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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: WSB FINANCIAL GROUP  
SECURITIES LITIGATION

Master File No. C07-1747RAJ

COMPLAINT – CLASS ACTION

**LEAD PLAINTIFF’S OPPOSITION TO  
DEFENDANT D.A. DAVIDSON &  
COMPANY’S REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT OF MOTION TO  
DISMISS**

NOTE ON MOTION CALENDAR:  
June 27, 2008

1           Lead Plaintiff, the Police and Fire Retirement System for the City of Detroit (“Detroit  
2 P&F or “Lead Plaintiff ), respectfully submits this Memorandum of Law in Opposition to  
3 Defendant D.A. Davidson & Company’s Request for Judicial Notice In Support Motion to  
4 Dismiss (“Davidson RJN ).

5 I.       INTRODUCTION

6           In support of its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (“Davidson  
7 Motion ), Defendant D.A. Davidson & Company (“Davidson ) submits and relies upon  
8 numerous newspaper articles and other unauthenticated materials that are not referenced or relied  
9 upon in the Consolidated Class Action Complaint for Violations of the Federal Securities Laws  
10 (the “Complaint ). See Davidson RJN Exhibits H-N. Davidson’s request is improper on a  
11 motion to dismiss and should be denied. First, as a general rule, materials beyond the pleadings  
12 may not be considered on a motion to dismiss. See *Lee v. City of Los Angeles*, 250 F.3d 668,  
13 688 (9th Cir. 2001). Second, Davidson seeks judicial notice of documents for the truth of factual  
14 matters asserted therein – factual matters disputed by Lead Plaintiff. Disputed factual questions  
15 are not properly the subject of a request for judicial notice. *Id.* at 689-90.

16           Finally, the unauthenticated, extraneous documents are irrelevant to whether the  
17 Complaint states a claim. The Complaint asserts claims under §§ 11 and 12(a)(2) of the  
18 Securities Act of 1933. Loss causation is a statutory affirmative defense for §§ 11 and 12(a)(2)  
19 claims, and is not an element of a *prima facie* case. See 15 U.S.C. § 77k(e); 15 U.S.C. § 771(b);  
20 *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 276 (3d Cir. 2004). Nevertheless, Davidson  
21 cites Exhibits H-N to support its factual contention that there are other potential causes for the  
22 decline in value of WSB’s stock. See Davidson Motion at 7. Accordingly, Davidson’s request  
23 for judicial notice of Exhibits H-N should be denied.

24 II.       ARGUMENT

25 A.       Legal Standards

26           As a general rule, a district court may not consider any material beyond the pleadings in  
27 ruling on a Rule 12(b)(6) motion. *Lee*, 250 F.3d at 688. There are two exceptions:  
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1 “authenticated documents that have been incorporated into the complaint and facts that are  
2 subject to judicial notice. *In re: SeraCare Life Scis., Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS  
3 19654, at \*11 (S.D. Cal. March 19, 2007) (citing *Lee*, 250 F.3d at 689-90). *See also Cooper v.*  
4 *Pickett*, 137 F.3d 616, 622-623 (9th Cir. 1998) (refusing to consider documentary evidence  
5 beyond the complaint, including unauthenticated conference call transcripts, declarations and  
6 internal projections).

7 With respect to the first exception, the Court may only consider documents that are  
8 central to, or form the basis of, plaintiffs’ claims and which plaintiffs refer to “extensively and  
9 rely upon. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“[A] document . . . may  
10 be incorporated by reference into a complaint if the plaintiff refers extensively to the document  
11 or the document forms the basis of the plaintiff’s claim. ). This ““is a narrow exception . . . . It  
12 is not intended to grant litigants license to ignore the distinction between motions to dismiss and  
13 motions for summary judgment.’ *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 995  
14 (S.D. Cal. 2005). The Court should not consider exhibits to a motion to dismiss where  
15 “Defendants offer the documents as evidence that Defendants did not commit securities  
16 violation[s]. *Id.*

17 With respect to the second exception, a district court may take judicial notice of matters  
18 of public record, but it cannot use this rule to take judicial notice of a fact that is subject to  
19 “reasonable dispute simply because it is contained within a public record. *Lee*, 250 F.3d at 689-  
20 90. The district court must reject requests to the extent that parties seek to have the court accept  
21 as true the facts contained within public documents. Disputed factual questions are not suitable  
22 for judicial notice. *Swartz v. Deutsche Bank*, 2008 U.S. Dist. LEXIS 36139, at \*17-\*19 (W.D.  
23 Wash. May 2, 2008) (citing *Lee*, 250 F.3d at 689-90).

