UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	02 Civ. 5571 (SAS) ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO CLASS PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ADMITTING THE CLAIMS OF CLASS MEMBERS ADVISED BY SOUTHEASTERN ASSET MANAGEMENT, INC.

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Defendant Vivendi, S.A. ("Vivendi" or "the Company") respectfully submits this Memorandum of Law in Opposition to Class Plaintiffs' Motion for Summary Judgment Admitting the Claims of Class Members Advised by Southeastern Asset Management, Inc. ("Southeastern").[1]

PRELIMINARY STATEMENT

Vivendi and Plaintiffs have cross moved for summary judgment on claims by Southeastern and its clients or advisees seeking approximately $57 million in supposed losses from Vivendi ADSs purchased during the Class Period.[2] In reality, Southeastern sustained no economic loss. It made a [redacted] profit on its Vivendi stock, which it began acquiring only at the end of the Class Period and which it continued purchasing in large quantities long after Vivendi's "liquidity crisis" was fully revealed on August 14, 2002. These acquisitions made Southeastern Vivendi's largest institutional shareholder, and the "damages" it asserts account for more than half the total damages approved by the Class Action claims administrator.

Southeastern is a highly sophisticated investor, and before acquiring its large Vivendi position it conducted exhaustive diligence of the Company. Southeastern concededly was not misled about Vivendi's debt. And it admittedly knew the value of Vivendi's numerous assets, some of which it had previously owned. Southeastern's thorough understanding of Vivendi's financial condition enabled it to perceive that Vivendi's assets were sufficiently liquid and valuable that it could comfortably meet its sizable debt obligations and still retain billions of dollars of assets.

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[1] Exhibits ("Ex.") cited herein are attached to the May 15, 2015 Declaration of Miranda Schiller in Support of Defendant Vivendi, S.A.'s Motion for Summary Judgment previously filed with the Court. The deposition transcript of Southeastern's Rule 30(b)(6) representative is cited herein as "Dep."

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

In the summer of 2002, Vivendi began selling assets to service debt and it was downgraded by ratings agencies. Its stock price plummeted as a result. According to Plaintiffs' expert, Dr. Nye, the decline in share price occurred because Vivendi's concealed "liquidity risk" had materialized. But that is not how Southeastern viewed the situation. It started purchasing Vivendi ADSs only after the price began to drop and it continued acquiring ADSs throughout the Class Period and beyond because, as it told its investors, it believed the liquidity crisis was overblown and could be easily fixed. The market punished Vivendi because the Company needed cash and was selling off assets. At the same time, Southeastern was *buying* Vivendi because it believed that Vivendi's assets, which were the "Facebooks of their time" (Dep. 209:12-13), would allow Vivendi to quickly resolve the liquidity crisis. When Southeastern eventually sold its Vivendi ADSs after its typical five-year holding period, it was proved right to the tune of [REDACTED].

Although Southeastern concededly "read everything" about Vivendi, Plaintiffs do not contend that it *directly* relied on the alleged misrepresentations. Rather, Plaintiffs move for summary judgment based solely on the fraud-on-the-market presumption. Plaintiffs' summary judgment motion must be denied (and Vivendi's must be granted) because Southeastern did not rely on Vivendi's market price as an accurate measure of liquidity risk, the subject of the alleged fraud. In fact, Southeastern bought Vivendi in large part because it believed the market had *misjudged* liquidity risk, which Southeastern viewed as a short-term concern that did not affect its long-term valuation or its expected five-year holding period. The fraud-on-the-market presumption survives challenge only when the plaintiff relied on the integrity of market price as a reflection of publicly available information. Value investors like Southeastern do sometimes rely on the integrity of market price for some information, as *Halliburton II* observed, so value

investors may assert the presumption and may be able to recover damages in a given case. But Southeastern cannot recover in this case. When it purchased Vivendi shares, it concededly believed the market was *wrong about liquidity risk*. Because Southeastern did not rely on the integrity of market price as a measure of liquidity risk, it did not indirectly rely on alleged misrepresentations about liquidity risk that were incorporated into the market price. Southeastern was not defrauded: it candidly admitted that none of the corrective disclosures revealed to it information that it did not already know.

Plaintiffs' summary judgment motion also must be denied because Southeastern sustained no losses and therefore is not entitled to any recovery under Section 28(a) of the Securities Exchange Act of 1934. As explained in Vivendi's May 15, 2015 Memorandum In Support of Summary Judgment (which Vivendi incorporates by reference) ("Moving Brief"), Southeastern is not entitled to any "damages" when it actually made a [redacted] profit on its investment. Southeastern purchased its Vivendi securities with a plan to hold them for its standard five-year investment period, at which point, as it correctly anticipated, it would be able to liquidate its investment at close to its appraised value. Southeastern did not suffer any damages. Its investment strategy worked flawlessly, earning it a very tidy profit.

