KAHN SWICK & FOTI, LLC
KIM E. MILLER (KM-6996)
BRUCE W. DONA (BD-3730)
250 Park Avenue, Suite 2040
New York, NY 10177
Telephone: (212) 696-3730
Fax: (504) 455-1498

-and-

LEWIS S. KAHN
J. RYAN LOPATKA
206 Covington St.
Madisonville, LA 70447
Telephone: (504) 455-1400
Fax: (504) 455-1498

Lead Counsel for Lead Plaintiff Stephen Klug and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE TESCO PLC SECURITIES LITIGATION	Case: 14 Civ. 8495-RMB HON. RICHARD M. BERMAN Class Action

LEAD PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

I. PRELIMINARY STATEMENT

Faced with the daunting task of challenging Lead Plaintiff's 102-page Complaint[1] on the ground that it fails to adequately allege claims under the Securities Exchange Act of 1934, Defendants spend the majority of their 35 pages of briefing trying to convince the Court to ship this securities class action for violations of the Securities Exchange Act—which involves of purchases of ***American*** Depository Shares by a United States citizen in the United States through a United States brokerage—to England. The United States securities laws are designed to protect U.S. investors, like Plaintiff, in connection with purchases of securities that take place in the U.S., like the transactions here, and as a result, each of Defendants' three arguments as to why the Court should decline jurisdiction over this case fail in turn.

First, Defendants' lead argument that Plaintiff's purchases of Tesco ADRs were foreign transactions to which Section 10(b) does not apply extraterritorially ignores the controlling Second Circuit opinion on this very issue, *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 66-67 (2d Cir. 2012). Plaintiff's purchases of ADRs are domestic transactions to which Section 10(b) applies.

Second, Defendants argue that England is the more convenient forum for this action; however, they fall short of meeting their heavy burden to demonstrate that this is one of the "rare instances" in which the Court should disregard the presumption in favor of Plaintiff's choice of forum on the basis that proceeding in the United States would be so oppressive to Defendants that Plaintiff must have filed in order to harass them. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000). Even if Defendants could make such a showing, they fail to establish that England is a proper alternative forum for this action. Instead, Defendants submit a

[1] Unless otherwise indicated, ¶__ refers to the Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint").

declaration from an English lawyer who readily establishes that England is, in fact, **not** an adequate alternative forum. Dkt. 79 at ¶¶24-25.

Third, in addition to conceding that this Court has personal jurisdiction over Tesco, Defendants also fail in their argument that this Court has personal jurisdiction over Defendants Clarke, McIlwee and Broadbent (the "Individual Defendants"). Not only did Clarke sign the Form F-6 Registration Statement filed with the SEC in connection with Tesco ADRs, the Complaint alleges facts that establish personal jurisdiction over all three Individual Defendants based on a conspiracy theory. *Singer v. Bell*, 585 F. Supp. 300, 302 (S.D.N.Y. 1984).

The remainder of Defendants' brief fails in its efforts to chip away at the detailed, well-pled allegations contained in the Complaint. Indeed, Defendants concede that Tesco made false and misleading statements during the Class Period, and that Plaintiff adequately pleads loss causation. Defendants' only arguments, that the Complaint fails to plead that the Individual Defendants made false and misleading statements and omissions and that Plaintiff does not adequately plead scienter, fail. As required by Fed. R. Civ. P. 9(b) and the PSLRA, the Complaint adequately alleges that throughout the Class Period, Defendants made material misstatements and omissions regarding Tesco's financial condition, its business practices and its compliance with IFRS. In addition to the misrepresentations specific to Tesco's financial condition made by Defendant Clarke, all three Individual Defendants verified Tesco's financial results—which, by Tesco's own admissions were incorrect—in the Company's annual reports.

