

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re:

LEHMAN BROTHERS SECURITIES AND  
ERISA LITIGATION

Civil Action No. 09-MD-2017 (LAK)

This document applies to:

*In re Lehman Brothers Mortgage-Backed Securities  
Litigation, No. 08-CV-6762*

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**DEFENDANT THE MCGRAW-HILL COMPANIES, INC.'S REPLY  
MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION  
TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT**

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The McGraw-Hill Companies, Inc. (“S&P”) respectfully submits this reply brief in support of its motion to dismiss the claims asserted against it in the Amended Complaint (“AC”).<sup>1</sup>

### **PRELIMINARY STATEMENT**

The unprecedented nature of Plaintiffs’ effort to treat credit rating agencies as “underwriters” and “sellers” under the Securities Act of 1933 (the “1933 Act”) is made abundantly clear by Plaintiffs’ Opposition Brief (“Pls. Br.”). Plaintiffs fail to cite even *one* case in which any entity that performed activities such as S&P is alleged to have performed here was determined to be an “underwriter” or “seller” under the 1933 Act. In fact, for all of Plaintiffs’ repeated references in the AC and Pls. Br. to the alleged “structuring” of the securities at issue by the rating agencies, Plaintiffs cite no case – in the more than 70 years since the enactment of 1933 Act – that has ever deemed “structuring,” or anything like it, sufficient to trigger potential liability under the 1933 Act. Nor do Plaintiffs cite any case in which “underwriter” liability has been imposed on an entity, such as S&P, that neither purchased, sold or distributed securities, nor was named to investors as endorsing the truth of the statements made in the registration statement. Without any legal precedent to support their claims, it is clear that what Plaintiffs are really seeking to do in this lawsuit is to amend retroactively the 1933 Act to broaden the categories of persons subject to liability.

For example, in defense of their § 11 claim, Plaintiffs latch onto out-of-context language by the Seventh Circuit in a case decided almost 15 years ago, which has never been applied by any court in the manner Plaintiffs suggest here, to urge the expansion of the term “underwriter” to cover essentially all persons involved in a registered offering. To do so, Plaintiffs must first hurdle the requirement, repeatedly set forth in case law, that an “underwriter” must participate in the *distribution* of securities. Plaintiffs seek to side-step this requirement with a sweepingly overbroad “but for” theory that twists the statute out of recognition. According to Plaintiffs, if an entity performed some activity in the creation of the securities at issue, it was therefore involved in

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<sup>1</sup> This case presents issues similar to those raised in another matter pending before this Court, entitled *Tsereteli, et al v. Residential Asset Securitization Trust 2006 A-8, et al.*, No. 08-CV-10637. The positions of Plaintiffs in these cases on certain issues, however, differ in some respects, *e.g.*, here, unlike in *Tsereteli*, Plaintiffs explicitly disavow any claim that S&P is liable as an expert.

the chain of events leading to the security's eventual "distribution" and thus, an "underwriter." Such a theory, if accepted, would not only improperly convert the rating agencies here into underwriters, but it would permit potential underwriter liability to be imposed for the first time on lawyers, accountants and other third parties who play significant roles in registered offerings but generally have no role in the distribution process and thus have never been understood to be "underwriters" under § 11. By transforming the term "underwriter" into one of unlimited applicability, Plaintiffs' theory would uproot well-established and, until now, uncontroversial law.<sup>2</sup>

### ARGUMENT

#### **I. PLAINTIFFS' § 11 CLAIM AGAINST S&P SHOULD BE DISMISSED**

Plaintiffs concede, as they must, that pursuant to SEC Rule 436(g), S&P's ratings are absolutely immune from liability under § 11 of the 1933 Act. (Pls. Br. at 9; *see also* S&P Op. Br. at 6-8). Attempting to sidestep this explicit bar, Plaintiffs claim that they are not suing S&P on the basis of its ratings, but rather as an "underwriter" under § 11(a)(5). Plaintiffs' claim fails for two reasons: 1) Plaintiffs § 11 claims are precluded by the consent requirements of § 11(a)(4); and 2) the activities S&P allegedly performed here do not as a matter of law constitute "underwriting."