FACTUAL BACKGROUND

Vivendi respectfully refers the Court to the facts as set forth at pages 3–10 of its Moving Brief. Certain key facts relevant to Vivendi's opposition to Plaintiffs' summary judgment motion are described below.

A. Southeastern's Pre-Purchase Valuation of Vivendi

Southeastern conducted a detailed pre-purchase valuation of Vivendi. James Thompson—"the primary person responsible for the Vivendi investment" and Southeastern's Rule 30(b)(6) deponent—began following Vivendi's stock in late 2000 or early 2001, *see* Dep.

15:18-21, 18:6-7, and carefully analyzed the Company's asset values in addition to its debt. *See* SAM20-SAM27, Ex. L. Market price played no role in Southeastern's valuation; it was simply "the numerator" in the fraction (market price divided by intrinsic value) that Southeastern used to calculate the "upside" of its investment. *See id.* 240:15-241:19.

Southeastern's decision to invest in Vivendi followed after an exhaustive analysis of Vivendi's debt and asset values. Thompson expressly acknowledged that he . Southeastern was also familiar with the value of Vivendi's assets dating back from before Vivendi even acquired some of them: certain of its assets had been stand-alone publicly-traded companies and therefore information about them could be derived from sources other than Vivendi. *See id.* 18:6-19:7.

Thompson was impressed with the value of Vivendi's assets—many of which Southeastern had owned previously—and with its ability to reduce debt, if necessary, through asset sales. *See id.* 120:7-12 ("We have owned many of Vivendi's assets previously, first at MCA and then at Seagram, and we are confident that even the most conservative asset appraisals comfortably exceed Vivendi's liabilities."), 209:9-14 ("there were considered extremely good assets"),

[REDACTED]. Indeed, Southeastern specifically contemplated asset sales as part of its investment thesis. *See id.* [REDACTED], 217:19-10 ("[T]here w[ere] ample assets to sell"). It knew Vivendi was a distressed company, *see id.* 101:19-21, and was confident in its assessment that Vivendi "had ample liquidity by selling assets," *id.* 224:20-2. According to Thompson, Vivendi was a conglomerate and there is a school of thought that conglomerates trade at a discount. *See id.* 111:5-112:9.

B. Southeastern's Post-Disclosure Purchases

When the price of Vivendi's stock dropped to an acceptably low point (60% or less of the Company's intrinsic value based on Thompson's valuation), Thompson recommended a purchase of Vivendi ADSs to Southeastern's investment committee, *see id.* 19:8-21:1, 22:9-23:24, 75:8-76:12 (confirming that Southeastern applied to Vivendi its strategy to "purchase when the common stock is available at 60 percent or less of our conservative appraisals"). Southeastern began purchasing Vivendi shares in earnest on June 25, 2002—after four of the nine "purportedly" corrective disclosures had already been disseminated to the market. *See id.* 172:19-25; Ex. G. Southeastern holds only 18-22 companies at any one time. *See* Dep. 69:4-9. As with its other investments, Southeastern anticipated a five-year holding period for its Vivendi ADSs, [REDACTED], with the objective that its Vivendi investment would eventually reach its appraisal, *see* Dep. 69:20-23.

Vivendi began marketing certain of its assets for sale at around the same time that Southeastern began investing. Within weeks of its initial purchase, Southeastern was aware of Vivendi's "liquidity crisis," *see id.* 49:11-54:13, and nevertheless continued to purchase Vivendi ADSs, consistent with its long-term plan, after each corrective disclosure during the Class Period and beyond, *see id.* 53:15-25; Ex. G; Moving Br. 5-9. Shortly after purchasing Vivendi,

Southeastern told its investors that Vivendi "contributed positively to performance" for the quarter ended June 30, 2002. Thompson confirmed that this statement was accurate. *See id.* 119:14-120.6.

