</i> , 396 F.3d 161 (2d Cir. 2005).....	34, 37
<i>Novak v. Kasaks</i> , 216 F.3d 300 (2d Cir. 2000).....	34
<i>Rolf v. Blyth, Eastman Dillon & Co.</i> , 570 F.2d 38 (2d Cir. 1978).....	24
<i>Rothman v. Gregor</i> , 220 F.3d 81 (2d Cir. 2000).....	38
<i>SEC v. Gold</i> , 2006 WL 3462103 (E.D.N.Y. Aug. 18, 2006).....	32
<i>SEC v. KPMG LLP</i> , 412 F. Supp. 2d 349 (S.D.N.Y. 2006).....	33
<i>SEC v. Lucent</i> , 363 F. Supp. 2d 708 (D.N.J. 2005)	32
<i>Sedaghatpour v. Doubleclick, Inc.</i> , 213 F. Supp. 2d 367 (S.D.N.Y. 2002).....	33
<i>Solutia, Inc. v. FMC Corp.</i> , 456 F. Supp. 2d 429 (S.D.N.Y. 2006).....	1, 32
<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> , 127 S. Ct. 2499 (2007).....	4
<i>Thomas v. Roach</i> , 165 F.3d 137 (2d Cir. 1999).....	14
<i>Wagner v. Barrick Gold Corp.</i> , 2006 WL 268753 (S.D.N.Y. Jan. 31, 2006);	38

Wechsler v. Steinberg,
733 F.2d 1054 (2d Cir. 1984)..... 24

Lead Plaintiff New Orleans Employees' Retirement System ("Lead Plaintiff") respectfully submits this Memorandum in Opposition to the Summary Judgment Motion ("Mot.") of Defendants Omnicom Group, Inc. ("Omnicom"), John Wren, Randall Weisenburger, Philip Angelastro and Bruce Crawford (collectively, "Defendants").

PRELIMINARY STATEMENT

At issue in this motion is whether Defendants have demonstrated that the evidence of their misconduct is so deficient, and the link between that misconduct and the billion-plus dollars in losses suffered by the certified Class so attenuated, that no reasonable person could find the elements of scienter and loss causation satisfied in this case. *Solutia, Inc. v. FMC Corp.*, 456 F. Supp. 2d 429, 441 (S.D.N.Y. 2006) (Pauley, J.). On this record, Defendants cannot carry this substantial burden. The motion should be denied and the case should proceed to trial, where a jury can properly decide these and other hotly contested factual issues.

This is a case where, in the face of the "internet bubble" bursting in early 2000, Defendants faced a choice. Like officers at other companies with problematic internet-related assets, they could have dealt with the consequences in a straight-forward manner by writing down the vanishing value of their assets, and suffering through the resulting decline in Omnicom's stock price. But the evidence here demonstrates compellingly that these Defendants chose a different course, engaging instead in a series of sham transactions intended to evade their obligation to report the true financial condition of Omnicom to the investing public – and repeatedly misleading their auditors, lawyers, valuation experts, regulators and others before, during, and after the process.

Notwithstanding the ample record of the foregoing fraudulent behavior, Defendants assert that trial is unnecessary, in part because Lead Plaintiff cannot muster enough evidence to

create an issue of fact as to whether they acted with the requisite scienter – or, to be precise, whether they acted with scienter as to *one* transaction, the “Seneca Transaction.” This argument should be swiftly rejected for several reasons.

First, the notion that the evidence pertaining to the Seneca Transaction does not, at a minimum, raise a triable issue of fact as to Defendants’ scienter is specious. This was a deal in which Defendants conveyed a set of indisputably (or, sufficient for purposes of defeating this motion, disputably) impaired internet assets and cash to a joint venture (ultimately called Seneca Investments LLC (“Seneca”)), in return for preferred Seneca stock with a “face value” of \$325 million – consideration that valued the internet assets as though they never lost a penny in value. Defendants persuaded Omnicom’s outside auditors, Arthur Andersen LLP (“Andersen”), that this was a bona fide arms-length transaction obviating the need for any write-down on Omnicom’s books because, among other things, (a) the “partner” in the joint venture, Pegasus Partners II, LP (“Pegasus”), had vouched for the claimed value of the internet assets by putting a significant amount of its own cash into Seneca, and (b) Omnicom had ceded control over the assets. The evidence demonstrates, however, that when Defendants made these and other critical representations to procure Andersen’s sign-off, they were lying.

On the matter of whether Pegasus actually invested in Seneca, for example, Defendants provided Andersen with a term sheet suggesting that Pegasus would be contractually committed to put \$25 million at risk; they did not provide Andersen with the final, signed term sheet that omitted that requirement. While there will be robust debate at trial as to whether Andersen understood that the final deal documents relieved Pegasus of any risk – those documents are not in Andersen’s workpapers – that debate is largely moot because in addressing this crucial point in a management representation letter to Andersen, Defendants specifically assured their auditor

that Pegasus had in fact put \$12.5 million “in Seneca”, was committed to pay another \$12.5 million to Seneca if so requested, and all of that money was “at risk”. LP Ex. 95, at AA 002274 at 2. These representations were knowingly false, but Defendants understood that without them Andersen would not have signed off on the deal.

The deception did not end there. For example, on the issue of control, Defendants made false representations to their lawyers to secure “true sale” opinions, despite the fact that they now claim the Seneca Transaction was not a “sale” at all. They also represented to Andersen that they did not control Seneca, even as they directed virtually every aspect of Seneca’s business solely for the benefit of Omnicom. The documentary evidence of Omnicom’s control is overwhelming. What’s more, Seneca’s CEO at the time, Michael Tierney, has recently filed papers in this Courthouse laying out in detail that, contrary to what Defendants told Andersen and the investing public, the assets purportedly sold to Seneca were *always* under the control of Omnicom. Tierney has now also provided a detailed declaration (the “Tierney Decl.”), submitted herewith, that attests under penalty of perjury to the accuracy of his complaint’s allegations, and which, together with previously undisclosed documents he attaches thereto, further foreclose the notion that this case can somehow be disposed of as a matter of law.¹

¹ Magistrate Judge Dolinger recently granted Lead Plaintiff’s request to reopen Tierney’s deposition to question him about compensation documents that Defendants failed to produce in discovery, but forbade any questions about the allegations in his subsequently-filed complaint. Rep. & Rec. and Mem. & Order, *In Re Omnicom Group, Inc. Sec. Litig.*, No. 02 Civ. 4483 (WHP) (MHD) (Docket No. 159) (“Dolinger R&R”), at 64-67. Lead Plaintiff respectfully disagrees with Judge Dolinger’s decision on this and two other discovery-related issues, but will focus its forthcoming appeal to this Court solely on the scope of the Tierney deposition. Given that Tierney has now vouched for his allegations concerning Omnicom’s control over Seneca under penalty of perjury – a development which reinforces that there is a triable fact issue as to the truthfulness of Defendants’ representations regarding control – we will urge the Court to recognize the “complexity of the claims and importance of clarifying disputed issues in advance of trial,” *Solutia*, 456 F. Supp. 2d at 450, and permit Lead Plaintiff the latitude to question Tierney about the allegations in his complaint at the re-opened deposition.

The evidence regarding these and other deceptions renders meaningless Defendants' boast in their papers that their accounting has been "approved" by others. This is especially so with regard to the assertion that even the Securities and Exchange Commission ("SEC") did not disagree with how Defendants accounted for the Seneca Transaction. (Mot. at 2-3, 13). By its own rules, of course, the SEC's decision not to initiate a formal action against Omnicom means nothing here. 17 CFR § 202.5(d) (termination of investigation by SEC staff "must in no way be construed as indicating that the party has been exonerated"); *In re Raytheon Co. Sec. Litig.*, No. 99-12142-PBS, electronic order (D. Mass. April 20, 2004) (submitted with the accompanying Hassel Decl.) (granting motion to exclude such evidence). But Omnicom's interactions with the SEC are relevant to Defendants' scienter; the evidence shows, for example, that Defendants repeatedly misled the SEC with respect to their interests in the pertinent assets, as well as their auditors' purported "concurrence" with their accounting. The present motion shows that the dissembling regarding Seneca has not yet ended.

The factual disputes regarding Seneca are alone enough to require a trial, but there are several other illegitimate transactions also at issue in this case. Defendants ignore these transactions in their motion, but their effort to restrict the Court's scienter analysis to Seneca alone contravenes the Court's obligation to view all of the evidence collectively and not in isolation. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (in

As for the other rulings in Judge Dolinger's opinion, Lead Plaintiff will accept the decision not to bar the testimony of Defendants' accounting expert, Prof. William Holder, notwithstanding that his opinion rests on "facts" which directly contradict specific factual representations previously made by Defendants to the Court in their Answer and motion papers; we will pursue this remarkable about-face in our cross-examination at trial. With regard to the denial of Lead Plaintiff's motion to compel the production of certain privileged documents pursuant to the crime-fraud exception, Lead Plaintiff notes Judge Dolinger's observation that this issue can be revisited at trial (Dolinger R&R at 36 n.17), and believes that, at this point, judicial efficiency is best achieved by deferring this issue until then – particularly given that Mr. Tierney will have been re-deposed on at least one material issue.

analogous Rule 12(b)(6) context, court must assess “whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard”) (emphasis in original). Where, as here, one seeks to disparage a securities fraud case as a dispute merely about “accounting judgment,” it is of course preferable to try to pull a curtain in front of other contemporaneous evidence which reinforces the conclusion – or at least raises a triable question of fact – that one has engaged in a pattern of intentional and reckless manipulation of reported financial results. And so, tellingly, Defendants’ motion papers do not address – let alone try to explain away – the damning evidence further demonstrating their scienter, evidence that pertains to, among other things:

- A pair of transactions, controlled by Defendant Weisenburger, in which Seneca bought a license for \$500,000 and, one day later, sold it to Omnicom for \$75 million, done to avoid acknowledging Seneca’s realized losses and hide the dramatic impairment of Omnicom’s preferred stock investment (the “LiveWeb Transaction”, *see* Fact Section B3 below);
- A transaction in which Wisenburger funneled \$10 million to his associates in the form of a backdated option to “purchase” two failed internet assets in order to avoid Omnicom having to recognize a \$23 million loss (the “Chaucer Transaction,” *see* Fact Section C1 below);
- Arrangements in which Omnicom avoided its obligation to recognize operating losses in one of its investments by parking enough common stock with entities controlled by Defendants Wren and Weisenburger so as to make it appear that Omnicom’s ownership was below the 20% threshold at which such recognition was required (the “Organic Parking Arrangement,” *see* Fact Section C2 below); and
- Another parking arrangement colluded in by the same person who made Seneca possible (Andrew Bursky), done to avoid recognizing fluctuations in the value of derivative securities of another Omnicom investment company (the “Agency Parking Arrangement,” *see* Fact Section C3 below).