##### **A. The Consent Requirements of § 11(a)(4) Preclude Plaintiffs' Claim**

Based on the activities Plaintiffs allege S&P performed, it is a prerequisite to § 11 liability that S&P have been named to investors as having prepared or certified the registration statement and consented to being so named. *See* S&P's Opening Brief ("S&P Op. Br.") at 8-11. Plaintiffs simply decline to reach this argument, asserting that they are not suing S&P as an expert under § 11(a)(4). (Pls. Br. at 9 n.4). Plaintiffs miss the point; they cannot simply bypass the consent requirements of § 11 by characterizing S&P's conduct as "underwriting." The types of activities S&P allegedly performed here, *i.e.*, providing rating opinions, drafting documents and advising on aspects of the transaction,<sup>3</sup> are activities that courts evaluate under the "expert" provision of

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<sup>2</sup> In addition to the arguments set forth herein, S&P joins in the arguments made in the reply briefs filed by the Individual Defendants and Defendant Moody's Investors Service, Inc.

<sup>3</sup> While S&P disputes the factual allegations of the AC, it has assumed as true, for purposes of this motion, Plaintiffs'

Footnote continued on next page.

§ 11(a)(4). *See, e.g., In re Refco, Inc. Sec. Litig.*, 2008 WL 3843343, at \*3 n.5 (S.D.N.Y. Aug. 14, 2008) (Lynch, J.) (noting that § 11 claims against “attorneys who draft the documents on which the public rely” are generally brought, and evaluated, under § 11(a)(4), not § 11(a)(5)).<sup>4</sup> Thus, to state a viable § 11 claim, Plaintiffs were required to allege that S&P was named as having prepared some allegedly misleading portion of the registration statement and consented to being so named. Plaintiffs do not — and cannot — make such an allegation. Not only is there no statement in the Registration Statements that S&P prepared or certified any portion of them, but § 7 of the 1933 Act requires that where an expert is so named, the expert’s *written consent* “shall be filed with the registration statement.” 15 U.S.C. § 77g(a).<sup>5</sup> No consent by S&P was ever filed and Plaintiffs do not claim it was. Accordingly, Plaintiffs’ § 11 claim against S&P must fail.

**B. S&P Is Not An “Underwriter” Of The Securities It Rates**

Beyond Plaintiffs’ failure to meet the consent requirements of § 11, their claim also fails because, as a matter of law, S&P is simply not an “underwriter” of the securities it rates. Plaintiffs attempt to justify their characterization of S&P as an “underwriter” by repeatedly asserting that their allegations are “facially plausible.” (Pls. Br. at 16-18). By so arguing, Plaintiffs blithely ignore that even taking all of their allegations as true the activities that S&P allegedly engaged in here simply do not fit, as a matter of law, within the long-standing definition of an “underwriter” under the 1933 Act. Plaintiffs assert – without citation to a single legal authority – that the Rating

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allegations regarding S&P’s role in the offerings at issue. As demonstrated here and in S&P’s Opening Brief, however, such allegations do not – as a matter of law – trigger liability under the 1933 Act.

<sup>4</sup> *See also McFarland v. Memorex Corp.*, 493 F. Supp. 631, 643 (C.D. Cal. 1980) (evaluating § 11(a)(4) claim against defendant allegedly involved in the “preparation and review” of the registration statement); *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 208-10 (S.D.N.Y. 2003) (Lynch, J.) (evaluating § 11(a)(4) claim against defendant alleged to have reviewed financial information and issued fairness opinions included in registration statement); *Tirone v. Calderone-Curran Ranches, Inc.*, Civ. 76-16, 1978 WL 1095, at \*8 (W.D.N.Y. June 14, 1978) (evaluating § 11(a)(4) claim brought against lawyer that “passed on all legal matters relative to the [offering documents]”).

<sup>5</sup> The purpose of this requirement is to protect experts that have not authorized issuers to name them as having prepared or certified the registration statement. *See* H.R. Rep. No. 73-152, at 26 (1933) (“The Senate accepted the . . . House bill . . . with the modification that, to protect an unauthorized use of the expert’s name, written consent to the use of his name . . . should be filed [with] . . . the registration statement.”).