Throughout the short-term liquidity squeeze, Southeastern continued to purchase Vivendi ADSs "[b]ecause we continued to believe that it was resolvable and it had ample assets to sell." Dep. 205:23-206:6. This belief was ultimately borne out. *See id.* 206:4-6. Thompson believed any liquidity issues were fixable because Vivendi had "extremely good assets. . . . These were the Facebooks of their time." *Id.* 208:20-209:22. Five months after the Class Period ended, Southeastern noted with much satisfaction that Vivendi had achieved $5 billion of asset sales since its initial investment. *See* SAM228, Ex. E. Only a month later, Southeastern reported more positive news: Vivendi asset sales had reached €7 billion. *See id.* at SAM234 ("Asset disposals in the second half will total [€]7bln, most at o[]r above our appraisal. . . . They are left with an enlarged stake in C[e]tegel, the entertainment assets, a bunch of securities and Canal Plus France. The plan now is to extract the highest value possible from these assets over the next two years."). For Southeastern, these sales only further confirmed its belief that the so-called liquidity "crisis" was "overblown." Dep. 121:7-13.

Thompson's view (both in 2002 and to this day) was that *none* of the nine disclosures identified by Dr. Nye "corrected" any misunderstanding held by him concerning the value of Vivendi. [REDACTED]. At most, he believed that [REDACTED].

Nor did Thompson believe that [redacted]

[redacted]

[redacted]

[redacted]. *See, e.g.*, *id.* [redacted]

[redacted], 215:5-217:16 (regarding Wall Street Journal article on date of Southeastern's first purchase describing Vivendi's share price "plummet[ting] . . . as investors became increasingly concerned about the company's liquidity position following a complex series of transactions aimed at raising cash quickly," Thompson was asked: "[Y]ou didn't view this Wall Street Journal article as a corrective disclosure, did you?" A: "No. It's just a bunch of people talking."). As a result of the purchases it made during and immediately following the Class Period, Southeastern became the single largest outside institutional investor in Vivendi: it acquired 45% of Vivendi's ADS float and profited to the tune of [redacted], comfortably achieving its investment objective. *See id.* [redacted], 45:6-17, 74:20-75:7; Chart #9, Ex. H.

ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 prohibits "(1) the 'use or employ[ment] . . . of any . . . deceptive device'; (2) 'in connection with the purchase or sale of any security,' and (3) 'in contravention of' Securities and Exchange Commission 'rules and regulations.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (quoting 15 U.S.C. § 78j(b)). To prevail on a § 10(b) claim, the plaintiff must establish reliance on the defendant's alleged misrepresentations or omissions. *See Dalberth v. Xerox Corp.*, 766 F.3d 172, 182-83 (2d Cir. 2014). The fraud-on-the-market theory announced in *Basic v. Levinson* creates a rebuttable presumption "that persons who had traded [in defendant's] shares had done so in reliance on the integrity of the price set by the market, but because of [defendant's]' material misrepresentations that price had been fraudulently depressed [or inflated]." 485 U.S. 224, 245 (1988). However,

"'[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the [*Basic*] presumption of reliance because the basis for finding that the fraud had been transmitted through market price would be gone.'" *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2415-16 (2014) ("*Halliburton II*") (*quoting Basic*, 485 U.S. at 248).

"Summary judgment is only appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Dalberth*, 766 F.3d at 182 (quoting Fed. R. Civ. P. 56(a)). The evidence must be viewed in the light most favorable to the non-movant, and all reasonable inferences must be drawn in the non-movant's favor. *See id*.

I. SOUTHEASTERN DID NOT RELY ON THE INTEGRITY OF VIVENDI'S MARKET PRICE WHEN PURCHASING VIVENDI SECURITIES

As *Halliburton II* explains, a defendant may "rebut the presumption of reliance with respect to an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock." 134 S. Ct. at 2412. The record in this case shows unequivocally that Southeastern did not rely on the integrity of Vivendi's market price as an accurate proxy for liquidity risk. On the contrary, Southeastern bought Vivendi ADSs *because* it believed the market was wrong about the impact of "short-term liquidity concerns." Dep. 121:10. The "liquidity risk" that Vivendi allegedly concealed was a risk that it would be unable to service its sizable debt with cash, assets readily convertible to cash, or accessible lines of credit. *See In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352, 366 (S.D.N.Y. 2009). But Southeastern invested in Vivendi because it believed that *in the long term* Vivendi would obtain billions of dollars from asset sales, thereby resolving any liquidity issues; would still retain crown jewel

assets that would enable it to continue servicing any debt; and that this value was not reflected in the market price at the time of Southeastern's purchases.