Defendants’ silence as to this evidence speaks volumes. Their failure to address these transactions in their opening papers is alone sufficient basis to deny their motion.

The only other argument in Defendants’ motion is an attack on loss causation. That is of course a quintessential fact question, and especially so on this record. Defendants’ arguments

seek to have the Court sort through the corrective disclosures at issue and conclude – as a matter of law – that no “new” information regarding Omnicom’s handling of its internet assets came to light that could have caused Omnicom’s stock price to decline from \$80.37 to \$54.62 per share, and that *none* of the Class’s loss could possibly flow from Defendant’s fraudulent conduct. Defendants’ arguments are specious – the first sell-off in this case occurred when the market learned that the Chairman of its Audit Committee had resigned, allegedly over Omnicom’s accounting for its internet assets. As detailed below, it is now well settled that these types of issues are intensely fact-specific and, on this record, cannot form the basis of summary judgment.

In sum, Defendants have not, and cannot, meet their burden of demonstrating the absence of any genuine issue of material fact either as to scienter or loss causation. The abundant evidence of Defendants’ misconduct and its causal connection to the Class’s damages is not only enough for a reasonable person to find in Lead Plaintiff’s favor, it is compelling. Defendants’ fact-intensive arguments to the contrary are grist for the jury, not summary judgment.

STATEMENT OF FACTS

A. Omnicom’s E-Service Assets Fail

In the late 1990s and early 2000, Omnicom made significant investments in internet advertising and marketing companies (the “E-Service Assets”), including Agency.com, Organic, Razorfish, Answerthink and Netcentives. ¶ 438.² Omnicom held these assets in its Communicade subsidiary. ¶ 454. While the market for internet stocks was exploding during this period, Omnicom touted their investments and took credit as these companies announced initial

² Unless otherwise noted, “¶ ___” refer to the paragraphs of Lead Plaintiff’s Response Pursuant to Local Rule 56.1(b) in Opposition to Defendants’ Motion for Summary Judgment (“Rule 56 Response”) submitted herewith. Expert reports and transcripts are referenced by the author’s last name, for example “Devor ¶ __,” “Devor Rebuttal ¶ __” and “Devor Tr. __.”

public offerings and watched their stock prices soar. ¶ 439-40. With the benefit of these investments, Defendant Wren boasted in 1999 that Omnicom “posted the best financial performance in its history.” ¶ 676.

In or around March 2000, however, things took a turn for the worse. The internet bubble burst, and the business of these internet companies disappeared. ¶ 441. Several of Omnicom’s investments became impaired in April 2000 and, by year-end, the fair value of all of these investments had plummeted far below Omnicom’s cost basis and they were suffering enormous operating losses. ¶ 456-58. This posed two significant problems for Defendants. First, Omnicom had to absorb its share of the losses being generated by some of the investments. ¶ 522. Second, Omnicom’s auditor was pressing it to document an other-than-temporary impairment (“OTTI”) analysis, which would likely result in significant write-downs and cause Omnicom to miss its earnings targets. *See* ¶ 252.

The documents produced in discovery leave little doubt that by the end of fiscal 2000, and certainly by the end of first quarter 2001, Omnicom’s internet investments were decimated, and that Defendants were aware of this fact. *See* ¶¶ 224-49, 454-67. The following chart compares Omnicom’s cost bases in certain of its public-company investments to their readily-determinable fair values on the dates relevant to this Action:

<u>Company</u>	<u>Omnicom’s Cost Basis</u>	<u>Fair Value on 12/29/2000</u>	<u>Fair Value on 3/31/2001</u>
Agency	\$73,207,400	\$57,195,000	\$20,295,000
Organic	\$38,359,000	\$12,417,400	\$7,641,500
Razorfish	\$27,284,000	\$19,365,100	\$5,213,700
Answerthink	\$17,240,000	\$3,001,500	(disposed of)
Netcentives	\$10,987,000	\$2,028,300	(disposed of)

See LP Ex. 2 (Dep. Ex. 170), Litinski email.

Omnicom’s investments in privately-held companies were faring no better. By the first

quarter 2001, Defendants knew that many of these investments were either contemplating liquidation or facing imminent write-offs, including Red Sky, Ntercept, e-Medicine, World Medical Leaders, Caresoft, e-Medicine, Healthology, and Dash.com. See ¶¶ 237-49.

The problem Defendants faced was that Omnicom was considered a “growth” company, and in order for its stock to be attractive to investors it had to maintain its unbroken string of twenty-six consecutive quarters of meeting or exceeding market expectations. ¶ 585, 676-85. If Omnicom wrote down these investments, as required under generally accepted accounting principles (“GAAP”), it would miss Wall Street’s consensus earnings estimates, and its stock price would be pummeled by the market.³ Rather than suffer this blow, Defendants chose instead to orchestrate an illicit scheme to avoid required operating losses and write-downs and to remove their E-Service Assets from Omnicom’s books.

B. Defendants Remove Impaired Assets From Omnicom’s Books Through The Fraudulent Seneca Transaction and Lie to Their Auditors About It

On April 24, 2001, Omnicom reported its first quarter results, claiming that it had exceeded Wall Street’s estimates by a penny per share. ¶ 587. The market responded favorably, driving Omnicom’s stock price up from \$88 to over \$92 on April 26. LP Ex. 125, Hakala ¶ 46 & Ex. C-1. This positive announcement was only possible as a result of the Seneca Transaction.

According to Defendants’ public disclosures, Seneca was a venture of Omnicom and a private equity firm, Pegasus, the stated goal of which was to “unlock value” in Omnicom’s internet investments. ¶ 266. It was presented to Omnicom’s auditors as an arms-length transaction in which Omnicom surrendered control over its then-remaining E-Service Assets and

³ By way of example, when Omnicom competitor Interpublic took a write down for a similar investment it had made in a company called MarchFirst, *Advertising Age* reported as follows: “Wall Street moved quickly to punish Interpublic. Several analysts cut their earnings estimates for the year. Interpublic stock dropped April 27; at mid-afternoon, it traded at \$32.50, down 10% and near its 52-week low.” ¶ 686.

paid \$47.5 million in cash to a new venture, Seneca, and Pegasus contributed \$12.5 million in cash (with an additional \$12.5 million “on call”) and committed to manage the new entity in order to realize value from the underlying assets. ¶ 285. In return for these investments, Omnicom received preferred stock in Seneca, which Defendants recorded on its books at a value exactly equal to its cost basis for the transferred assets. ¶ 285. Pegasus received all of the common stock of Seneca. ¶ 285.

Seneca was a sham. The evidence developed in discovery demonstrates that Pegasus made no bona fide contribution to Seneca (¶¶ 290-300); it received a multi-million dollar payday (dressed up as “management fees”) for doing nothing more than signing the deal (¶¶ 302-04); and never took control of the E-Service Assets from Omnicom (¶¶ 305-51). The former CEO of Seneca, Michael Tierney, recently stated unequivocally in papers filed in this Court that “Pegasus contributed nothing, and was required to contribute nothing,” to Seneca. Tierney Decl., Ex. A ¶ 137, attached as Ex. 1 to the Johnson Decl.

Omnicom reported the Seneca Transaction in its first quarter Form 10-Q on May 14, 2001, stating merely that it had contributed its interests in the internet assets in exchange for preferred stock in Seneca, and that it had recognized no gain or loss. ¶ 287. It then stated, “[m]anagement continually monitors the value of these investments to determine whether an [OTTI] has occurred. *As of the quarter ended March 31, 2001, the carrying value of these investments approximates their fair value.*” ¶ 287 (emphasis added). This statement was materially misleading. In fact, Defendants knew that by March 31, 2001, the public assets transferred to Seneca (Agency, Razorfish and Organic) were impaired by over \$100 million. ¶ 225.

Thereafter, in the second and third quarters of 2001, Omnicom failed to report any

operating losses associated with Seneca, and repeatedly reported that its investment in Seneca had not suffered any impairment that was “other than temporary.” ¶¶ 288-89. Omnicom further represented in the third quarter that the “co-investor [Pegasus] contributed cash” to Seneca. ¶ 289. Omnicom finally represented in its Form 10-K for fiscal 2001 that it accounted for the Seneca Transaction pursuant to SFAS 140. ¶ 118. Omnicom never publicly indicated whether it applied “carry-over basis accounting” or “sale accounting” in recording this deal. Nevertheless, the market understood that this transaction was a “sale.” *See, e.g.*, Def. Ex. R4. Indeed, Defendants reinforced this perception by claiming that the deal was done at “fair value,” which is only applicable to “sale accounting.” *See* ¶¶ 356-64.

Omnicom’s statements relating to Seneca were materially false and misleading for three principal reasons: (i) Pegasus never invested any money in Seneca and never had any obligation to do so; (ii) Omnicom always controlled Seneca; and (iii) Omnicom’s Seneca preferred shares simply were not worth what Omnicom claimed.

1. Pegasus Never Invested any Money in Seneca

The evidence shows that Pegasus never made any cash contribution to Pegasus. *See* ¶¶ 290-300; Defs. 56.1 Stmt. ¶ 34. It also shows that Pegasus had no legal obligation to make any such payment. For example, Pegasus’ Andrew Bursky testified that he viewed the Seneca Transaction as two transactions – one in which Pegasus paid \$12.5 million to its own wholly-owned subsidiary, Pegasus E-Services Holdings LLC (“Pegasus Holdings”), and a second where Pegasus Holdings purchased all of the common stock of Seneca for a nominal \$100. LP Ex. 4, Bursky Tr. 121-22. He testified that if Seneca ever requested that any of the \$12.5 million placed with Pegasus Holdings actually be paid to Seneca, he would have viewed it as an entirely separate investment decision. *Id.* at 166-67. Thus, Pegasus’ money was *not* committed to

Seneca. Indeed, Defendants' expert, Dr. Michael Horvath, acknowledged that, based on these facts, Pegasus' money was *not* at risk. LP Ex. 34, Horavth Tr. 34, 140-44, 227.