Agencies “were clearly engaged in activities traditionally associated with underwriters.”<sup>6</sup> (Pls. Br. at 11). The opposite is in fact true: not only are the Rating Agencies’ alleged activities far removed from “traditional” underwriting functions, it would require a radical and unwarranted expansion of the settled terms of § 11 to force S&P into the definition of an “underwriter.”

Significantly, not one of the cases cited by Plaintiffs in support of their “underwriter” theory held that a entity that allegedly “structured” the transaction, or played any similar role in the *creation* of the securities, was an “underwriter” of the offering or subject to liability under § 11. Indeed, in all but one of the cases cited by Plaintiffs in which an entity was determined to be an “underwriter,” the entity had in fact purchased, sold or distributed the securities at issue.<sup>7</sup> The remaining case, *i.e.*, the case on which Plaintiffs’ entire theory thus rests, is *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392 (7th Cir. 1995). (Pls. Br. at 13). Yet, the entity at issue in

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<sup>6</sup> Plaintiffs summarily state that the activities S&P allegedly performed here in ¶¶ 15, 33-34, 36, 172-78 constitute “traditional underwriting functions.” (Pls. Br. at 16). Yet, these alleged activities in no way relate to the role of “underwriters — a term generally understood to refer to those who undertake actively to sell the securities,” but rather each constitute alleged “behind the scenes” activities unrelated to the distribution of the securities. As such, they are not “underwriting.” *Refco*, 2008 WL 3843343, at \*3 n.5, \*4. See AC ¶ 15 (alleging that S&P rated and structured the Certificates); ¶¶ 33-34 (alleging that S&P participated in the drafting of documents, structuring of securities and provided ratings); ¶ 36 (alleging that S&P participated in determining the collateral and credit enhancement needed to achieve a AAA rating); ¶¶ 172-78 (alleging that S&P had a role in the “creating and structuring” of the Certificates).

<sup>7</sup> In several of the opinions cited by Plaintiffs, the court either did not reach the issue or determined that the entities at issuer were not “underwriters,” as none had played a role in the distribution of the securities. See *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 629-30 (S.D.N.Y. 2007) (facts discussed at S&P Op. Br. at 15-16); *Ingenito v. Bermeo Corp.*, 441 F. Supp. 525, 535-36 (S.D.N.Y. 1977) (describing underwriter claim as “a fanciful machination, advanced with frightening nonchalance” where the alleged underwriter merely loaned funds to the issuer and plaintiffs failed to allege that the defendant ever sold or purchased securities “with an eye to public redistribution”); *SEC v. Holschuh*, 694 F.2d 130, 139 n.13 (7th Cir. 1982) (affirming a finding of “participant liability” against an individual deemed to be an “issuer” of the securities, and declining to address the further argument that the individual was also a “controlling person” and an “underwriter”). In the remaining cases, the court determined that the persons or entities at issue were “underwriters” under circumstances where, unlike here, they had purchased, sold or distributed the securities to the public. See *SEC v. Kern*, 425 F.3d 143, 152 (2d Cir. 2005) (entities were “underwriters” where they had “acquired securities . . . with a view to distribution”); *SEC v. Universal Exp., Inc.*, 475 F. Supp. 2d 412, 430, 432 n.13 (S.D.N.Y. 2007) (individual was an underwriter where there was “no dispute that [he] offered and sold millions of shares” of stock); *SEC v. North American Research & Development Corp.*, 280 F. Supp. 106, 118, 126 (S.D.N.Y. 1968), *aff’d in part and vacated in part*, 424 F.2d 63 (2d Cir. 1970) (various defendants held to be “underwriters” where they had purchased, sold and/or participated in the actual distribution of the shares to the public); *SEC v. Chinese Consol. Benev. Ass’n, Inc.*, 120 F.2d 738, 739-41 (2d Cir. 1941) (entity was “underwriter” where it had “solicited the orders, obtained the cash from the purchasers and caused both to be forwarded [to issuer] so as to procure the bonds”); *Special Situations Fund, III, L.P. v. Cocchiola*, 2007 WL 2261557, at \*8-\*9 (D.N.J. Aug. 3, 2007) (deciding on summary judgment that certain defendants that had in fact purchased and sold shares were “underwriters” in case where all defendants had been listed in prospectus “as underwriters who had each agreed to purchase” shares).