A. Southeastern Invested in Vivendi Because It Believed the Market Price Was Not an Accurate Proxy for Liquidity Risk

Before investing in Vivendi, Southeastern concededly understood both the Company's debt and asset valuations, and "part of the investment case" was "that the assets exceeded the liabilities." Dep. 120:24-121:4. As Thompson repeatedly confirmed, he [redacted] [redacted] [redacted], 118:16 ("We understood the debt pretty well."). Before Southeastern acquired any Vivendi ADSs, Thompson knew that "selling off assets" to cover the debt "was a possibility" as part of a "range of options that [Vivendi] had to realize value." *Id.* 49:11-50:2. And Thompson knew what those assets were worth. *See id.* [redacted] [redacted] 209:9-14 ("These were considered . . . extremely good assets. . . . I mean, this was very sexy stuff."), 209:24-210:3 ("it was . . . a treasure[] trove of assets").

In the summer of 2002, Vivendi's "liquidity risk" allegedly materialized when the Company sold assets and was downgraded by ratings agencies due to concerns over its debt. Only then—after four of the nine "corrective disclosures" identified by Dr. Nye—did Southeastern begin acquiring Vivendi ADSs. *See* Ex. G. And it continued purchasing as the stock price dropped because it believed the market was overreacting to short-term liquidity issues and ignoring long-term asset values. As Southeastern (through the Longleaf Funds) explained to investors in September 2002, shortly after the Class Period closed, it believed Vivendi "would quickly resolve short-term liquidity needs and would begin to reduce total debt. . . . *The market was less convinced and the price fell to dramatic lows*." Dep. 122:10-19

(emphasis added); *see also id.* 121:7-13 ("we believe that short-term liquidity concerns are *overblown*" (emphasis added)). Within weeks of buying Vivendi, Thompson recalled that the liquidity issue arose: "the stock dropped, and so we believed – our internal thesis was they could fix it." *Id.* 53:23-25. Thus, when Southeastern purchased Vivendi ADSs, it was not relying on the integrity of market price as an accurate proxy for liquidity risk. Quite the opposite, it bought Vivendi because it believed the market was underpricing the stock due to short-term liquidity issues.

Throughout the Class Period and beyond, Thompson confirmed that his valuation of Vivendi was accurate through frequent contact with Vivendi Investor Relations representatives who in turn passed on his valuations to the CFO. For example, in an email dated June 25, 2002—the date of Southeastern's first purchase—Thompson stated that [redacted] [redacted]. Similarly, in an undated note Thompson states: "I have run this by the company's IR person and she is very smart but would want a second set of eyes from our side and the CFO opinion." SAM0167, Ex. J. Thompson also sought granular financial data from Vivendi. For instance, his notes indicate that "the company publicly reports Recreation and Film together," but that "[i]f you bug them enough they break it out . . . ." *Id.* at SAM0170; *see also id.* ("Again bug them enough and you will find out that EBITDA was 304M" for Studio Canal+.).

In a November 2002 update to Southeastern's investment committee about Vivendi asset sales, Thompson reported that "V is so far ahead of targets that they may not even need the debt. . . . Since June [2002], the company has sold over 5B in assets." SAM228, Ex. E. This internal memo reflects that Vivendi began selling assets at the same time Southeastern made its first investment (June 2002) and that in less than five months had raised $5 billion in cash from asset

sales, thereby eliminating any liquidity risk. The sales bore out Thompson's investment hypothesis: attractive, highly liquid assets would yield a big reward over the intended five year term of its investment. As Thompson noted in the same memo, "*The stock reaction yesterday and today is largely due to people finally getting the numbers, which have never been a secret. They are stunning, better than I would have ever thought.*" *Id.* at SAM229 (emphasis added). Thompson's November 2002 update makes clear that he had not been misled: "Everything I said in the past is on target with three exceptions." (The three exceptions he identifies are three assets that were performing much better than he projected.) Thompson notes: "The entire group is forecast to be debt free in the middle of next year [2003] if they don't pay a dividend. This is the gem of Vivendi." *Id.* Again, these are hardly the words a defrauded investor who did not get the benefit of his bargain, or who relied on an inflated share price to make his investment decision. Thompson sums up his conclusions to the investment committee: "In British parlance, Vivendi is about to get on the front foot.[3] . . . Things are looking up. Debt should end the year on French GAAP at 14B, which is well ahead of schedule." *Id.* at SAM230.

