UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	C.A. No. 02 Civ. 5571 (SAS)

REPLY MEMORANDUM IN FURTHER SUPPORT OF CLASS PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ADMITTING THE CLAIMS OF CLASS MEMBERS ADVISED BY SOUTHEASTERN ASSET MANAGEMENT, INC.

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Class Plaintiffs respectfully submit this Reply Memorandum In Further Support of Class Plaintiffs' Motion for Summary Judgment Admitting the Claims of Class Members Advised by Southeastern Asset Management, Inc. ("SAM").

I. INTRODUCTION

The parties' prior four briefs on these cross-motions have surely provided exhaustive discussion of the proper parameters for rebutting the presumption of reliance—yet Class Plaintiffs and Vivendi still have completely different positions on what those parameters are and how they should be applied to the evidence about SAM's purchases. As it happens, Class Plaintiffs submit that several of the arguments in Vivendi's opposition brief (D.E. 1250) lay bare the error in its approach.

II. ARGUMENT

A. SAM's purchases and decision-making corresponded exactly to Justice Roberts's discussion in *Halliburton II* about how value investors rely on market efficiency and integrity.

The premise of Vivendi's main argument is that an investor's belief that the market has misjudged an investment opportunity or risk means that the investor by that very fact is not relying on the efficiency and integrity of the market price. That is a false equivalence and fallacious conclusion. An investor's belief that the market price is "wrong" (that the market price does not accurately reflect the prospects for the stock's future value) is ***not the same as and does not constitute*** doubt in the investor's mind about the efficiency and integrity of the market (that the market price accurately reflects all market participants' evaluation of all material information in the public domain, unaffected by fraud). Rather, an investor's belief that the market is "wrong" reflects ***that investor's evaluation and judgment*** that the available information, properly assessed, indicates that the price should be, and will probably in the future be, higher (or lower).[1] That is categorically different from distrusting the market. An investor who concludes based on information in the public domain that a stock's market price will likely rise in the future is doing what any normal investor who decides to buy a stock does. This has nothing to do with doubting the efficiency or integrity of the market. The market price at any moment is simply a clearing price that reflects the input of all investors active in the market at that time (both those who expect increases and those who expect declines). That is the way free markets operate.

Vivendi continually conflates those two different concepts. Vivendi states SAM cannot recover because "it believed the market was ***wrong about liquidity risk***" and therefore "did not rely on the integrity of market price as a measure of liquidity risk." Viv. Opp. Br. at 3 (emphasis in original). But surely, an investor who judges that liquidity risk (or any other risk or factor) was higher or lower than the market consensus did not therefore believe the market lacked efficiency or integrity. Vivendi repeats its same observations later and (again mistakenly) assumes that an investor's disagreement with the market price is the same as distrust of the efficiency and integrity of the market pricing mechanism. Vivendi says that SAM "purchased Vivendi ADSs when they were trading at historic lows because it believed that ***the market was incorrect about liquidity concerns***. Southeastern therefore cannot recover damages under the fraud-on-the-market presumption." Viv. Opp. Br. at 18 (emphasis added). Again, Vivendi's

[1] As Vivendi notes, "Southeastern's focus on long-term valuation (instead of short-term liquidity) led it to appraise Vivendi differently than the market had at the time Southeastern purchased its Vivendi shares." Viv. Opp. Br. at 14. This is a good example of how different investors may have a different focus, perspective or emphasis when trying to decide whether an investment is likely to increase in value in the future. None of these considerations calls into question the efficiency or integrity of the market for Vivendi ADSs. All of the examples in Vivendi's brief about how Thompson's judgments and evaluations of Vivendi's prospects conform to ***Class Plaintiffs'*** position on value investors' reliance on market efficiency and integrity and not to ***Vivendi's*** position.

statement is a non-sequitur.

SAM's situation is ***exactly*** what Justice Roberts described in his discussion of value investors in *Halliburton II*. Although the Court has seen this passage several times in the prior briefing, it is worth repeating here:

> Such an investor implicitly relies on the fact that a stock's market price will eventually reflect material information—how else could the market correction on which his profit depends occur? To be sure, the value investor "does not believe that the market price accurately reflects public information ***at the time he transacts***." But to indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable period. The value investor also presumably tries to estimate ***how*** undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price tainted by fraud.