*Harden* was not alleged to have had merely a role in the creation of the securities at issue; rather *Harden* “dealt with an entirely different animal,”<sup>8</sup> *i.e.* the “Qualified Independent Underwriter” (“QIU”). To understand *Harden*, it is important to understand the role of a QIU.

A QIU is an entity that, *inter alia*, is legally required (as an “underwriter” would be) to conduct the due diligence on a transaction in situations where the actual underwriter is an affiliate of the issuer, a situation which the NASD and SEC have determined presents a potential conflict of interest. *NASD Manual* (CCH) ¶ 1883, Sch. E, § 3(c)(1) (1994). The QIU “thus performs the same protective function envisioned by the 1933 Congress when it defined [the term underwriter].” *Harden*, 65 F.3d at 1403. To qualify as a QIU, the NASD requires that the entity agree “to undertake the legal responsibilities and liabilities of an underwriter under the Securities Act of 1933, specifically including those inhere in Section 11 thereof.” *NASD Manual*, Sch. E, § 2(o)(7).<sup>9</sup> Moreover, where a QIU is used, this fact must be disclosed to investors in the “underwriting section of the registration statement,” along with “the name of the member acting as qualified independent underwriter, if any, and that such member is assuming the responsibilities of acting as a qualified independent underwriter in pricing the offering and conducting due diligence.” *NASD Manual*, Sch. E, § 4(b). Thus, nothing in *Harden* changes the fact, discussed in S&P’s Opening Brief (pp. 10-18), that it is those entities “identified to the public as endorsing the truth of representations contained [in the registration statement]” that are the subject of § 11.

The Seventh Circuit ultimately concluded that the QIU at issue “would qualify as an underwriter in this case” because “[i]ts role as [a QIU] was ‘necessary to the distribution of [the] securities.’” 65 F.3d at 1401 (citation omitted). Specifically, the Seventh Circuit held:

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<sup>8</sup> *In re Adelpia Communications Corp. Sec. Litig.*, 2007 WL 2615928, at \*8-\*9 (S.D.N.Y. Sept. 10, 2007).

<sup>9</sup> As stated in the *NASD Manual* in effect when *Harden* was decided, both the NASD and SEC agree that “the full responsibilities and liabilities of an underwriter under the [1933 Act] attach to a ‘qualified independent underwriter’ . . . .” *NASD Manual*, Sch. E, § 2(o). Nonetheless, in proposing the requirement that a QIU affirmatively accept the legal responsibilities and liabilities of a § 11 underwriter, the NASD noted: “[The SEC] has directed . . . that the Association should institute steps directed toward amending Schedule E to specifically require, should there be any doubt as to the legal attachment of [§ 11] responsibilities and liabilities, that [QIUs] specifically undertake those responsibilities and liabilities.” *Harden*, 65 F.3d at 1399.

The qualified independent underwriter . . . performs the same protective function envisioned by the 1933 Congress when it defined, in section 2(11), those entities who would be subject to section 11 liability. Indeed, the qualified independent underwriter ‘participates’ in the issues through its voluntary and explicit assumption of the liability usually assumed by the underwriter. That assumption of liability is an important factor in maintaining investor confidence. Accordingly, we hold that Raffensperger was subject to section 11 liability because it acted as Firstmark’s [QIU]. *Id.* at 1403.

Plaintiffs’ exclusive focus on the phrase “necessary to the distribution” in the *Harden* opinion ignores the unique role of the QIU in *Harden*, which was hired as an underwriter, paid as an underwriter, voluntarily and explicitly assumed the liability of an underwriter, performed due diligence as an underwriter would and was publicly presented as an underwriter. *See Harden*, 65 F.3d at 1397-1403. S&P has not done any of those things and Plaintiffs do not allege otherwise.