Even while Vivendi's stock price was declining, Southeastern did not rely on the integrity of market price as a measure of liquidity risk. Notably, Thompson's July 24, 2002 memo updating the investment committee on Vivendi contains no reference to Vivendi's share price, which had then been declining for a month; instead, it sums up Thompson's assessment as follows: "*Everything is going as I would expect*. . . . There is still a risk in this, but things do appear to be improving." SAM0173 (emphasis added), Ex. J. This was written a month after Southeastern's first purchase on June 25, 2002 and during a time that it was purchasing ADSs virtually every day that the market was open. *See* Ex. G. A December 2002 update to the

[3] This means "at an advantage, outclassing and outmaneuvering one's opponents." Collinsdictionary.com.

investment committee further confirms that Thompson's original investment thesis was borne out and that he was not misled: "Jim's [Thompson] been dead right on almost every aspect of this. Asset disposals in the second half will total €7 bln, most at our [sic] above our appraisal." SAM234, Ex. E. This update was prepared following a meeting with Vivendi's CEO, CFO and COO. *See id.*

According to Plaintiffs, a September 27, 2002 memorandum reveals that Thompson had recently learned that the liquidity situation was "worse than anyone knew—worse even than his conservative appraisal." Memorandum of Law in Support of Class Plaintiffs' Motion for Summary Judgment ("Pl. Br.") 10-11. The date of this memorandum alone shows that it cannot support Southeastern's claim for damages. Plaintiffs' theory at trial was that the allegedly concealed "liquidity risk" was *fully* revealed by August 14, 2002, the last day of the Class Period. *See In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 82 (S.D.N.Y. 2007); Complaint ¶¶ 1, 14-16. Thompson admittedly "read everything" about Vivendi and specifically confirmed that [REDACTED]

[REDACTED]. Dep. 216:20-22, [REDACTED].

So any liquidity issue that Thompson supposedly "learned" of in September 2002 could not be the same liquidity risk that Plaintiffs allege was fraudulently concealed (and then fully revealed in August 2002). Indeed, the September 27, 2002 memo that Plaintiffs cite appears to be discussing a *post-Class Period* €2 billion refinancing. *See* SAM0178, Ex. J.

But there is an even bigger problem with Plaintiffs' contention that Southeastern purchased Vivendi ADSs in reliance on misrepresentations that concealed liquidity risk. As Thompson repeatedly confirmed, he always believed that the so-called "liquidity crisis" was a short-term concern that did not affect his long-term valuation and therefore did not undermine

his reasons for investing in Vivendi. For example, Plaintiffs point to Thompson's testimony that, after meeting with Vivendi's new management, he thought "it was more of a crisis internally than I had perceived."[4] Pl. Br. 11, 19 (quoting Dep. 54:24-25). But Plaintiffs conspicuously omit Thompson's testimony immediately after making this observation: "[S]o *in the short term* it felt very crisisy. *In the long term, I felt very good about my valuations*." Dep. 55:6-8 (emphasis added). Similarly, Plaintiffs emphasize that Thompson [redacted] [redacted]. But Plaintiffs ignore [redacted] [redacted].

The assets are the reason that Southeastern viewed any liquidity issues as "*highly fixable*." *Id.* 209:24-210:7 (emphasis added). In fact, as Thompson admitted, Southeastern continued purchasing Vivendi ADSs "throughout the crisis" (and beyond) "[b]ecause we continued to believe that it was resolvable and [Vivendi] had ample assets to sell." *Id.* 205:25-206:3; *see also id.* 53:23 ("[T]he stock dropped [after the liquidity issue], and so we believed—our internal thesis was they could fix it . . . ."), [redacted]

[4] While Plaintiffs assert that Thompson's meeting with Vivendi CEO Fourtou occurred in September 2002, *see* Pl. Br. 10-11, 18-19, Thompson actually recalled it occurred in August 2002, though he could not confirm the date with certainty. *See* Dep. 236:25-237:19.

[5] Thompson also continued to seek information through direct communications with Vivendi representatives. For example, he wrote in a July 24, 2002 email: "The company has told me that sometime today the [French authorities] will testify to the Senate (or French equivalent) that the investigation is very limited and there are no accounting issues." SAM172, Ex. J.

, 217:9-11 ("We just thought there w[ere] ample assets to sell, that there's no cause for [a] liquidity squeeze."), 224:14-21 ("[W]e believed that they had ample liquidity by selling assets."). Southeastern unequivocally stated that its expected investment time frame was approximately five years. *See* SOF ¶ 13 and *supra* p.5. Over a multi-year horizon, Southeastern did not expect the liquidity risk to continue to depress Vivendi's stock price since Vivendi's assets were highly liquid and were worth billions of dollars. It confirmed this expectation to its own mutual fund investors, informing them that it typically holds for five years and believes Vivendi was capable of double digit growth over time.