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2405 (2014) ("*Halliburton II*") (emphasis in original).

It would be difficult to find a more apt description of how SAM viewed this security, what SAM must implicitly have believed about market efficiency and integrity, and what SAM in fact did in evaluating and consummating its purchases. As the testimony and contemporaneous documentary evidence confirm, SAM purchased Vivendi ADSs believing they were undervalued in the market ***at the times of purchase***, but expecting that the market price would eventually rise. Class Plaintiffs' Opp. Br. (D.E. 1252) at 4-7. SAM also was attentive, as evidenced by its use of the P/V ratio, to analyzing ***how far*** the market price might eventually rise in the future as compared to the market price at time of purchase. *Id.* SAM made its decision to purchase only when the ratio declined to SAM's threshold for investing. *Id.*

Vivendi contends that Justice Roberts's description of value investors' reliance applies only "sometimes" (Viv. Opp. Br. at 2) and "not necessarily" (*id.* at 17), but those are false qualifiers in this situation. The example consistently given by Vivendi for disqualifying SAM—

that SAM "believed the market was wrong about liquidity risk"—is ***exactly*** the quality that the *Halliburton II* passage says constitutes reliance for a value investor. By definition, the value investor relies on its belief that what it perceives is "wrong" about the market price today will eventually be corrected by operation of the honest and efficient market. Here, SAM implicitly relied on market efficiency and integrity in its decision-making. Justice Roberts's description of reliance by a value investor, in the passage quoted above from *Halliburton II,* is in complete accord with SAM's thought process and decision to purchase in the present case.[2] In thinking that the market was wrong, SAM nonetheless assumed and relied on its belief that the market was (and would continue to be) efficient and honest.

B. SAM's decisions to keep purchasing Vivendi ADSs during the liquidity crisis and after the close of the Class Period do not contradict the presumption of reliance for SAM's Class Period purchases.

SAM began purchasing Vivendi ADSs after four of the fraud-related materialization events (as later analyzed by Dr. Nye) had occurred and caused the ADS prices to decline. SAM's purchases thus began at those lower prices, and it continued to purchase during the Class Period as the remaining five materialization events operated to fully correct the market effects of the fraud, causing further price declines. The jury determined that fraud-related inflation

[2] Vivendi also offers a hypothetical of an investor considering two factors about a company: its financial statements and the competition it faced. Viv. Opp. Br. at 17-18. Vivendi posits that the investor might believe the market price has efficiently incorporated all information about the company's finances "but not yet processed other, recent information (such as a major competitor leaving the market)," so the investor purchases the stock to take advantage of the market's delay in processing the information. *Id.* But this is not a valid or fair example for testing reliance based on market price because Vivendi has loaded the dice by assuming the market does ***not*** efficiently incorporate all public material information (and that the investor knows this while others do not) such that the market lacks efficiency or integrity or both. As Justice Roberts observed, however, value investors "implicitly" rely on efficient and honest markets to eventually reflect and appreciate the factors the value investors believe will ultimately lead to price increases. Once that insight is integrated into the example, the point Vivendi is trying to make disappears.

remained in the ADSs until the end of the Class Period, albeit at lower price levels, and that investors are entitled to recover damages based on the inflation recorded in the verdict form. Despite Vivendi's rumblings in earlier briefing to the contrary, there is zero evidence that SAM possessed any non-public or inside information about this remaining fraud-related inflation while it was making its purchases. In particular, there is no evidence that SAM or Thompson knew that the company's liquidity risk was worse than was reflected in the ADSs' market price at any given time. *See* Class Plaintiffs' Opening Br. (D.E. 1248) at 19. Therefore, Vivendi has no basis for insinuating (*see* Viv. Opp. Br. at 6, 10-12), contrary to the jury verdict, that investors in SAM's position (purchasing late in the Class Period) somehow should not recover their market losses caused by inflation due to Vivendi's fraud. The fact that SAM also continued to make purchases ***after*** the end of the Class Period is similarly legally irrelevant to its reliance for Class Period purchases. *See Acticon AG v. China N. E. Petroleum Holdings Ltd.*, 692 F.3d 34, 41 (2d Cir. 2012) (an investor's decision to buy or hold post-class-period is properly treated as "a second investment decision unrelated to [its] initial decision to purchase the stock").