Moreover, the *Harden* opinion simply does not stand for the proposition Plaintiffs seem to urge here that all entities that performed activities allegedly “necessary” to the creation of the securities are somehow transformed into underwriters. Plaintiffs’ elemental “but for” interpretation of § 11(a)(5) (*i.e.*, but for the rating agencies alleged “collaboration with Lehman to rate the Certificates, Lehman would not have been able to offer the Certificates for sale”); Pls. Br. at 13) would extend the term “underwriter” to every lawyer, accountant, or other third-party professional that could be said to have contributed in some way to the creation (and thus, ultimately the distribution) of the securities. Plaintiffs essentially seek to transform the term “underwriter” – contrary to Judge Lynch’s opinion in *Refco*<sup>10</sup> – into one of “unlimited applicability,” extending it not only to those entities involved in the actual distribution of securities but to every participant in a registered offering. There is simply no basis for using the *Harden* case to expand the 1933 Act in this manner. Indeed, since the opinion was issued in 1995, no court has applied *Harden* to extend underwriter liability to an entity not involved in the purchase, sale or distribution of securities.<sup>11</sup>

With no basis in current law for their claims, it is evident that what Plaintiffs are really

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<sup>10</sup> *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 629 (S.D.N.Y. 2007) (Lynch, J.). *See* S&P Op. Br. at 16.

<sup>11</sup> In fact, courts in this district have recognized that the holding in *Harden* must be limited to the narrow situation presented there. *See Adelpia*, 2007 WL 2615928, at \*8-\*9 (describing *Harden* as “a decision of no moment here because it dealt with an entirely different animal, the ‘qualified independent underwriter’ that accepts § 11 liability per NASD regulations”); *Refco*, 2008 WL 3843343, at \*4 n.6 (quoting *Adelpia*).

asking the Court to do here is not to apply the well-settled terms of the 1933 Act to the facts of this case, but rather to amend retroactively the 1933 Act to broaden the categories of persons subject to liability. But, as the Supreme Court held in *Pinter*, interpreting another provision of the 1933 Act:

‘The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.’ The ascertainment of congressional intent . . . must rest primarily on the language of that section. The broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision ‘more broadly than its language and the statutory scheme reasonably permit. *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (internal citations omitted).

Not only is Plaintiffs’ request inappropriate as a jurisprudential matter, but it could also undermine the stability of the capital markets. Plaintiffs ask this Court to rewrite the 1933 Act so they can seek billions of dollars in strict liability from an entity that had no meaningful way to anticipate such potential exposure -- and thus no meaningful opportunity to protect itself or take steps to minimize that exposure. Leaving aside the fundamental injustice of such a result, Plaintiffs’ theory would not only expose credit rating agencies in this manner but also every lawyer, accountant, or other entity that is involved in securities offerings. The resulting uncertainty would lead to dramatic inefficiencies and costs (both in time and money) in the offering process. Indeed, courts have rejected attempts to expand a cause of action where it would also necessarily expand the well-recognized limits on liability that are relied upon by market participants. *See, e.g., Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008) (refusing to extend §10(b) to “aiders and abettors” and holding that “[t]he practical consequences of [such] an expansion . . . provide[d] a further reason to reject [plaintiff’s liability theory]” as it “would expose a new class of defendants” to the risks of “extensive discovery” and the potential “extort[ion] [of] settlements” which may force these defendants to contract to “protect against these threats, raising the costs of doing business”); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 49-50 (2d Cir. 1991) (refusing to extend liability to a new class of defendants and noting that “[i]t is in the nature of the marketplace that parties take into account the risk of liability under the securities laws . . . when calculating the costs and benefits of entering into a particular transaction.”).

Throughout the long history of the 1933 Act, the key in determining whether a defendant is

an “underwriter” is whether the defendant had a role in *distributing* the securities.<sup>12</sup> *See, e.g., Refco*, 2008 WL 3843343, at \*4 (“[T]he definition of ‘underwriter’ is intended to sweep up all — but only — those who play a role in the distribution of the securities.”).<sup>13</sup> Beyond an expansive and unsupported “but for” theory that S&P was allegedly involved in the *creation* of the securities at issue, Plaintiffs do not provide the Court with any basis, factual or legal, to conclude that S&P had a role in the actual distribution of securities. Plaintiffs’ § 11(a)(5) claim therefore must fail.