Southeastern's focus on long-term valuation (instead of short-term liquidity concerns) led it to appraise Vivendi differently than the market had at the time Southeastern purchased its Vivendi shares. As Thompson said of

216:23-25 ("So the thing that is happening here is that the stock price is coming down. We feel very good about our value."), 121:7-13 ("we believe that short-term liquidity concerns are overblown"), 122:16-19 ("The market was less convinced and the price fell to dramatic lows.").[6]

[6] As we now know, Thompson was correct in viewing these liquidity issues as a short-term concern. By November 26, 2002, Thompson wrote to his investment committee that "[l]iquidity issues [are] largely resolved." SAM0184, Ex. K. In December 2002, Southeastern ecstatically noted that Vivendi had achieved €7 billion of asset sales. *See* SAM 234, Ex. E.

Clearly, Southeastern "did not rely on the integrity of [Vivendi's] market price" as a measure of liquidity risk. *Halliburton II,* 134 S. Ct. at 2412. Rather, it purchased Vivendi stock because it believed the market misjudged the very risk that, according to Plaintiffs, was fraudulently concealed. Southeastern believed throughout the entire Class Period (and beyond) that its valuation of Vivendi was correct, whereas the market price did not accurately reflect the value of Vivendi's assets after repayment of the debt. Accordingly, Southeastern's appraisal of Vivendi's intrinsic value did not meaningfully change throughout the Class Period or thereafter, during the approximately five-year period that it held the ADSs it purchased in 2002. *See* Dep. 240:11-13 ("So it seems like it was always between 33 and 29 when we owned it, the valuation."); SAM0177, Ex. J (Sept. 20, 2002 memo noting, after approximately 28% drop in share price, that "[n]othing has changed to my value"). And Southeastern continued actively purchasing large blocks of Vivendi ADSs until long after the Class Period closed, showing that the "liquidity crisis" did not reduce its appetite for Vivendi stock.[7] *See* Exs. G and H. Even with

[7] Plaintiffs contend that Southeastern's "decision to *hold*, rather than sell" Vivendi stock after the Class Period "is irrelevant to reliance or any other issue." Pl. Br. 19-20 (emphasis added). But Southeastern did not merely "hold" Vivendi stock during this period; it *bought a lot more* in an effort to attain its goal of having Vivendi comprise 5% of its portfolio. On August 14, 2002, the final day of the Class Period (when Vivendi's "true liquidity position" was allegedly revealed), Southeastern purchased 368,000 Vivendi ADSs, increasing its total position to more than 11,000,000 shares. *See* Ex. G. By November 11, 2002, it had acquired almost 2,500,000 additional ADSs and its Vivendi position exceeded 13,500,000 shares. *See id.* Plaintiffs have improperly redacted Southeastern's trading records from August 15, 2002 onward, and withheld from production all trading records which post-date August 14, 2002. SAM0188-SAM0220, Ex. K. But based on just the redacted records, it appears that Southeastern may have continued purchasing every day that the market was open for many weeks after the Class Period. *See id.* It continued to purchase in 2005. *See* Chart #6, Ex. H. Southeastern's steady purchases of large quantities of Vivendi ADSs during and after the corrective disclosure period confirm that its high appraisal of Vivendi was not undermined by the so-called "liquidity crisis." *See GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F.Supp.2d 88, 101-02 (S.D.N.Y. 2013) ("[T]he Plaintiffs did not materially rely on the market price in making their investment decision. Instead, . . . had Vivendi's fraud been known to the market, the Plaintiffs would have been all the more eager to invest—which indeed they did, throughout the Corrective Disclosure Period.").

the benefit of hindsight, Thompson still believes that his valuation of Vivendi was correct. *See* Moving Br. II.A. And, indeed, his exhaustive analysis earned Southeastern a [redacted] *profit* from the transactions for which Plaintiffs now seek another $57 million (plus interest) in non-existent "damages."

B. *Halliburton II* Confirms that the Presumption of Reliance Has Been Rebutted

Plaintiffs rely on a passage from *Halliburton II* observing that "value investors" are not always indifferent to the integrity of market price. Pl. Br. 16-18. To be certain, even value investors may believe that, at any given time, a stock's market price is a reliable measure of its value as to at least *some* public information. But this observation is no help to Southeastern because when it purchased Vivendi stock it concededly believed that market price was *not a reliable measure of liquidity risk*—the subject of the alleged fraud. Thus, Southeastern did not indirectly rely on the alleged misrepresentations about liquidity risk that were supposedly incorporated into the stock's price.