Defendants knew that Pegasus' cash payment was never made to Seneca. Weisenburger negotiated the Seneca deal. ¶¶ 295. Weisenburger and Angelastro were on e-mails where the absence of a cash payment was specifically discussed. ¶ 296. To secure Andersen's sign-off on their accounting, however, Defendants had to lie and say Pegasus did make a significant cash payment into Seneca. Defendants did so repeatedly. For example, when Andersen initially reviewed this deal, Omnicom sent them a term sheet that stated Pegasus would pay the money to Seneca. ¶ 291. The final term sheet, which was not provided to Andersen, states the money would go only to Pegasus Holdings. ¶ 290. More importantly, Defendants specifically misrepresented the nature of Pegasus' cash contribution in sworn management representation letters. Specifically, in a letter to Andersen on February 18, 2002, Defendants attested that "Pegasus through Partners has made an equity investment *in Seneca* as the equity owner of Seneca common stock for \$12.5 million with a call on a further \$12.5 million. *Such equity is at risk* and not guaranteed by Omnicom." LP Ex. 95, at AA 0002274 (emphasis added), ¶¶ 372-73. They made similar representations to KPMG in August 2002. ¶ 660.⁴

Both sets of auditors specifically relied on these representations in assessing the Seneca deal. See ¶¶ 377, 661. Indeed, Jack Benedik, Andersen's engagement partner, testified that his decision to sign off on the deal was premised on the fact that the value of Seneca's preferred stock was supported by an arms-length negotiation in which both sides took on risks and rewards

⁴ KPMG reviewed the Seneca Transaction in connection with successor auditor procedures it performed in the summer of 2002, when KPMG replaced Andersen as Omnicom's auditor. KPMG's procedures were not an audit. ¶ 658. Further, KPMG specifically did *not* concur with Omnicom's accounting for the Seneca Transaction. ¶ 662. Based largely on management's representations, they concluded only that Omnicom's opening balances as of January 1, 2002 did not require revision. ¶ 662.

associated with the transaction. LP Ex. 55, Benedik Tr. 153, 230-31. Absent a bona fide cash contribution to Seneca, Pegasus undertook no risk. *See* LP Ex. 23, Atkins at 28, 31. Indeed, Benedik expressed serious concern when he learned that the money may never have been paid. LP Ex. 55, Benedik Tr. 312.

Similarly, KPMG's Teresa Iannaconi testified that the money had to at least be committed to Seneca in order for it to be at risk. LP Ex. 81, Iannaconi Tr. 339-40. She believed that Seneca had to have "the commitment of resources from Pegasus to insure its ability to operate as it was proposed that it would," *id.* at 331, and that absent the cash commitment, there was a significant question as to whether Seneca "lacked substance." *Id.* She also made clear that if there was no legally enforceable obligation for Pegasus to pay money to Seneca, then "we would be talking about a different transaction" than the one KPMG considered. *Id.* at 339-40.

2. Omnicom Always Controlled Seneca

From the moment the Seneca deal closed, Omnicom always controlled Seneca:

- Omnicom was the sole investor in Seneca. ¶¶ 290-300, 317.
- Wren and Weisenburger negotiated and controlled Seneca's taking-private of both Agency.com and Organic, by far the two largest Seneca holdings. ¶¶ 337-38, 340-42.
- Omnicom planned and negotiated Seneca's purchase of the LiveWeb license from Livetech for \$500,000 and Omnicom's immediate purchase of the same license from Seneca for \$75 million (described *infra* at p. 16). ¶¶ 345, 412-37.
- Omnicom acquired Agency.com and Organic back from Seneca in accordance with Omnicom's pre-Seneca plans. ¶ 339, 343.
- Omnicom made the decision to liquidate Seneca's holding in Razorfish at a large loss prior to Seneca's formation, and Seneca carried out that decision shortly after Seneca's formation. ¶ 344.
- Pursuant to the Seneca formation agreements, Omnicom had the legal power to force Seneca to pay Omnicom the proceeds from the sale of assets, Omnicom had legal control over Seneca's ability to incur debt, and Omnicom's approval was required for appointment or election of Seneca's

officers. ¶ 311-13.

- Apart from the liquidation of Razorfish at a huge loss, Omnicom was the sole source of operating cash for Seneca. Seneca never even considered requesting any cash infusions from Pegasus, despite the fact that Tierney had to ask Weisenburger for cash several times in 2001. ¶¶ 300, 317, 321.
- Omnicom controlled the \$47.5 million cash it “contributed” to Seneca for several months by holding that cash in its own account. Tierney had to ask Weisenburger for distributions from that account. ¶ 315.
- Seneca was completely dependant on Omnicom for its operations, including bookkeeping, accounting and auditing, tax, office space and support, employee benefits, and other services. For example, Seneca personnel used Omnicom e-mail and were included in Omnicom’s corporate telephone directory. ¶¶ 316, 319-20.
- Omnicom chose Tierney and Neumann, who were Omnicom employees, to be Seneca’s officers, and Pegasus had no role in that selection. After the deal, Omnicom and Seneca always considered Tierney and Neumann still to be Omnicom employees, and held them out as such. ¶¶ 324-26, 331-36, 348.
- Omnicom and Seneca considered Seneca to be an Omnicom subsidiary that was operating solely for Omnicom’s benefit, and so did third parties. ¶ 330, 332.
- While Tierney and Neumann were at Seneca, Omnicom gave them grants of Omnicom stock as incentive pay. ¶ 327.
- After the formation of Seneca, Tierney and Neumann were in frequent contact with Weisenburger and other Omnicom personnel regarding a host of matters concerning the companies in Seneca’s portfolio. There are literally hundreds of e-mails between Weisenburger, Angelastro and Profusek at Omnicom and Tierney and Neumann at Seneca. By contrast, Tierney and Neumann virtually never were in contact with anyone at Pegasus. ¶ 328.
- Neumann did Weisenburger’s bidding in the Chaucer and Agency warrants schemes. *See infra* at Fact Sections C1, C3. Tierney did not even know these transactions took place. ¶ 485-86, 604.

The evidence shows that Pegasus had virtually no involvement in Seneca’s management or investment decisions. ¶ 322. Tierney testified that throughout 2001 he had only *one* communication with Bursky. ¶ 328. Bursky himself stated that he viewed Pegasus’ role as that of an investor, not a manager. ¶ 305. And even Defendants’ expert, Horvath, opined that Pegasus was nothing more than a “free rider.” ¶ 306. While Pegasus entered into a so-called

“management agreement” for Seneca, the agreement required it to do nothing. Yet, Omnicom paid Pegasus \$6.15 million in “management fees”, which were deemed “fully earned” as soon as Bursky signed the deal. ¶ 302.

Tierney – the very person Omnicom installed as Seneca’s CEO – has now confirmed, under penalty of perjury, that Omnicom controlled Seneca and that, in reality, it was nothing more than a subsidiary of Omnicom. Tierney confirms, *inter alia*, that:

- Omnicom formed Seneca as an “off balance sheet entity” that Omnicom always controlled. Tierney Decl. ¶ 17 and Ex. A ¶¶ 54, 67, 124-128.
- Tierney always worked for Omnicom. *Id.* ¶¶ 67, 69-76, 156.
- Defendants orchestrated the Seneca Transaction so as to ensure that Omnicom would always bear all of the risk and rewards in the new entity, and it always maintained complete control over Seneca and its assets. *Id.* ¶¶ 50, 54, 124, 126.
- “Seneca relied completely on Omnicom for funding,” as well as for its employees, insurance, space, administrative services and other operational functions. *Id.* ¶¶ 55, 58, 247-253.⁵

As with the purported Pegasus cash payment, Defendants misled Omnicom’s auditors with respect to their control over Seneca. Andersen (and later KPMG) required that Omnicom obtain true sale opinions with respect to the Seneca Transaction. ¶¶ 381-82, 660. In forming those opinions, Omnicom’s counsel at Jones Day relied upon assumptions that Defendants knew

⁵ Citing *Thomas v. Roach*, 165 F.3d 137 (2d Cir. 1999), Defendants claim that Tierney’s post-deposition representations are inadmissible. Mot. at 22. However, in *Thomas*, the Second Circuit vacated summary judgment against plaintiff, in part, because it found that plaintiff’s affidavit – like Tierney’s affidavit here – did indeed “create a genuine factual issue” by clarifying vague and inconclusive statements. *Id.* Moreover, in *Palazzo v. Cordio*, 232 F.3d 38, 43-44 (2d Cir. 2000), the Second Circuit clarified that the general rule discussed in *Thomas* does not apply where: (1) the affidavit offered does not actually contradict the affiant’s prior testimony but instead clarifies an ambiguous, confusing or incomplete record; or (2) the prior testimony is contradicted by other evidence corroborating the subsequent affidavit. *Id.* “[W]hen such other evidence is available, the concern that the proffered issue of fact is a mere sham is alleviated.” *Id.* at 44. Both of these factors are present here. Indeed, the overwhelming documentary evidence corroborates Tierney and shows that Omnicom always controlled Seneca.

were false. ¶¶ 383-85, 388-92. For example, Jones Day assumed, incorrectly, that “the purchase price paid by [Seneca] for the Contributed Property is approximately equal to the amount that generally could have been obtained by Omnicom in the marketplace in comparable transactions.” ¶¶ 390-91. Jones Day also relied on specific misrepresentations from Weisenburger regarding the purported arms-length relationship between Seneca and Omnicom. The representations made by Weisenburger and the specific reasons why they were false are described at ¶ 385. Those representations were then reaffirmed by Wren, Weisenburger and Angelastro in their management representation letter to Andersen. ¶ 373, 376.

Andersen specifically relied on Jones Day’s opinions and management’s representations in signing-off on Omnicom’s accounting for Seneca. ¶ 377, 386, 393. KPMG also relied on Jones Day’s true sale opinions. ¶ 660-61.⁶ There is no indication that Defendants shared with either Andersen or KPMG any of the salient facts relating to their control over Seneca as described in the bullets above and in the evidence cited therein.