Finally, the Complaint pleads a strong inference of scienter. Through allegations supported by a whistleblower who alerted the current CEO to the accounting fraud, well-placed former employees with knowledge of the Company's operational and financial conduct, warnings of manipulation by Tesco's auditor, and a bevy of news reports citing well-positioned

sources of their own, Plaintiff provides sufficient detail to indicate that Tesco's improper accounting practices were known to, or at the very least, recklessly disregarded by Defendants. When considered collectively alongside the massive profit overstatement of £263 million, the resignations of numerous Tesco executives (including all three Individual Defendants), investigations by four regulatory bodies (the Financial Conduct Authority (FCA), the Financial Reporting Council (FRC), the Serious Fraud Office (SFO), and the Groceries Code Adjudicator (GCA)), and post-Class Period admissions by the Company as to its Class Period financial practices and supplier conduct, Defendants' arguments against a finding of scienter quickly fizzle. Defendants' motion should be denied in full.

II. ARGUMENT

A. SECTION 10(b) APPLIES TO PLAINTIFF'S DOMESTIC TRANSACTIONS IN AMERICAN DEPOSITORY SHARES

Defendants' argument that Plaintiff's purchases of Tesco ADRs were foreign transactions to which Section 10(b) does not apply extraterritorially is based not only on a misreading of controlling Supreme Court and Second Circuit authority, but also on a failure to address the controlling Second Circuit opinion on the issue, *Absolute Activist*. Plaintiff's purchases of ***American*** depository shares are inherently domestic transactions to which Section 10(b) of the Exchange Act applies, and the Second Circuit case Defendants cite in support of their position, *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), actually supports the application of 10(b) to transactions in unlisted ADRs like those here.

In *Morrison v. National Australia Bank Ltd*., 561 U.S. 247, 130 S. Ct. 2869 (2010), the Supreme Court established that Section 10(b) has no extraterritorial application, and no civil suit under that section may be brought unless the action is predicated on either: 1) a purchase or sale of a security listed on a domestic exchange; or 2) a domestic purchase or sale of another

security. *See id*. at 267 ("And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."). "If either prong of the *Morrison* test is met, Section 10(b) applies to the transaction." *United States v. Martoma*, 2013 U.S. Dist. LEXIS 176998, at *8 (S.D.N.Y. Dec. 16, 2013), citing *Absolute Activist*, 677 F.3d at 66-67. In *Absolute Activist*, the Second Circuit set forth a bright-line test for determining when a transaction in securities is "domestic" under the second prong of *Morrison*. The Second Circuit instructs that for a transaction to qualify as domestic, either "the parties [must] incur irrevocable liability to carry out the transaction within the United States or . . . title [to the securities must be] passed within the United States." 677 F.3d at 69.

1. Plaintiff's ADR Purchases are a "Domestic Purchase or Sale of Another Security"

Plaintiff's purchases of ADRs fit squarely within the "domestic purchase or sale of another security" category of transactions enunciated in *Morrison*. First, "[t]here can be no dispute that the [Company] ADRs are 'securities.'" *Martoma*, 2013 U.S. Dist. LEXIS 176998, at *9, citing 15 U.S.C. § 78c(a)(10); *see also In re Austl. & N.Z. Banking Grp. Ltd. Sec. Litig.*, 2009 U.S. Dist. LEXIS 116578, at *2 (S.D.N.Y. Dec. 14, 2009) ("An ADR is a security denominated in U.S. Dollars…"). Second, Plaintiff's purchases of Tesco ADRs were domestic under the Second Circuit's test in *Absolute Activist*, because both "irrevocable liability to carry out the transaction" was incurred in the United States ***and*** title to the securities was passed in the United States. *Absolute Activist,* 677 F.3d at 69.

Irrevocable liability to carry out the ADR transaction was incurred in the United States, because ADRs are created, purchased, and sold entirely within the United States. ADRs are created by a U.S. depositary bank (here, Deutsche Bank Trust Company Americas) as a separate and distinct security from the ordinary shares the ADRs represent. *See* Miller Declaration

("Miller Decl.") at Exh. 1, *Securities and Exchange Commission Investor Bulletin: American Depository Receipts* 1 ("SEC ADR Bulletin"). The U.S. depositary bank then "will issue ADRs to the investor in the U.S. and the investor will be able to re-sell the ADRs on a U.S. exchange or [as here] the over-the-counter market." *Id*. Here, Plaintiff purchased the Tesco ADRs through a U.S. broker, TD Ameritrade, which in turn entered into a transaction for the shares through the U.S. over-the-counter market. *See* ¶21. Thus, all aspects of the ADR transactions at issue occurred in the United States and irrevocable liability was incurred here.