Vivendi's suggestion that some of Thompson's retrospective assessments indicate that SAM was indifferent to market efficiency and integrity is not supported by ***any*** evidence. Again, ruminations by Thompson about whether his judgment at the times of SAM's purchases—that Vivendi's stock price should and would increase in the future—was correct are irrelevant to the *Basic* inquiry as to whether the defendant has shown that the investor did not rely on the market's efficiency and integrity.[3] Here, Thompson's expectation that the market would

[3] In SAM's case, even if the inquiry about reliance were diverted from the efficiency and honesty of the market to the individual factors considered by SAM when deciding to enter the market, the conclusion would be that SAM did rely on liquidity-risk-related factors, among others, in making its purchase decisions, and was misled by Vivendi's false public statements about its liquidity risk. *See* Class Plaintiffs' Opening Br. at 4-7; Class Plaintiffs' Opp. Br. at 4-6. The Court does

eventually vindicate his judgment about the value of Vivendi's securities shows he was indeed (using Justice Roberts's term) "implicitly" relying on the efficient and honest operation of the market. There is no evidence to the contrary, direct or indirect.

Vivendi also tries to use SAM's post-Class Period purchases of Vivendi's ADSs as evidence that SAM would have purchased the securities during the Class Period even "had it known the 'truth' about the allegedly concealed liquidity risk." Viv. Opp. Br. at 20.[4] Of course, those later purchases were made at lower prices, reflecting the market price declines as the materialization events disclosed Vivendi's fraud. Thus, the later purchases are logically not germane to the reasons behind SAM's Class Period purchases. As the Seventh Circuit held in its careful explanation of how a rebuttal of the *Basic* presumption would work, "*Basic* was very clear that the way to rebut the presumption is to show that the investor would have paid the same ***price***" if it had known the truth behind the defendant's misrepresentations. *Glickenhaus & Co. v. Household Int., Inc.*, No. 13-3532, slip op. at 45 (7th Cir. May 21, 2015) (emphasis in original). In that light, Vivendi's attempt to extrapolate from SAM's later purchases at lower prices is obviously off-base.

III. CONCLUSION

It is a correct and inescapable conclusion from the jury verdict in this case that SAM, like any other open-market purchaser of Vivendi ADSs on any Class Period purchase date, paid a market price for its securities that was in fact ***inflated as a result of Vivendi's commission of securities fraud***. It is also established that the market was operating efficiently. Vivendi's defense that the market already knew about liquidity risks at the company at any such time (truth

not need to reach this issue (and should not) because of the *Basic* presumption that all investors rely on efficient and honest markets.

[4] The fact that Vivendi puts the word "truth" in quotation marks demonstrates that it is still in denial about the jury's finding that its Class Period statements about liquidity risk were false.

on the market) also was rejected by the jury. The only remaining consideration that could disqualify SAM from being entitled to collect damages from Vivendi is if Vivendi shows there was something about SAM's purchase decisions that "severs the link" between Vivendi's fraud and the market "price … paid" by SAM or SAM's "decision to trade at a fair market price." *Basic Inc. v. Levinson,* 485 U.S. 224, 248 (1988). But Vivendi has not shown, and there is no evidence to permit such a showing, that SAM traded on inside information, did not care whether the market price it paid was inflated by fraud, or was subject to some other link-severing condition that should disqualify it from recovering damages based on the inflated price it ***in fact*** paid for its ADSs when it purchased them on the NYSE.

As Justice Blackmun observed in *Basic,* quoting *Schlanger v. Four-Phase Systems Inc.,* 555 F. Supp. 535, 538 (S.D.N.Y. 1982) (Brieant, J.), "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Basic,* 485 U.S. at 246-47. Although this observation seems almost trite thirty-plus years later, it still eloquently expresses the underlying principle that conditions constituting a rebuttal of the presumption of reliance (for transactions consummated on stock exchanges) will actually be very rare—at least as rare as the player of a for-stakes crap game who does ***not*** care whether the dice are loaded against her. Judge Brieant, Justice Blackmun, and Justice Roberts all recognized and accepted the fact that investors are in the market to make money and are not indifferent to fraud that corrupts and distorts fair market prices. Investors making purchases do not voluntarily buy shares at an inflated price if they have the choice to transact at an honest, lower price.

The Court should order that SAM's claims are accepted.

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Respectfully submitted,

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