3. Omnicom’s Preferred Stock Interest In Seneca Was Not Worth What Omnicom Claimed

Finally, at a fundamental level, Omnicom’s preferred stock was never worth what Omnicom claimed. At year-end 2001, Andersen signed off on the deal because it believed that the value of the preferred was supported by an arms-length negotiation and Pegasus’ assumption of risk in the form of its capital contribution to Seneca. *Supra* at pp. 11-12. Nevertheless, it also required that Omnicom obtain a third-party valuation to confirm the claimed value of the preferred stock at year-end 2001. ¶¶ 396, 413. This created a predicament for Defendants. ¶

⁶ In connection with these later opinions, which were issued in July 2002 in connection with KPMG’s successor auditor review (*see* note 4 *supra*), Tierney has indicated that he no longer believes these opinions are trustworthy. Tierney Decl. ¶ 42. Indeed, he specifically sent a letter to Jones Day and a similar letter to Omnicom’s Board of Directors, stating that he believes Seneca was a fraud and that the representations Jones Day relied upon in the true sale opinions were not accurate. *Id.* Ex. E&F

414. In its short existence, Seneca had already realized losses of approximately \$75 million from, *inter alia*, its liquidation of Razorfish at a loss of \$24.3 million just weeks after the Seneca deal (¶ 344), and write-offs associated with the liquidation of several private companies that Defendants had fraudulently valued at \$55 million. ¶ 395. Omnicom's preferred stock interest was therefore seriously impaired. May at III-15.

At the time Andersen requested the valuation, Omnicom was negotiating to purchase a software license from LiveTech (one of the E-Service Assets) for \$500,000. ¶ 415-16.

Defendants decided to kill two birds with one stone by executing another fraudulent transaction. Rather than purchasing the license directly from LiveTech, Omnicom orchestrated a three-way deal in which *Seneca* purchased the license from LiveTech for \$500,000, and then, the very next day, sold it to Omnicom for \$75 million. ¶ 418-19. By these machinations, Omnicom injected \$74.5 million of value into Seneca and improperly hid the impairment of its Seneca preferred stock. ¶ 427.

Defendants then hired a valuation firm, Murray Devine & Co. ("MD"), to conduct a third party valuation of its preferred stock interest in order to satisfy Andersen. ¶ 397. In addition to artificially inflating Seneca's value through the LiveWeb transaction, Omnicom also misled MD with respect to other key facts that affected its valuation. For example:

- Omnicom failed to inform MD that Pegasus had not paid any money into Seneca. As a result, MD included in its valuation \$25 million to which Seneca never had access. ¶ 399.
- Omnicom failed to inform MD that \$15 million in Red Sky debt, which it included as part of Agency.com's assets, had been extinguished in bankruptcy. ¶¶ 403-05.
- Omnicom failed to inform MD that Ntercept, also included in Agency.com and valued at \$2.3 million, was worthless. ¶¶ 406-07.
- Omnicom failed to inform MD of an impending \$80-100 million goodwill write-down it knew Agency was planning to take in 2001. ¶¶ 408-09.

In total, these issues artificially inflated MD's valuation by at least \$122.3 million and thus gave Andersen – and subsequently KPMG – false comfort that Omnicom's Seneca preferred stock was fairly valued at year-end 2001. ¶ 411.

C. Defendants Avoid Write-Downs and Operating Losses Through Other Fraudulent Transactions in Fiscal 2000 and the First Quarter 2001

Omnicom orchestrated at least three additional transactions in order to fraudulently avoid write-downs and operating losses associated with the E-Service Assets. These transactions, discussed briefly below, are detailed in at ¶¶ 470-609 and in LP Ex. 24, Atkins at 15-27.

1. The Chaucer Transaction

On February 20, 2001 (the first day of the Class Period), Omnicom surprised the market by announcing fourth quarter and year-end results that beat Wall Street's expectations by two cents per share. ¶¶ 498. The announcement marked Omnicom's twenty-sixth consecutive quarterly earnings achievement, and continued its streak of thirty-eight consecutive quarters of year-over-year growth in revenue and earnings. ¶ 498. The announcement sent Omnicom's stock soaring by 6.5%, from \$88.75 per share up to \$94.51. *See* ¶ 499. However, Defendants were only able to report these positive results by executing the fraudulent Chaucer Transaction.

This transaction was supposedly a sale of four E-Service Assets to Chaucer Investments Co., LLC, which was an "associate" of Weisenburger. ¶ 477. Two of those assets, Netcentives and Answerthink, had been impaired since April 2000, and by year-end they had lost more than 80% of their value to Omnicom. ¶¶ 470-71. Thus, Defendants knew they were required to write these assets down at year-end 2000 for a combined impairment charge of at least \$23.4 million, or seven cents per share. ¶ 472. Such a charge would have caused Omnicom to miss its earnings targets. ¶ 472.

To avoid this result, Omnicom packaged these E-Service Assets with two other

investments, L90 (which was also impaired) and Headhunter.com (which was trading above Omnicom's book value), and sold this "basket" of assets to Chaucer at a value essentially equal to Omnicom's total cost basis. ¶¶ 483, 488. They purportedly signed an agreement to this effect on December 29, 2000, the last business day of 2000, although the deal did not close until several months later. ¶¶ 489-90. Defendants then declined to take the required write-downs for Answerthink and Netcentives on the theory that the deal value was roughly equal to Omnicom's total cost basis. ¶509. This decision violated GAAP and rendered Omnicom's year-end 2000 financial statements materially false and misleading. LP Ex. 25, Devor ¶¶ 58-62.

Defendants then went further. On or about February 8, 2001, they renegotiated the deal to add "additional consideration" for Chaucer. ¶¶ 493. Specifically, they gave Chaucer an option to purchase four million shares of Omnicom stock at \$82 per share, for which Chaucer was to pay \$4 million. ¶ 494. The option was granted on February 8, 2001, and *backdated* to December 29, 2000. ¶¶ 493-94. On the actual grant date, Omnicom's stock was trading at \$89.66 per share (\$6.78 higher than on December 29th), which gave the backdated option an intrinsic value of \$26.6 million. ¶ 495. This was, not coincidentally, the same amount that Chaucer supposedly agreed to "pay" for the three impaired E-Service Assets it was taking off Omnicom's hands. ¶ 495. The net effect of this deal (as of February 8, 2001) was that Defendants gave these E-Service Assets away for free, resulting in a total loss on the transaction of \$30.1 million. ¶ 495.

Omnicom then allowed Chaucer to backdate its *exercise* of the option. Chaucer exercised the option on or about March 20, 2001, but Omnicom deemed that the exercise date would be February 21, 2001 – the day after Omnicom issued its positive earnings release, driving Omnicom's stock price up to \$94.30. ¶¶ 498-99. Thus, Omnicom actually funneled \$45.2

million to Chaucer in order to do this deal. ¶ 499. In view of these facts, Defendants should have recorded a loss on the transaction of \$48.7 million. ¶ 507. Omnicom actually reported a loss of only \$3.5 million, omitting entirely the \$45.2 million paid on the backdated option. ¶ 507.

The circumstances of this transaction, such as the true value of Omnicom's cost bases for the individual Chaucer assets and the circumstances of the Chaucer option, were never disclosed to investors or the SEC. ¶ 506, 511. Indeed, the option – which would have represented two percent of the Company's outstanding shares – was never even disclosed to Omnicom's Board of Directors. ¶ 516.

2. The Organic Parking Arrangement

Omnicom's second largest E-Service Asset was its interest in Organic. ¶ 225. At year-end 2000 and in the first quarter of 2001, Omnicom claimed to own 17% of Organic's common stock. ¶ 545. Thus, it claimed that its ownership interest was under the 20% threshold that would have required Omnicom to record its share of Organic's operating losses pursuant to the equity method of accounting. ¶¶ 549-50. In reality, however, Omnicom owned an additional 5.5% of Organic, which it had parked in entities controlled by Wren and Weisenburger. ¶ 548. Specifically, at year-end 2000, Weisenburger and Wren each controlled about 2.75% of Organic's common stock through two entities, DVH (controlled by Weisenburger) and MCD (controlled by Wren). ¶ 548. Defendants Angelastro and Crawford were both aware of these shares; indeed, they held some of them in their own names during fiscal 2000. ¶¶ 554-55.

The transactions through which this parking arrangement was established are detailed at ¶¶ 521-89 and LP Ex. 24, Atkins at 15-19. Defendants never disclosed this interest in Organic to Omnicom's auditors. ¶¶ 579-83. Indeed, the auditor responsible for these issues testified that

he had never heard of DVH or MCD. ¶ 580. Had Omnicom accounted for its entire beneficial interest in Organic, it would have had to record losses of \$5.8 and \$10.5 million in the fourth quarter of 2000 and the first quarter of 2001, respectively, thus causing it to miss earnings expectations in both of these periods. ¶¶ 585-88.

Ultimately, Omnicom's entire interest in Organic was transferred to Omnicom. In or around August 2001, Wren transferred his shares to Weisenburger, and then Weisenburger sold them to Seneca. ¶ 569. The purchase was disclosed to the SEC in a Seneca filing, which Weisenburger signed on behalf of Omnicom as one of the "filing persons." ¶ 574. The filing neglected to mention that the shares in question were purchased from Wren and Weisenburger, the CEO and CFO of Omnicom. *Id.* Defendants thereby concealed from the SEC that Omnicom had long controlled more than 20% of Organic.

3. The Agency Warrant Parking Arrangement

Omnicom's largest investment in the E-Service Assets was in Agency. In fiscal 2000, Omnicom owned approximately 33% of Agency's common shares and warrants to purchase an additional 14% of the company. ¶ 590. In the first quarter of 2001, Omnicom parked a portion of its warrants and related debt with Bursky (of Pegasus), and later Weisenburger, in order to avoid fluctuations in the warrants' price, which would have affected Omnicom's earnings. ¶¶ 591-98. The transactions through which this arrangement was orchestrated are described in ¶¶ 590-609 and LP Ex. 24, Atkins Report at 19-23. At the time of the Seneca deal, Weisenburger relieved himself of the warrants and debt by transferring them to Seneca. ¶ 600. Defendants never disclosed their interest in these warrants to Andersen, despite the fact that the parking arrangement was a material "side deal" that affected the arms-length nature of the Seneca Transaction. LP Ex. 25, Devor ¶¶ 157-70.