Further, title to the Tesco ADRs was passed in the U.S. The "ADR is a negotiable certificate that evidences an ownership interest in American Depositary Shares ("ADSs") which, in turn, represent an interest in the shares of a non-U.S. company that have been deposited with a U.S. bank." Exh. 1 at 1[2]; *see also* Tesco PLC webpage at Miller Decl. at Exh. 2 ("An American Depositary Receipt (ADR) is a certificate which is evidence of ownership of ADS shares."). Because the United States depositary bank created the Tesco ADRs, issued them to investors in the U.S., and Plaintiff took ownership of the Tesco ADRs when he purchased them through a U.S. broker, title to the Tesco ADRs was passed within the U.S.

In *United States v. Martoma*, the court also held that ADRs satisfied both the irrevocable liability and title transfer prongs of *Absolute Activist* to determine that the transactions at issue were not extraterritorial under *Morrison*. In *Martoma*, the court rejected defendants' arguments—the same arguments Defendants make here—that "ADRs are merely 'receipts that may be redeemed for the foreign stock at any time,'" and that "ADRs are economically equivalent to…a foreign issuer's stock that is traded abroad" and that therefore the court should treat the ADR transactions as foreign. *Id*. at *14-15; *see also* D.E. 76 at 5 n.3, 14. The court in

[2] "The terms 'ADS' and 'ADR,' though technically representing different things, are often used interchangeably." *Law Debenture v. Maverick Tube Corp.*, 2008 U.S. Dist. LEXIS 87438, at *4, n.4 (S.D.N.Y. Oct. 15, 2008).

Martoma held that these arguments "are not persuasive" because they do "not address where the transactions in the ADRs took place." *Martoma*, at *15-16. Because the court found that the relevant ADR transactions occurred in the United States, "which means that the formation of contracts for those trades, the passing of title to those securities, and the incurring of liability on the part of sellers and purchasers of those ADRs occurred in the United States," the court held that the domestic transaction prong of *Morrison* was satisfied. *Id*. at *16.[3]

2. Defendants Mischaracterize the Second Circuit's Opinion in *Parkcentral*

Defendants' reliance on the Second Circuit's decision in *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), to suggest that the Second Circuit has limited the "domestic transaction" prong of the *Morrison* test is wrong. Dkt. 76 at 13. Defendants have not only mischaracterized the securities at issue in *Parkcentral*, but misread the Second Circuit's holding, which was limited to "the particular character of the unusual security at issue." *Id*. at *202.

The transactions in which plaintiffs brought suit in *Parkcentral* were securities-based swap agreements tied to the value of Volkswagen's stock, which traded on the German stock exchange. *Id*. at 201. "A securities-based swap agreement is a private contract between two parties in which they 'agree to exchange cash flows that depend on the price of a reference security.'" *Id*. at 205 (citation omitted). The "amount of gain and loss in the transactions depended on prices of VW stock recorded on foreign exchanges." *Id*. at 201. In other words, the holder of the swap agreement never has title or right to ownership of the underlying reference security, but simply gets paid cash if the value of the foreign traded security goes up or down.

[3] Although the ADRs in *Martoma* were purchased through an exchange, the court's analysis would not change if, as here, the ADRs were purchased off-exchange, as the over-the-counter transactions still occurred in the United States with title passing in the United States. *See Morrison*, 130 S. Ct. at 2884 ("the focus of the Exchange Act is not upon the place where the deception occurred, but upon purchases and sales of securities in the United States.").