## II. S&P IS NOT A “SELLER” UNDER § 12(a)(2)

Plaintiffs concede both that S&P was not a “direct seller” of the Certificates and that S&P had no direct contact with Plaintiffs. (Pls. Br. at 18, 19). Plaintiffs nevertheless claim that S&P was a “solicitation seller” of the Certificates, relying again on a “but for” theory that S&P’s role in allegedly drafting documents and structuring the Certificates was “necessary for the ultimate sale of the Certificates.” (Pls. Br. at 21). Plaintiffs cite no legal authority to support this expansive “solicitation seller” theory and the cases cited in S&P’s Opening Brief (pp. 19-22) preclude it.

Moreover, Plaintiffs’ assertion that a party whose actions were a “substantial factor” in the sale of securities may qualify as a “seller” under § 12(a)(2) is flat wrong. While the Supreme Court’s rejection of the “substantial factor” test in *Pinter*, 486 U.S. at 650, specifically involved a claim under § 12(a)(1), courts in the Second Circuit have repeatedly held that the *Pinter* holding

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<sup>12</sup> Although at one point Plaintiffs appear to dispute that § 11 “liability may only attached to those who are involved in the ‘distribution’ of the subject securities” (Pls. Br. at 12), they later recognize, as they must, that a “role in the distribution” is necessary to the definition of an underwriter (Pls. Br. at 13). In fact, as demonstrated in S&P’s Opening Brief (at pp. 11-18), “[i]t is crucial to the definition of ‘underwriter’ that any underwriter must participate in the distribution of a security.” *McFarland*, 493 F. Supp. at 644. This requirement is also reflected in other provisions of the 1933 Act and the regulations thereunder. For example, § 11(e) limits the liability of underwriters as follows: “[i]n no event shall any underwriter . . . be liable . . . for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public.” 15 U.S.C. § 77k(e). *See also* Preliminary Note to S.E.C. Rule 144, “Persons Deemed Not to be Engaged in a Distribution and Therefore Not Underwriters,” 17 C.F.R. § 230.144 (“An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an ‘underwriter’” and “individual investors who are not professionals in the securities business also may be ‘underwriters’ if they act as links in a chain of transactions through which securities move from an issuer to the public.”).

<sup>13</sup> Plaintiffs attempt to distinguish *Refco* on the grounds that defendants there “‘merely comment[ed] on a draft of a registration statement . . . in which they *took no part in the distribution of the bonds.*’” (Pls. Br. at 13-14). Yet, the emphasized text is what makes this case indistinguishable from *Refco*. It is the defendant’s participation in the distribution process, a fact not alleged here with respect to S&P, which is a prerequisite for imposing underwriter liability. *Refco*, 2008 WL 3843343, at \*4. Allegations that the defendant performed “behind the scenes” activities in the registered offering — as Plaintiffs allege here against S&P and as plaintiffs alleged in *Refco* — are insufficient. *Id.*

applies to § 12(a)(2) as well. *See, e.g., Wilson v. Saintine Exploration and Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989). Indeed, the cases that Plaintiffs cite in support of their argument that the “substantial factor” test is still viable provide no basis for asserting that a different standard applies under §§ 12(a)(1) and 12(a)(2).<sup>14</sup> (Pls. Br. at 19-21). Furthermore, the cases on which Plaintiffs rely do not change the rule outlined in detail in S&P’s Opening Brief that to meet the definition of a “seller,” the defendant must have either passed title or had an active role in soliciting an actual sale. S&P Op. Br. at 19-22; *Shain v. Duff & Phelps Credit Rating Co.*, 915 F. Supp. 575, 581 (S.D.N.Y. 1996) (“[P]ersons are not liable under § 12 . . . unless they directly or personally solicit the buyer.”).<sup>15</sup> Here, Plaintiffs do not allege any contact between themselves — or any other purchaser — and S&P, let alone that S&P successfully solicited any sales or directly controlled solicitation efforts. Plaintiffs § 12 claims against S&P must accordingly be dismissed.