24 B. Exhibits H-N Should Be Stricken

25 In support of its motion to dismiss, Davidson has improperly submitted two  
26 unauthenticated transcripts of remarks purportedly made by the Chairman of the Federal Reserve  
27 Bank, Ben S. Bernanke, (Exs. H, I) and five newspaper articles (Exs. J, K, L, M, N). Not one of  
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1 these documents was cited or referenced in the Complaint. The Court may not take judicial  
2 notice of any of these documents for the truth of the matters asserted therein. Without citing any  
3 authority, Davidson seeks judicial notice of these documents for the purpose of arguing that  
4 statements set forth therein are true facts that dispute the Complaint's allegations. This is  
5 improper. *See, e.g., In re Boeing Sec. Litig.*, 40 F. Supp. 2d 1160, 1171 (W.D. Wash. 1998)  
6 (noting that newspaper articles are not properly considered on a motion to dismiss).  
7 Accordingly, the Court should not consider Exhibits H-N submitted in support of Davidson's  
8 motion to dismiss. In addition, the Court should not consider any arguments relying upon  
9 Exhibits H-N as such argument is premised upon facts not properly before the Court. *See, e.g.,*  
10 Davidson Motion at 9.

11 The request for judicial notice should also be denied because the extraneous documents  
12 are entirely irrelevant to whether the Complaint states a claim. Davidson cites Exhibits H-N to  
13 support its factual contention that there are other potential causes for the decline in value of  
14 WSB's stock, including decline in the entire mortgage industry. *See Davidson Motion at 7.*  
15 Loss causation, however, is not an element of a § 11 claim, and, thus, there is no pleading  
16 requirement. *Levine v. Atricare, Inc.*, 508 F. Supp. 2d 268, 273 (S.D.N.Y. 2007) (finding that  
17 causation is presumed and that "plaintiffs have no obligation to plead or prove loss causation in  
18 § 11 cases ). Rather, the Securities Act provides a defendant with an affirmative defense to  
19 reduce damages if it can prove that the depreciation in value of the securities resulted from  
20 factors other than its allegedly false or misleading statement. 15 U.S.C. § 77k(e) ("if the  
21 **defendant proves** that any portion or all of such damages represents other than the depreciation  
22 in value . . . resulting from such part of the registration statement, with respect to which his  
23 liability is asserted, . . . such portion of or all such damages shall not be recoverable ). *See also*  
24 *In re Portal Software, Inc. Sec. Litig.*, 2006 WL 2385250 (N.D. Cal. Aug. 17, 2006) (loss  
25 causation is an affirmative defense on which "the defendant has the burden of proof ) (quoting  
26 *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1422 (9th Cir. 1994)).

1 In sum, the Court should not consider such arguments because causation is not an  
2 element of Lead Plaintiff's § 11 claim. Further, the Court should not consider Exhibits H-N  
3 because they are outside the Complaint, not properly before the Court, and such factual  
4 determinations are left to the trier of fact after a record is developed. If, after a record is  
5 developed, Davidson wishes at trial to blame an industry-wide fall-off, it will be free to attempt  
6 to carry its burden of proof. At this stage, however, the Complaint's allegations are accepted as  
7 true: It alleges company-specific false and misleading statements (*see* ¶¶74-80) and the basis for  
8 the falsity of each statement (¶¶42, 47, 81-87).

9 III. CONCLUSION

10 This matter is governed by the Private Securities Litigation Reform Act ("PSLRA"),  
11 including the automatic stay of discovery during the pendency of the motion to dismiss.  
12 15 U.S.C. § 77z-1(b)(1) ("all discovery and other proceedings shall be stayed during the  
13 pendency of any motion to dismiss . . . ). As such, Lead Plaintiff has not had the opportunity to  
14 obtain discovery. Nevertheless, the Complaint is a well-pleaded document. In its motion,  
15 Davidson attempts to have it both ways by using the PSLRA discovery stay as a shield while  
16 also attempting to create a one-sided "record" by introducing matters outside the pleadings.  
17 Davidson's disregard for the Complaint's factual allegations and attempt to rely on materials  
18 outside of the Complaint to support its motion to dismiss should be rejected. Accordingly, the  
19 Court should deny Davidson's request for judicial notice of Exhibits H-N and disregard any  
20 arguments relying upon news articles and other unauthenticated, extraneous matters not  
21 referenced in the Complaint.

22 Dated: June 6, 2008

Respectfully submitted,

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*Attorneys for Lead Plaintiff the Police and Fire Retirement System of the City of Detroit and Lead Counsel to the Class*

1 CERTIFICATE OF SERVICE

2 I, KAYE A. MARTIN, do hereby certify that on this 6th day of June 2008, true and  
3 correct copies of the foregoing

- 4 • LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT D.A. DAVIDSON &  
5 COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO  
6 DISMISS;  
• DECLARATION OF SERVICE

7 were filed electronically with the Clerk of the Court using the Electronic Case Filing (ECF)  
8 System, which will send notification of such filing to those attorneys who are registered with the  
9 ECF System.

10 The following attorneys who are not registered with the Court's ECF system will be duly  
11 and properly served by United States mail, in accordance with the Federal Rules of Civil  
12 Procedure:

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