Value investors do not believe that market price *always* serves as an accurate proxy for *all* available information. Their investment strategy is to purchase stocks that are *under*valued (or sell stocks that are *over*valued). So value investors reject, at a minimum, that the market is always efficient; they believe it is possible to "beat the market" by trading securities at prices that do not reflect the company's intrinsic value. But this does not mean that value investors think that market price is *always inaccurate* as to *all* material information. In fact, when they purchase an underpriced stock they expect that the market price will eventually come to reflect the intrinsic value that they have identified. At the time they buy the stock, value investors believe the market is wrong about *something*; they do not necessarily believe it is (and always will be) wrong about *everything*.

As *Halliburton II* observed, because value investors are not completely indifferent to the integrity of market price, a value investor's transactions could satisfy the premises underlying the fraud-on-the-market presumption. One of those premises is that most investors purchase stock "in reliance on the integrity of [market] price." *Halliburton II*, 134 S. Ct. at 2408. Halliburton challenged this premise, arguing that, for many sophisticated investors, "price integrity" is "marginal or irrelevant," so "courts should not presume that investors rely on the integrity of [market] prices and any misrepresentations incorporated into them."[8] *Id.* at 2410-11. Rejecting this argument, the Court wrote that "even . . . the value investor" is not "as indifferent to the integrity of market prices as Halliburton suggests":

> 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.

Id. (internal quotation marks and citation omitted).

This observation illustrates how a value investor *could*—but does *not necessarily*—rely on fraudulent misstatements that are incorporated into market price. For example, a value investor might believe that a stock's market price accurately reflects most public information (such as the company's financial statements) but has not yet processed other, recent information

[8] Vivendi also submitted an amicus brief in *Halliburton II*, arguing, among other things, that sophisticated institutional investors should not benefit from a presumption of reliance because they frequently do not rely on the integrity of market price and because, unlike retail investors, they ordinarily keep records that show what facts they actually did rely on when making investment decisions. The Court declined to abandon the *Basic* presumption, but said nothing about what factual showing would be sufficient to rebut the presumption in an individual case—the issue before this Court now.

(such as a major competitor leaving the market). Because the market has not yet adjusted the stock's price to reflect the benefits of reduced competition, the value investor might conclude the stock is currently underpriced and therefore purchase it. If it was later revealed that the stock's price was inflated by fraud *unrelated to the reduced competition* (if the financial statements were falsified, for example), the investor could claim to have indirectly relied on the fraudulent misrepresentations in the manner described by *Basic*. After all, this investor thought that the market was wrong only as to competition; as to all other matters, she believed that market price was an accurate proxy for public information. So if the misrepresentations were not related to competition, the false information could have been "transmit[ted] . . . to the investor in the processed form of a market price." *Basic*, 485 U.S. at 244.

But that is not what happened here. When Southeastern purchased Vivendi stock during the Class Period, it believed that the market was *wrong about liquidity risk*, the very subject of the alleged fraud. *See, e.g.*, Dep. 122:10-19 ("We believed that [Vivendi] would quickly resolve short-term liquidity needs . . . . The market was less convinced and the price fell to dramatic lows."); *see also id.* 122:10-19, 121:7-13 ("we believe that short-term liquidity concerns are overblown"), [redacted]. Thus, Southeastern did not rely on the integrity of market price as an accurate measure of liquidity risk. Rather, it 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.

Nothing in *Halliburton II* suggests that the presumption applies even when a value investor (or any investor) concededly did not rely on the integrity of market price with regard to the subject of the alleged fraud. On the contrary, *Halliburton II* reaffirmed that an "investor

indirectly relie[s] on [a] misrepresentation *through his reliance on the integrity of the market price*." 134 S. Ct. at 2414 (emphasis added) (internal quotation marks and alterations omitted). Accordingly, *Halliburton II* explained that the presumption can be rebutted by a showing that the plaintiff "did not rely on the integrity of the market price in trading stock." *Id.* at 2412. Because Southeastern concededly did not rely on the integrity of market price *about liquidity*, it did not indirectly rely on alleged misrepresentations *about liquidity*.

In their effort to make the fraud-on-the-market presumption fit these facts, Plaintiffs distort *Halliburton II.* They contend the presumption cannot be rebutted unless the plaintiff knew of the fraud or "market price played ***no*** part whatsoever" in Southeastern's investment decision. Pl. Br. 14 (emphasis in original) (internal quotation marks and alteration omitted). But that is not what *Halliburton II* says. The presumption withstands challenge only if the investor purchases "in reliance on the *integrity* of [market] price," *i.e.*, "belie[ves] that it reflects all public, material information." *Halliburton II*, 134 S. Ct. at 2408 (emphasis added). Southeastern fails this test because it admittedly did not believe that Vivendi's market price accurately incorporated all available information about liquidity risk.