D. Callander Resigns from the Audit Committee

On February 10, 2002, Robert Callander, the Chairman of Omnicom’s Audit Committee, began to raise questions about the Seneca Transaction. ¶ 610. On May 21, 2002, after several weeks of back and forth between Callander and Wren regarding Seneca (*see* ¶¶ 611-13), Wren informed the Audit Committee that he intended to buy back Agency and Organic. ¶ 617. Callander immediately requested that the Audit Committee be allowed to review the prospective transactions and told Wren that the Audit Committee would “retain a qualified professional” to review the Seneca Transaction. ¶ 617. The following day, Wren informed Callander that he had formed a new “Finance Committee” to deal with these issues. ¶ 618. Callander immediately resigned. ¶ 619.⁷

E. The Market Becomes Aware of Defendants’ Financial Chicanery

On June 5, 2002, after the close of business, Omnicom announced Callander’s resignation. ¶ 621. Over the next two days, rumors flourished that the resignation was due to problems with Omnicom’s accounting, and that *The Wall Street Journal* (“WSJ”) was working on a story in this regard. ¶¶ 622-23. As a result of this news, Omnicom’s stock price dropped from \$80.37 on June 5, 2002 to \$72.69 on June 7, 2002. ¶ 624. In response to these material price movements, Omnicom issued a press release, claiming it knew of no corporate development to account for this dramatic decline. ¶ 625.

⁷ In May 2002, Callander wrote to Columbia Business School Professor David Beim, requesting advice regarding his responsibilities vis-à-vis Seneca. ¶ 614. Professor Beim responded on May 9 by stating, *inter alia*, that it was “not clear why any private investor would want a leveraged equity position in such businesses, nor is it clear how Omnicom could dispose of them without taking a loss.” ¶ 615. According to Professor Beim, at \$280 million, the transaction was “definitely material” and one must ask “[h]ow much did the shareholder invest?” He also asked the “basis for this belief” that the carrying value of Seneca’s preferred (\$280mm) approximated fair value, stating “there seems to be a puzzle in need of explanation. A material set of businesses that were probably losing money has been disposed of without loss. There must be some additional source of value supporting them.” ¶ 615. There was none.

On June 12, 2002, the *WSJ* published an article reporting that Callander had resigned over “Omnicom’s handling of its soured internet investments.” ¶ 626. The article also revealed for the first time that (i) Seneca had been formed to avoid a write-off; (ii) it was doubtful that the fair value of the assets could support the value of the preferred stock; and (iii) Omnicom intended to buy back its interests in Agency and Organic. ¶ 626. That same day, *The Financial Times* published an article also calling Omnicom’s handling of its E-Service Assets into question. ¶ 626. In response to this news, Omnicom held a conference call during which Wren confirmed that the *WSJ*’s explanation for Callander’s resignation was correct. ¶ 627. On these disclosures, Omnicom’s stock price dropped another 30%, from \$77.56 on June 11, 2002, to \$54.62 on June 13, 2002. ¶ 634.

F. Defendants Mislead the SEC

In May 2002, the SEC requested information about the cost bases of Omnicom’s “FAS 115” investments at year-end 2000, which included Organic, Razorfish and the four assets “sold” in the Chaucer Transaction. ¶ 633. The SEC was trying to figure out how Omnicom could have failed to take an OTTI charge with respect to these investments in light of the dramatic downturn in the market. ¶ 663. In response to this request, Defendants lied to the SEC. In a letter dated May 21, 2002, they claimed that the four assets sold to Chaucer had a total cost basis of \$38.5 million and that, in the aggregate, their market value had never fallen below Omnicom’s cost. ¶¶ 667-70. In fact, Omnicom’s cost basis for these assets was \$55.9 million and, in the aggregate, they had been impaired since at least the second quarter of 2000. ¶¶ 667-70. In addition, Defendants claimed that Omnicom suffered a loss of only \$3.5 million on the Chaucer Transaction. ¶ 670. They failed to make any mention of the backdated Chaucer option. ¶ 670.

Following the disclosures on June 12, 2002, the SEC’s Enforcement Division began an

informal inquiry into Omnicom’s handling of the E-Service Assets. ¶¶ 631. During the course of this investigation, Omnicom provided the SEC with Andersen’s memorandum discussing Omnicom’s accounting for the Seneca Transaction (¶ 632), which Defendants knew relied on false facts and assumptions, as detailed herein. Omnicom also provided the SEC with draft Board minutes, claiming that KPMG had “concurred” with Omnicom’s Seneca accounting for the Seneca Transaction. ¶ 674. As noted above, KPMG *never* concurred with Omnicom’s accounting. ¶ 675. Further, Defendants lied in response to specific questions regarding their holdings in the E-Service Assets. Specifically, they misrepresented the interests Wren and Weisenburger held in Organic and Agency through the parking arrangements described above. ¶¶ 574, 576, 603-04.

G. Pegasus Holdings Sells Its Seneca Common Stock for \$100

Pegasus Holdings exited the Seneca arrangement in June 2003 by selling its common stock back to Seneca. ¶ 310. The price it received was a grand total of \$100. ¶ 310.

ARGUMENT

On a motion for summary judgment, the “burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party.” *Bank of India v. Subramanian*, 2007 WL 1424668 at *2 (S.D.N.Y. May 15, 2007) (Pauley, J.). “In determining whether there is a genuine issue as to any material fact, ‘the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor.’” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). “[T]he court must view all facts in the light most favorable to the non-moving party.” *In re Worldcom Sec. Litig.*, 346 F. Supp.2d 628, 655 (S.D.N.Y. 2004). “A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* “If there is any evidence in the record from

any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.” *Byrnie v. Town of Cromwell Bd. Of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001) (internal citation and quotation marks omitted). Credibility assessments, choices between conflicting versions of the events, the weighing of evidence, and the weighing of expert testimony have long been recognized to be matters for the jury. *Curry v. City of Syracuse*, 316 F.3d 324, 333 (2d Cir. 2003). *See also Lendino v. Trans Union Credit Info. Co.*, 970 F.2d 1110, 1113 (2d Cir. 1992); *Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 79 (2d Cir. 2002) (disagreement among the experts gives rise to a genuine issue of material fact).

Applying these well-settled principles here, Defendants’ motion should be denied.

I. A REASONABLE JURY WOULD HAVE NO DIFFICULTY CONCLUDING THAT DEFENDANT’S ACTED WITH SCIENTER

Proof of scienter need not be direct, but may be “a matter of inference from circumstantial evidence.” *Herman & MacLean v. Huddleston*, 459 U.S. 375 n. 30 (1983); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978).

Issues of motive and intent are usually inappropriate for disposition on summary judgment. In a § 10(b) action, a court may not grant such relief to the defendants on the ground of lack of scienter unless the plaintiff has failed to present facts that can support an inference of bad faith or an inference that defendants acted with an intent to deceive.

Wechsler v. Steinberg, 733 F.2d 1054, 1058-59 (2d Cir. 1984) (citations omitted) (evidence that “defendants were attempting by their choice of accounting methods to artificially increase the market price” of shares precluded summary judgment on scienter). Facts showing a defendant’s participation in, or knowledge of, fraudulent transactions provides strong evidence of scienter. *In re Refco, Inc. Sec. Litig.*, 2007 WL 1280649 at *32 (S.D.N.Y. April 30, 2007) (defendants’

awareness of fraudulent transactions raised material issue of fact regarding scienter).⁸

Here, a jury could readily conclude that the Seneca Transaction was a fraud and that Defendants acted with scienter. As detailed in Lead Plaintiff's expert reports, and as now confirmed by the CEO of Seneca, the Seneca Transaction had no economic substance. (*See LP Ex. 24, Atkins at 31-32; Tierney Decl. ¶¶ 17, 28, 29, 42, Ex. A ¶¶ 21, 37, 50, 54, 55, 124, 126, 137.*) Seneca was nothing more than Omnicom's Communicade subsidiary by a different name. Pegasus took on no risk in connection with Seneca (*Id.* at ¶ 137), and Omnicom always controlled its business and operations (*Id.* at ¶ 124). Defendants knew these facts. They negotiated the deal which omitted the requirement that Pegasus pay money into Seneca; paid Pegasus an exorbitant "management fee" in return for nothing other than Pegasus signing this deal; and affirmatively controlled every aspect of Seneca from the moment it was created. Based on these facts, a jury could conclude that no accounting could justify this transaction and, thus, Defendants' Class Period statements were intentionally false and misleading.

Defendants' arguments that they did not control Seneca and that they properly applied carry-over basis accounting to the deal pursuant to FAS 140 ¶ 10 do little more than raise material issues of fact. Indeed, even if a jury were to conclude that Defendants did apply this provision of GAAP – a factual proposition that is, in itself, very much in dispute – it could easily conclude that Defendants' use of this provision to justify their failure to record losses associated with the E-Service Assets was fraudulent.

A. Assuming Omnicom Applied FAS 140 ¶ 10, Defendants' Accounting for the Seneca Transaction was Fraudulent

⁸ *See also In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 214-15 (S.D.N.Y. 1999) (fraudulent revenue-generating transactions "unquestionably constitute strong circumstantial evidence of conscious misbehavior"); *In re AOL Time Warner, Inc. Securities and ERISA Litig.*, 381 F. Supp. 2d 192, 222 (S.D.N.Y. 2004) (defendant's involvement with fraudulent deals raised material issue of fact regarding scienter).

1. The Application of FAS 140 Requires the Surrender of Control – a Requirement Defendants Knew Was Not Satisfied

Defendants acknowledge that a precondition for applying FAS 140 was that Omnicom surrendered control over the E-Service Assets. *See* Mot. at 18; Def. Ex. C2, Holder ¶¶ 187-88. As detailed above, the documentary evidence demonstrating control, as described above and detailed more fully in the Rule 56 Response at ¶¶ 309-52, is overwhelming. Lead Plaintiff’s accounting expert, Harris Devor, specifically considered many of these facts, and concluded that they demonstrated control. *See* LP Ex. 25, Devor ¶¶ 177-260. He also specifically addressed the requirements for the surrender of control under FAS 140 ¶ 9 and concluded that they were not satisfied. LP Ex. 25, Devor ¶¶ 261-81.⁹

The evidence shows that this is not some academic dispute over accounting judgments. It is about lies and how those lies misled Omnicom’s auditors and others. In reviewing this transaction, Andersen specifically required management representations, as well as true sale opinions establishing that Omnicom had in fact surrendered control. The evidence shows that Defendants secured the true sale opinions by fraud, and lied to Andersen on this critical point. (*See* discussion *supra* at pp. 14-15).