### III. NO “MISSTATEMENTS” ARE ALLEGED REGARDING S&P’S RATINGS

Although Plaintiffs concede that S&P’s ratings themselves are not actionable (Pls. Br. at 9), they nonetheless assert that S&P can be held liable for allegedly omitting certain information about the ratings. Recognizing that an “omission” cannot be actionable absent a legal duty to disclose the information, Plaintiffs claim that S&P did have a duty to disclose because “[w]hen a defendant speaks on a subject, there is a duty to disclose all material information that would bear on the accuracy of the statement.” (Pls. Br. at 36; emphasis added). In so arguing, Plaintiffs ignore the fact that S&P did *not* speak; not one statement in the registration statement (beyond its exempt

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<sup>14</sup> In fact, one of the cases cited by Plaintiffs recognizes that “the language of sections 12[(a)](1) and 12[(a)](2) is identical in meaning.” *Capri v. Murphy*, 856 F.2d 473, 478 (2d Cir. 1988).

<sup>15</sup> In *Capri v. Murphy* (cited at Pls. Br. at 19), the Second Circuit held that two defendants were sellers where all “promotional efforts were done ‘at the behest of [the defendants]’” and no action was taken in relation to the investors “other than that which was contemplated and authorized by defendants.” 856 F.2d 473, 478-79 (2d Cir. 1988). The court thus found that all promotional efforts were “directly attributable” to the defendants. *Id.* In contrast, the court held that another defendant that “‘played a major role’ in setting up the . . . venture” did not qualify as a § 12 “seller.” *Id.* In *In re American Bank Note Holographics, Inc. Sec. Litig.* (cited at Pls. Br. at 20), the court held that a subsidiary that was spun-off in offering at issue and had solicited sales through, *inter alia*, its participation in road shows was a “solicitation seller.” 93 F. Supp. 2d 424, 439 (S.D.N.Y. 2000) (McMahon, J.). Plaintiffs also cite *McMahan & Co. v. Warehouse Entertainment, Inc.*, 859 F. Supp. 743, 755 (S.D.N.Y. 1994), which held that “direct contact” is not necessary “provided that the defendant, *with scienter*, participated in the sale of securities.” (emphasis added). Even if Plaintiffs here had pled participation in an actual sale of securities, Plaintiffs do not come close to pleading “scienter” and in fact, disclaim that the AC contains any allegations “sounding in fraud.” AC ¶ 3.

ratings) is attributable to S&P. Again it must be emphasized that Plaintiffs here are attempting to impose liability on S&P for statements it did not make.

Moreover, no Defendant here had any obligation to disclose in the Registration Statements the information about S&P's ratings that Plaintiffs allege was omitted. In fact, in 1994, in recognition of "the development of a vast market for mortgage and asset backed securities," the SEC considered – and ultimately rejected – proposals to require the disclosure of the "method of compensating" rating agencies, "the extent of the rating organization involvement in the structuring of the security" and "whether issuers should be required to disclose activities that could be viewed as 'ratings shopping.'" <sup>16</sup> SEC Release No. 33-7086, 1994 WL 469347, at \*3, \*9-\*10. The alleged omission of this information thus cannot be actionable.<sup>17</sup>

#### IV. PLAINTIFFS FAIL TO STATE A § 15 CLAIM AGAINST S&P

Plaintiffs have no § 15 claim against S&P. In their brief, Plaintiffs merely recite the allegations of the AC, but in no way provide a basis for concluding that S&P "controlled" the trusts or the Individual Defendants. (S&P Op. Br. at 33-35). Their § 15 claim should be dismissed.

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Respectfully submitted,

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<sup>16</sup> The SEC's public recognition in 1994 of "structuring" and "ratings shopping" practices by some entities also refutes Plaintiffs' allegation that these issues first surfaced in 2008. *See, e.g.*, AC ¶ 17.

<sup>17</sup> Plaintiffs also continue to ignore that certain of the information that they claim was "omitted" from the Offering Documents was indeed well-known in the marketplace. For example, the allegedly "undisclosed conflicts of interest" (Pls. Br. at 29) posed by S&P's business model have long been the subject of public comment. *See, e.g.*, Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, at 40-41 (Jan. 2003) (noting that "[p]otential conflicts of interest have existed in the credit rating business for many years. . ."); Daniel M. Co-vitz & Paul Harrison, *Testing Conflicts of Interest at Bond Ratings Agencies with Market Anticipation: Evidence that Reputation Incentives Dominate* (Dec. 2003) (referring to "well-known conflicts of interest at bond rating agencies").