Plaintiffs also contend that Southeastern relied on the integrity of market price because its investment decision was based on its "assessment of Vivendi's P/V ratio"—*i.e.*, the fraction that has, as its numerator, Vivendi's market price and, as its denominator, the stock's intrinsic value as calculated by Southeastern. Pl. Br. 15. Southeastern purchased stock only when the P/V ratio was 60% or lower (*e.g.*, a stock with intrinsic value of $100 trading at $60 or less). *See* Dep. 75:8-19. Plaintiffs assert that Vivendi's alleged fraud "artificially influenced the P/V ratio and invalidated the investment decision." Pl. Br. 15; *see also id.* 16 n.11 (ratio was "skewed" by fraud-inflated price). Not so. The *integrity* of market price has no effect on P/V ratio.

. As Thompson testified, market price was simply "the numerator." *Id.* 241:15-19. But in this role, the integrity of market price is irrelevant. Market price is an indisputable *fact*—the price at which Southeastern could acquire the shares. It makes no difference to P/V ratio whether market price accurately reflects public information; in fact, Thompson believed it was not accurate.

Plaintiffs are also incorrect when they assert there is no evidence that Southeastern would have purchased Vivendi ADSs had it known the "truth" about the allegedly concealed liquidity risk. Not only did Southeastern purchase Vivendi shares right after the risk was supposedly fully revealed, but it continued to do so virtually every day thereafter that the market was open. *See* SAM0193, Ex. K. By the end of its buying spree, Southeastern had acquired 45% of the total ADS float, one third of which was purchased after the Class Period. *See* Charts #9 & #10, Ex. H. As noted in Vivendi's Moving Brief at 6-9, Southeastern purchased for years after the Class Period and remains one of its largest shareholders today.

Southeastern's alleged reliance on a share price inflated by concealed liquidity risk is thus contradicted by its actions (continuing to purchase millions of dollars of ADSs long after the Class Period), its statements to its own investors (explaining that liquidity concerns are overblown); and Thompson's internal updates to his investment committee (explaining why his Vivendi thesis would be borne out even as the Company's stock price declined). When Thompson was asked why Southeastern filed a claim after making a profit, he replied:

[REDACTED].

That is not the testimony of a defrauded investor.[9]

As *Halliburton II* explains, the basis for the fraud-on-the-market presumption is that the misrepresentation is "reflected in the market price at the time of [the] transaction," and the investor "indirectly relies on that misrepresentation through his reliance on the integrity of market price." *Halliburton II*, 134 S. Ct. at 2414 (internal quotation marks and alterations omitted). Southeastern admittedly did not rely on the integrity of market price as to the subject of Vivendi's alleged fraud, so the presumption of reliance has been rebutted.

II. SOUTHEASTERN HAS NO LEGALLY COGNIZABLE DAMAGES

Southeastern also cannot recover from Vivendi because it has not sustained any legally cognizable damages. *See* Moving Br. 22–25. This is an independent additional basis for denial of Plaintiffs' Motion.

CONCLUSION

For the foregoing reasons, Southeastern's summary judgment motion should be denied.

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[9] Plaintiffs' suggestion (*see* Pl. Br. 3-4) that document discovery was completed is incorrect. Vivendi sought permission to move for summary judgement even though discovery of Southeastern was incomplete because Thompson's testimony and the partial document production suffices to rebut *Basic's* reliance presumption. *See* Letter from James Quinn (Apr. 22, 2015), Dkt #1238. At the pre-motion conference, Plaintiffs disclosed that they would cross-move for summary judgment. Vivendi indicated that if its motion is denied, it will then move to compel the production of Southeastern's remaining documents.

Plaintiffs' assertion that "SAM was never provided with non-public information" cannot be tested since none of its internal memos were produced until after Thompson's deposition, thereby depriving Vivendi of the opportunity to question him about the sources of certain information. Additionally, other potentially key documents were withheld such as Thompson's narrative ten-page memo to the investment committee recommending the Vivendi investment. Thompson describes the Investment Memo as "the written case, if you will, for why it's an investment." Dep. 23:13-16. The Investment Memo would have been [REDACTED]. Even without these documents, the record is sufficiently developed to rebut any claim of reliance by Southeastern on a hidden liquidity risk.

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