KPMG and Defendants’ accounting expert, Prof. William Holder, also relied on the proposition that Omnicom did not control Seneca in considering this deal. *See, e.g.*, LP Ex. 94, at KPMG 00006 (relying on true sale opinions and representations virtually identical to those

⁹ As Devor explains, assuming there was some legitimate business justification for this deal, Omnicom would have had to apply APB 29, which would have required Defendants to record a material loss on the transaction and consolidate Seneca’s losses going forward. LP Ex. 25, Devor ¶¶ 171-78, 291-96. But this is the exact result Defendants were desperate to avoid. Defendants argue that APB 29 was not the appropriate GAAP because the Seneca preferred stock was a “monetary asset,” as opposed to a “non-monetary asset.” (Mot. at 17). This specifically contradicts Defendants prior representations, *see* ¶¶ 345-47 (detailing many instances where Defendants acknowledged that this was, in fact, an exchange of non-monetary assets), and by itself creates a triable issue of fact.

relied upon by Andersen); Def. Ex. C2, Holder ¶¶ 187-202. In fact, Holder admitted that if Tierney’s allegations regarding Omnicom’s control over Seneca are true, then Defendants’ purported accounting was improper. LP Ex. 100, Holder Tr. 317. Based on these facts, a jury could reasonably conclude that Defendants acted with scienter.

2. The Evidence Shows Defendants Concocted the Seneca Transaction to Avoid Losses Associated with their E-Service Assets at 1Q2001

Under FAS 140 ¶ 10, Omnicom would have been required to document an OTTI analysis and, if write-downs were required, record a loss on the deal. *See* ¶¶ 87, 122; LP Ex. 25, Devor ¶¶ 25-39; Def. Ex. C2, Holder ¶ 168 n.263. Defendants did not perform such an analysis in connection with the transaction. ¶¶ 270-80. Defendants’ claims to the contrary (Mot. at 15) are belied by the documentary evidence. Indeed, when specifically asked to identify all analyses performed at the time of the deal, Defendants could point to only one document analyzing only eight of the sixteen companies transferred to Seneca (and *none* of the public companies, which Defendants’ knew were substantially impaired). ¶¶ 55, 66-67, 139, 271, 273.

The absence of any documentation of an OTTI analysis is telling. As detailed above, in view of the substantial declines in the value of the E-Service Assets, Andersen had informed Omnicom that it would require a documented OTTI analysis in the first quarter of 2001. ¶¶ 61, 252. Omnicom avoided this requirement through the Seneca Transaction. Indeed, Andersen’s Benedik testified that once the Seneca Transaction was agreed to, this issue became a “moot point” because he believed (incorrectly) that Pegasus had made a substantial cash investment in Seneca. ¶¶ 277-79; LP Ex. 55, Benedik Tr. 230-33 (“Q. So your understanding of the deal is based on the idea that there was a good-faith, arms-length negotiation between independent parties and that both of those parties took on risks and rewards in connection with the transaction? A. In general, yes.”) He further testified that Andersen conducted no procedures in

this regard, and none are documented in their workpapers. ¶ 275.¹⁰

Critically, however, Andersen did require audit evidence that the Seneca Transaction was an arms-length transaction which could support the value Omnicom was attributing to its preferred stock. ¶¶ 368. Defendants provided this “evidence” – they gave Andersen, *inter alia*, a term sheet indicating the money would be paid to Seneca (*supra* at p. 11), as well as specific representations that the money *had actually been paid to Seneca* (*supra* at 11). ¶¶ 369, 374. Andersen specifically relied on these representations in signing off on the Seneca deal. ¶ 377. In truth, this money was never paid. *See, e.g.*, Def. 56.1 stmt. ¶ 34; ¶¶ 290-300.

KPMG also relied on similar representations. ¶¶ 600-61. KPMG’s Iannaconi testified that if the money was not legally committed, then “we would be talking about a different transaction” than the one they reviewed. LP Ex. 81, Iannaconi Tr. 344. Defendants’ expert, Horvath, confirmed that no such legal commitment existed (*supra* at p. 11), as did Bursky of Pegasus (*supra* at p. 10).

In addition, both sets of auditors specifically relied on the fact that Omnicom provided a third-party valuation of the preferred stock at year-end 2001. ¶¶ 369, 660. As detailed above, Defendants purposefully manipulated this valuation through the LiveWeb transaction and misrepresentations to Murray Devine. (*See* discussion *supra* at p. 16.) In view of these facts, a jury could easily conclude that Defendants acted with scienter.

¹⁰ This testimony undermines Defendants’ accounting expert, who claims that an OTTI analysis would have been necessary if Omnicom actually recorded the deal under FAS 140 ¶ 10 (as they now claim). ¶ 280. Further, it renders Defendants’ current claims that KPMG reviewed Andersen’s determinations regarding OTTI nonsensical (*see* Mot. at 15) – it is impossible that KPMG reviewed work that was never performed in the first place. *See* LP Ex. 60, Devor Rebuttal ¶¶ 45-48. All of these facts raise triable issues for a jury.

3. Even if FAS 140 ¶ 10 was an Appropriate GAAP Provision to Apply to This Deal, Defendants Improperly Avoided Reporting a Material Loss

As Mr. Devor explains, even if FAS 140 ¶ 10 could have applied to this transaction, that provision required Defendants to allocate their original cost basis in the E-Service Assets between the Seneca preferred stock and the common stock sold to Pegasus. LP Ex. 60, Devor Rebuttal ¶¶ 20-28. Defendants never took this critical step, which necessarily would have resulted in a material loss on the transaction. LP Ex. 60, Devor Rebuttal ¶¶ 25, 28. The only justification for this omission that can be inferred from the evidence is that Omnicom convinced Andersen that the “fair value” of the preferred was equal to Omnicom’s original cost basis of the transferred assets. *See* LP Ex. 88, at AA 0016733 (“We note that Pegasus and Omnicom agreed the fair value of the preferred stock received in exchange by Omnicom was equal to Omnicom’s basis in the assets contributed.”). As detailed above, however, Andersen’s conclusion was procured by Defendants’ false representations.

4. Regardless of How Defendants Accounted for the Transaction, Omnicom was Required to Record Seneca’s Losses After the Deal

Finally, a jury could conclude that Omnicom’s post-Seneca financial statements were materially false and misleading because Omnicom controlled Seneca, and thus should have recorded Seneca’s post-transaction losses through consolidation. *See* LP Ex. 25, Devor ¶¶ 171-78. Defendants argue that there could be no consolidation (or equity accounting based on “significant influence”) because Omnicom did not own any of Seneca’s common stock and had only “protective minority rights.” *See* Mot. at 21-23. Contrary to Defendants’ claims, however, their own accounting expert conceded during his deposition that there may be circumstances when consolidation or equity accounting is appropriate in the absence of any common stock holdings. *See* LP Ex. 100, Holder Tr. 308-10 (despite the lack of voting rights, if “all of the

indices of control and substance were those of Omnicom... [and] Omnicom had financial control over Seneca as envisioned by the professional standards, then... [Omnicom] would consolidate”). And regardless, if the jury determines that the Seneca Transaction was a fraud, then this argument rings hollow. Indeed, Holder conceded that if Tierney’s representations regarding Omnicom’s control over Seneca are true, then Omnicom was required to consolidate Seneca, regardless of the capital structure Defendants concocted. *See* LP Ex. 100, Holder Tr. *Id.* at 317 (“If everything in [Tierney Complaint]... was true... the level of control being described would be sufficient to require Omnicom to consolidate Seneca.”). In any event, as Devor’s rebuttal report makes clear, Omnicom *did* have substantive participating rights. LP Ex. 60, Devor Rebuttal ¶¶ 62-70. At best, these issues are for a jury to decide.

B. The Manner in Which Omnicom Accounted for the Seneca Transaction is Itself a Material Issue of Fact

Contrary to their current arguments, Defendants initially represented to this Court that they accounted for the Seneca Transaction as a “sale” pursuant to FAS 140 ¶ 11. ¶¶ 354, 365. Similarly, they specifically *denied* that the Seneca preferred stock was a beneficial interest in the E-Service Assets, as they now claim. ¶ 353. If a jury were to accept these prior representations as true, then it could easily conclude that Defendants committed fraud. Indeed, Defendants’ shifting story, in and of itself, creates triable issues of fact regarding their scienter.¹¹

¹¹ Even aside from their own representations to the Court, there is abundant evidence in the record that Defendants actually accounted for the deal as a sale, purportedly at fair value. For example, Omnicom’s contemporaneous journal entries show it recorded the deal at “fair value” (¶ 361), and Wren admitted to the *WSJ* that they applied “fair value” (¶ 356). Andersen’s Benedik similarly testified that he viewed this transaction as a “sale/transfer,” not as a “contribution.” *See* LP Ex. 60, Devor Rebuttal ¶¶ 11-18 (quoting relevant portions of Benedik’s testimony). Indeed, Benedik required Omnicom to get “true sale” opinions from their lawyers (which were obtained by fraud, *see* discussion *supra* at pp. 14-15), and he specifically testified that the Seneca preferred stock was *not* a beneficial interest, as Defendants now claim. *See* LP Ex. 55, Benedik Tr. 214 (all requirements of ¶ 9 were satisfied, *i.e.*, Omnicom received consideration other than beneficial interest in assets sold); *id.* at 258 (Omnicom no longer had

Further, if the jury agrees with what Defendants have previously argued – that Omnicom accounted for the deal as a sale under FAS 140 ¶ 11 – then it could easily conclude that Defendants are liable for fraud. As Defendants’ own expert recognizes, under ¶ 11 Defendants would have been required to record the deal based on the fair value of the assets surrendered. LP Ex. 100, Holder Tr. 99-120, 226. However, Defendants ignored the underlying assets’ “fair value,” which is defined in FAS 140 ¶ 68 as “market value” (¶ 48), and in so doing avoided a loss of approximately \$190 million. *See* LP Ex. 25, Devor ¶¶ 101, 115; LP Ex. 60, Devor Rebuttal ¶ 34.

Defendants’ only response is that the preferred stock’s “fair value” was supported by an arms-length negotiation with Pegasus. (Mot. at 19-20). As discussed above, however, this argument is unavailing and, at best, raises a jury question. (*See* discussion *supra* at pp. 10-12).¹²

C. The Evidence of Additional Fraudulent Transactions Orchestrated By Defendants Further Supports a Finding of Scienter

In addition to Seneca, Lead Plaintiff has developed substantial evidence of other transactions involving the E-Service Assets that manipulated Omnicom’s financial results. As Devor explains, these transactions also rendered Omnicom’s financial statements materially false and misleading. *See* LP Ex. 25, Devor ¶¶ 39, 53, 62 (Chaucer and parking transactions rendered Omnicom’s year-end 2000 and first quarter 2001 results materially false and misleading); Devor ¶¶ 246, 259-60 (LiveWeb rendered year-end 2001 results materially false and misleading).

“any interest” in transferred assets); *id.* at 189-90 (deal was true sale and Omnicom had “no remaining interest in [the] individual assets”).

¹² Defendants do not seek summary judgment on the grounds that the manipulations at issue were immaterial. Nor could they. A misstatement may be “qualitatively material” when “the misstatement hides a failure to meet analysts’ consensus expectations” for a given period or “the misstatement masks a change in earnings or other trends.” *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (S.D.N.Y. 2000). Devor opines that each of the transactions described herein (with the exception of the Agency Warrant transactions), if properly recorded, would have caused Omnicom to miss analyst expectations. LP Ex. 25, Devor ¶¶ 33, 62, 72, 75, 259-60.

Despite the fact that these transactions have been the subject of depositions, motion practice, responses to interrogatories, requests for admission and expert reports from both sides, Defendants say nothing about them in their motion. Accordingly, these claims must be allowed to go forward. To the extent Defendants attempt to address this evidence for the first time in their reply, that gambit should be rejected. In any event, there can be little doubt that this evidence is admissible to prove Lead Plaintiff's claims on the above-referenced false statements, which were specifically pled in the Complaint. *See Solutia, Inc. v. FMC Corp.*, 456 F. Supp. 2d at 449 (J. Pauley) (plaintiff allowed to use evidence adduced in discovery even where evidence related to unpled misrepresentations and omissions); *cf. Tellabs*, 127 S.Ct. at 2509 (courts should consider evidence of scienter in the aggregate).¹³

D. Defendants' Lies to their Auditors and the SEC Are Additional Compelling Evidence of Scienter

As detailed above, the evidence shows that Defendants specifically lied to their auditors and the SEC regarding the key facts of the Seneca deal and their handling of the E-Service Assets. (*See* discussion *supra* at pp. 8-16). This evidence amply supports a finding of scienter sufficient to defeat summary judgment. *See, e.g., SEC v. Lucent*, 363 F. Supp. 2d 708, 717 (D.N.J. 2005) (misstatements and omissions to company's accountant give rise to inference of scienter); *SEC v. Gold*, 2006 WL 3462103, *4 (E.D.N.Y. Aug. 18, 2006) (providing false documents to auditors raised strong inference of scienter).

E. Defendants Had Ample Motive to Commit Fraud

In view of the substantial evidence of Defendants' scienter, there is no need for Lead

¹³ On a related point, Defendants' suggestion that Lead Plaintiff has abandoned its claim regarding Defendants' failure to write-down E-Service Assets (Mot. at 13) is wrong. The evidence shows that Omnicom fraudulently avoided write-downs of Answerthink and Netcentives at year-end 2000. (*See* discussion *supra* at p. 17). In addition, Omnicom fraudulently avoided recording operating losses associated with Organic in this period. (*See* discussion *supra* at pp. 19-20).

Plaintiff to prove motive at trial. *See AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 221 (2d Cir. 2000) (given direct evidence of participation in fraudulent activity, district court was wrongly concerned about absence of motive evidence); *SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 382 (S.D.N.Y. 2006) (plaintiff “is not required to prove scienter at trial through evidence of motive”). *See also Tellabs*, 127 S.Ct. at 2511 (“[w]hile it is true that motive can be a relevant consideration. . . the absence of a motive allegation is not fatal”). Lead Plaintiff will do so, however, because significant evidence of motive exists. For example, the evidence shows that Omnicom’s stock traded at a premium based on its consistent ability to meet or exceed Wall Street estimates, and thus Defendants had a significant professional and personal interest in keeping that stock price high. ¶ 649. Indeed, Defendants had enormous wealth tied up in Omnicom securities, and they were entitled to massive incentives if Omnicom’s stock continued to grow in value. ¶ 688-99. While these factors may not be sufficient in and of themselves to overcome a motion to dismiss at the pleading stage, they are certainly admissible at trial to prove motive and weigh against summary judgment here. *See, e.g., Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1064 (9th Cir. 2000) (evidence of motive to maintain ability to raise financing, along with evidence of reckless disregard of truth, precluded summary judgment); *In re Phar-Mor, Inc. Sec. Litig.*, 900 F. Supp. 784, 786-87 (W.D. Pa. 1995) (defendants’ alleged motives to preserve their jobs, salaries were for jury to decide).¹⁴

¹⁴ The cases cited by Defendants in this regard (Mem. at 10) are inapposite. In *Sedaghatpour v. Doubleclick Inc.*, 213 F. Supp. 2d 367 (S.D.N.Y. 2002), there was no evidence whatsoever of any intent to deceive; indeed, the facts showed that defendants told plaintiff the truth regarding the exercisability of unvested stock options in the event of his dismissal from Doubleclick. Similarly, in *In re Northern Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446 (S.D.N.Y. 2000), there was no “circumstantial evidence of conscious misbehavior or recklessness,” no evidence of a material falsehood, evidence that defendants had, in fact, released negative information, and defendants’ annual compensation was irrelevant because only two quarterly statements were involved. The rest of Defendants’ cases deal solely with whether motive pleadings should be

II. A REASONABLE JURY WOULD HAVE NO DIFFICULTY FINDING A CAUSAL LINK BETWEEN DEFENDANTS' FRAUD AND LOSSES SUFFERED BY THE CLASS

“Loss causation is causation in the traditional ‘proximate cause’ sense – the allegedly unlawful conduct caused the economic harm.” *AUSA*, 206 F.3d at 209. “A misstatement or omission is the ‘proximate cause’ of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged...” *Lentell v. Merrill Lynch & Co. Inc.*, 396 F.3d 161, 173 (2d Cir. 2005) (emphasis in original). Here, there is no dispute that the corrective disclosures identified by Lead Plaintiff’s expert are within the zone of risk implicated by Defendants’ misstatements. The dispute is whether a jury could conclude that (i) new information regarding Omnicom’s handling of its E-Service Assets came into the market on June 12, 2002, and (ii) whether those disclosures relate to the alleged fraud. *See In re Bristol-Myers Squibb Sec. Lit.*, 2005 WL 2007004 at *22 (D.N.J. Aug 17, 2005) (denying loss causation argument raised at summary judgment because the alleged corrective disclosure “relates to the alleged fraud”). There is more than ample evidence in the record to support a jury finding in Lead Plaintiff’s favor on both of these issues.

A. Defendants Do Not Challenge Loss Causation With Respect to the Corrective Disclosures on June 6, 7, 13, 14, 24 or 25

Lead Plaintiff’s expert identified corrective disclosures on June 6, 7, 13, 14, 24, and 25, 2002, and explained why those disclosures were within the “zone of risk” of Defendants’ misstatements. *See* LP Ex. 125, Hakala ¶¶ 70-71, 78-84. Despite the fact that these issues have been the subject of interrogatories, requests for admission, deposition testimony, motion practice and both Parties’ expert reports, Defendants do not dispute that these drops were proximately

dismissed prior to discovery in the absence of other factual allegations giving rise to a strong inference of scienter and are thus inappropriate. *See Kalnit v. Eitchler*, 264 F.3d 131 (2d Cir. 2001), *Acito v. IMCERA Group, Inc.*, 47 F.3d 47 (2d Cir. 1995), *In re Alpha Pharma Inc. Sec. Litig.*, 372 F.3d 137 (3d Cir. 2004); *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

caused by the disclosure of the instant fraud. Summary judgment must therefore be denied.

**B. Defendants' Arguments Regarding the June 12, 2002
Disclosures Raise Triable Issues of Fact**

There is no dispute that Omnicom's stock traded in an efficient market and, thus, only new information could have caused the declines in Omnicom's stock price on the relevant dates. *See In re Initial Public Offerings Sec. Litig*, 383 F. Supp. 2d 566, 579 (S.D.N.Y. 2005). The evidence shows that on June 12, 2002, the only new information revealed to the market was: (1) Omnicom had orchestrated the Seneca Transaction to avoid required write-downs associated with its E-Service Assets; (2) there was no "fair value" to support the value of these investments; (3) Omnicom intended to unwind Seneca by buying back Agency and Organic; and (4) a confirmation by Omnicom that Callander had resigned because of Omnicom's handling of its soured internet investments. *Supra* at p. 22. Based on these disclosures, Omnicom's stock price plummeted from \$77.56 on June 11, 2002, to \$54.62 on June 13, 2002. *Supra* at p. 22. Analysts' reports confirm that the June 12, 2002 disclosures marked the first time that the market understood that the Seneca Transaction was financial engineering to avoid a write-off. ¶¶ 635-42. This revealed that Omnicom had not achieved the past financial success it had reported and created a huge credibility problem for Omnicom's management. ¶¶ 632, 645-50. Even Omnicom's board acknowledged this problem in board minutes on June 16, 2002. LP Ex. 211, at OMC 0043646.

Despite these facts, Defendants claim Lead Plaintiff cannot establish loss causation with respect to the June 12th disclosures based on three interrelated arguments. At best, Defendants' arguments do nothing more than raise triable issues of fact.

**1. Substantial Evidence Demonstrates that the Drops in June 2002
were "Fraud-Related"**

Defendants argue that Lead Plaintiff's expert failed to separate "fraud-related losses"

from “nonfraud-related losses.” Mot. at 26. First, they argue that information in The *WSJ* article unrelated to the E-Service Assets – specifically information related to Omnicom’s earn-outs and organic growth – may have caused some portion of the loss on June 12th. Mot. at 25. However, as Dr. Hakala specifically explained, all of the relevant information regarding organic growth and earn-outs was already in the market well before the publication of the *WSJ* article. LP Ex. 125, Hakala ¶ 76 & n.26. Consequently, this information could not have caused any portion of investors’ losses. Significantly, Defendants’ expert agrees with Dr. Hakala on this point – he specifically opined that the earn-out and organic growth information was not new information, and thus did not cause the stock price declines on June 12. LP Ex. 123, Lehn Tr. 119. Moreover, Defendants themselves argued this point – and won – on their motion to dismiss. *See* Defs’ Mot. to Dismiss at 7-8. In view of these facts, Defendants arguments in this regard are ill-founded.¹⁵

Second, Defendants say Dr. Hakala failed to account for the role of “post -Enron skittishness” in the stock price decline following these disclosures. Mot. at 25. The notion that this drop could be traced – as a matter of law – solely to market irrationality is specious. When the market was informed that Omnicom was linked to improper financial engineering, it quite rationally reevaluated Omnicom and the credibility of Omnicom’s management and formed a new judgment about the value of Omnicom’s stock. LP Ex. 125, Hakala ¶ 11. The jury could easily conclude that the resulting losses were a direct result of the instant fraud. *See In re Initial Public Offering Sec. Litig.*, 399 F. Supp. 2d 298, 307 (S.D.N.Y. 2005) (“One risk is that the

¹⁵ Defendants argue that Lead Plaintiff’s allegations in the Complaint somehow conceded that disclosures regarding organic growth and earn-outs caused some portion of the drop on June 12th. (Mot. at 25). Not so. First, these allegations were dismissed by the Court. Second, Defendants’ own expert agrees that this information did not cause any part of the price drop, and this conclusion enjoys substantial support in the analyst reports and news articles that followed the June 12th article. ¶¶ 629, 637.

market could simply discover that the earnings estimates had been tainted by fraud, and that confidence in the securities would diminish, causing their prices to fall.”).

Defendants misconstrue the cases they cite on this point (Mot. at 25). In particular, Defendants’ citation of *Gordon Partners v. Blumenthal*, 2007 WL 1438753 (S.D.N.Y. May 16, 2007) is completely misleading. The plaintiffs in that case submitted *no evidence whatsoever* on loss causation in opposition to the motion for summary judgment – neither an event study nor any other evidence. *Id.* at *2. That is obviously not the case here.¹⁶

Defendants also mis-cite *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), for the proposition that if plaintiffs cannot distinguish the stock price effects of the alleged fraud from other “confounding factors,” loss causation is not proven and Defendants are entitled to judgment as a matter of law. *Dura* says no such thing; indeed, it provides little, if any, guidance on what proof plaintiffs must offer to establish that their losses were caused by the fraud. It is not Lead Plaintiff’s burden on this motion to show that the entire relative price drop on June 12 was due to the fraud. Rather, it is Defendants’ burden to prove that, as a matter of undisputed fact, *none* of the price drop could have resulted from the fraud. *See In re Motorola Sec. Litig.*, 2007 WL 487738 at *40 (N.D. Ill. Feb. 8, 2007) (explaining that at summary judgment “Lead Plaintiff does not...bear the burden of showing that the decline in...share price...was *not* caused by factors other than the [corrective disclosures at issue]...nor must Lead Plaintiff at this stage ‘quantify’ the part of the decline that resulted from [the corrective disclosures at issue]...Lead Plaintiff can survive summary judgment by presenting enough evidence from which a reasonable

¹⁶ Similarly in *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007), and *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005), the courts granted motions to dismiss because the corrective disclosures said *nothing whatsoever* about the alleged fraudulent practices. Moreover, as the Court noted in *Lattanzio*, both cases involved fraudulent statements that were accompanied by other, true information concerning the same subjects. 476 F.3d at 158.

jury could conclude that the [corrective disclosure at issue], *at least in part*, caused the decline”) (emphasis added). Defendants clearly have not satisfied that daunting burden here.

2. The June 12, 2002 Disclosures Constituted Corrective Disclosures of the Instant Fraud

Defendants next claim that nothing in The *WSJ* article revealed to the market the falsity of Omnicom’s prior statements. Mot. at 27-29. At bottom, they contend that because the article did not set forth the exact details of the instant fraud or a point-by-point refutation of Defendants’ previous statements, they are entitled to summary judgment. Mot. at 27. This ridiculously narrow view of loss causation has been widely rejected by the courts.

It is now well-settled that “[a] disclosing event need not disclose every bit of a fraudulent scheme, including the fact of the scheme itself, to remove price inflation from the market. Otherwise, no scheme could be fully ‘disclosed’ until the matter is litigated....” *In re Initial Public Offering Securities Litigation*, 383 F. Supp. 2d 566, 580 (S.D.N.Y. 2005).¹⁷ A jury could easily find that the June 12th disclosures first informed the investing public about Defendants’ *improper* handling of, and disclosures about, the E-Service Assets, as detailed above. There is no basis for summary judgment in this regard. *Cf. Solutia*, 456 F. Supp. 2d at 442 (summary judgment not appropriate where issue is scope of curative disclosures).

3. The June 12th Disclosures Revealed New Facts to the Market

Defendants finally argue that none of the information in The *WSJ* article concerning Omnicom’s handling of its soured internet investments was “new” and therefore it cannot be a

¹⁷ See also *Rothman v. Gregor*, 220 F.3d 81 (2d Cir. 2000); *Motorola*, 2007 WL 487738 at *24-48; *In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d 266, 296-97 (S.D.N.Y. 2006); *Wagner v. Barrick Gold Corp.*, 2006 WL 268753, at *4 (S.D.N.Y. Jan. 31, 2006); *In re Bradley Pharmaceuticals, Inc. Sec. Litig.*, 421 F. Supp. 2d 822, 827-28 (D.N.J.,2006); *In re ICG Comm., Inc. Sec. Litig.*, 2006 WL 416622, at *10 (D.Colo. Feb. 7, 2006); *In re Retek Inc. Sec. Litig.*, 2005 WL 3059566, at *4 (D.Minn. Oct. 21, 2005) (all rejecting arguments that corrective disclosures must exactly mirror alleged misstatements or omissions).

“corrective disclosure.” Mot. at 29. Defendants point to a series of previous articles relating to Seneca and claim that those articles constituted earlier disclosures of the issues described above. However, none of those articles discusses the fact that Omnicom orchestrated Seneca to avoid write-offs – a fact admitted by Wren in The *WSJ* article when he stated, “Seneca was smart because instead of just walking away . . . and taking a write-off” they did the Seneca deal instead. LP Ex. 3, at 4. None of the articles discusses the fact that Callander resigned because of Omnicom’s “handling of its soured internet investments” – a fact admitted by Omnicom on its June 12th conference call. ¶¶ 626-27. And none of the articles indicates that Omnicom intended to buy Seneca’s two largest assets back from Seneca and, thus, unwind the Seneca Transaction – a fact first revealed in The *WSJ* article.¹⁸ A jury could easily conclude that it was this new information that caused the dramatic decline in Omnicom’s stock on June 12th. Cf. *Ganino*, 228 F.3d at 167 (“truth-on-the-market defense is intensely fact-specific”); *In re Columbia Sec. Litig.* 155 F.R.D. 466, 482 (S.D.N.Y. 1994) (burden of proving truth-on-the-market defense is “extremely difficult, perhaps impossible to meet at the summary judgment stage”).

Defendants claim that the market had all the information necessary to determine that the E-Service Assets were impaired, and that all one had to do was “subtract the Public Companies’ value from \$280 million.” Mot. at 31. This is absurd. Omnicom never disclosed its cost basis in the public companies. Nor did it disclose which private company investments were sold to Seneca, or the cost basis of those investments. It would have been impossible for investors to

¹⁸ The May 2002 *Fintellect* article cited in Mot. at 30 is particularly telling in this regard. The article does not suggest that the Seneca Transaction was improper, and it contains several omissions and misrepresentations, including that Omnicom “was able to conclude that its ongoing investment in Seneca was sufficiently robust to avoid the need to make any provision for permanent diminution in value,” and that Omnicom had disengaged from the management of the Seneca assets. Def. Ex. R4. It also incorrectly implies that Pegasus had actually invested in Seneca and that it was taking an active role in managing Seneca. *Id.* Moreover, this article makes clear that the market always understood the Seneca transaction to be a “sale.” *Id.*

simply “do the math” and figure out these valuation issues, much less that the Seneca Transaction was the result of improper financial engineering. This case therefore does not bear the slightest resemblance to *In re Merck & Co. Sec. Litig.*, 432 F.3d 261 (3d Cir. 2005) (Mot. at 32) (only allegedly undisclosed fact was revenue figure that could be determined by simply adding up other publicly available numbers).

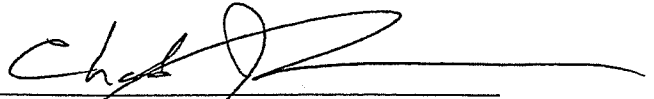
Defendants also argue that the reasons for Callander’s resignation were previously disclosed in a June 10, 2002 *WSJ* article reporting that he had expressed concern about the creation of Seneca. Mot. at 31. As Dr. Hakala explains, however, this article actually reassured the market because, despite prior rumors it did not state – or even intimate – that Callander resigned because of accounting improprieties. *See* LP Ex. 125, Hakala ¶ 72. It was not until the June 12th article made this clear – and Omnicom confirmed it during a conference call with analysts – that the market reacted, driving down Omnicom’s stock by 30%. *See* LP Ex. 125, *Id.* ¶ 73. In any event, this is clearly a debate for the jury, not a basis for summary judgment.

Finally, Defendants claim that the disclosure of Omnicom’s intent to buy back Agency and Organic was “not material.” Mot. at 31. But a jury could easily find that this disclosure revealed that Seneca was nothing more than a ploy, which Omnicom now planned to unwind. LP Ex. 125, Hakala ¶73. In fact, this is exactly what happened and, as the documents show, this was Omnicom’s plan from the outset. ¶¶ 339, 343. Defendants’ reference to a single analyst who may disagree with this assessment does nothing to justify taking these issues away from the jury.

CONCLUSION

For all the foregoing reasons, and in view of the disputed issues of fact and the evidence submitted herewith, the Court should deny Defendants’ motion for summary judgment.

By: _____



John P. Coffey (JC-3832)

J. Erik Sandstedt (JS-9148)

Chad Johnson (CJ-3395)

Salvatore J. Graziano (SG-6854)

Wallace A. Showman (WS-0881)

David R. Hassel (DH-0113)

1285 Avenue of the Americas

New York, NY 10019

(212) 554-1400

*Lead Counsel for Lead Plaintiff
and the Certified Class*