Despite Defendants' assertion that securities-based swaps and ADRs are "strikingly similar," at least three critical differences between swap agreements and ADRs drove the Second Circuit's decision in *Parkcentral* and compel a different outcome here. First, the Second Circuit noted the underlying securities in the swap agreements were traded in Germany, whereas unlisted ADRs—like the Tesco ADRs here—are traded in the United States:

> VW had two sponsored, unlisted American depositary receipt ("ADR") programs based in New York. An ADR is an instrument that represents a specified amount of a foreign security that has been deposited with a foreign branch or agent of the depositary, known as the custodian. The holder of an ADR is not the title owner of the underlying shares. ***Nothing in the record before us suggests that swap counterparties could not designate an ADR rather than the security linked to the ADR as a swap's reference security if they wished. They did not, however, do so in this case.***

Id. at 207 n. 9 (internal citations omitted) (emphasis added). Clearly, the Second Circuit determined that had the swap used an unlisted ADR as the reference security rather than a stock traded in a foreign market, the transaction would not have been extraterritorial under *Morrison*, because the underlying security would have been domestic.

Second, unlike here where Defendants initiated the market for Tesco ADRs in the United States, defendants in *Parkcentral* had no involvement with the securities at issue. In *Parkcentral,* there were no allegations that defendants were "a party to any securities-based swap agreements referencing VW stock, or that [they] participated in the market for such swaps in any way." *Id*. at 215. This was critical to the Second Circuit's decision because the court reasoned that plaintiffs could always sue in the U.S. under a private swap agreement "even if the foreign defendants were completely unaware of it." *Id*. By contrast, here Tesco participated in the market for ADRs by registering with the SEC so the ADRs could be traded in the U.S. and explained on the Company website how investors can trade in the ADRs. *See* ¶26; Miller Decl. at Exh. 2. In circumstances such as those present here, the Second Circuit noted that "the fact

that the transaction was domestic might well be deemed sufficient to compel the conclusion that the invocation of § 10(b) is also domestic." *Parkcentral*, 763 F.3d at 216 n.12.

Third, the Second Circuit in *Parkcentral* distinguished securities based swaps as "exotic securities" based on the unique way in which they derive their value; ADRs, on the other hand, are valued like more traditional securities. *Parkcentral*, 763 F.3d at 206. Unlike the swaps in *Parkcentral*, which are bilateral agreements to pay money if the referenced stock goes up and down in value, ADRs have value independent from the Company's foreign listed ordinary shares. *See* Miller Decl. at Exh. 3, ADR Basics: Determining Price, ("Once an ADR is priced and sold on the market, its price is determined by supply and demand, just like an ordinary stock. . . . ADRs tend to follow the general trend of the home country shares, but this is not always the case."). The nature of a securities-based swap—a transaction that occurs "without either party taking actual ownership interest in the reference security"—is very different from the nature of ADRs and other "less exotic securities, which involve actual transfer of shares." *Parkcentral*, 763 F.3d at 206.

In drawing exaggerated comparisons to the facts in *Parkcentral*, Defendants failed to heed the Second Circuit's explicit caution that "[t]he conclusions we have reached on these facts cannot, of course, be perfunctorily applied to other cases based on the perceived similarity of a few facts." *Id*. at 217. Contrary to Defendants' position, *Parkcentral* unambiguously supports the application of §10(b) to the ADRs at issue here.

3. *SocGen* Carries Little Weight After *Absolute Activist*

Defendants also rely on this Court's opinion in *In re Societe Generale Sec. Litig.,* 2010 U.S. Dist. LEXIS 107710 (S.D.N.Y. Sept. 29, 2010) ("*SocGen*") to argue that trade in ADRs is "predominantly foreign," however the *SocGen* analysis of ADRs is no longer good law after *Absolute Activist*. In *SocGen*, this Court determined that because "[a]n ADR 'represents one or more shares of a foreign stock or a fraction of a share'" the nature of an ADR transaction is

"predominantly foreign." *Id*. at *14 (citations omitted). This Court further stated that because the ADRs were not traded on an official American securities exchange, there was "'lower exposure to U.S.-resident buyers.'" *Id*. at 20 (quotation omitted). The Second Circuit's opinion in *Absolute Activist*, however, created a bright-line test for determining when a transaction is domestic, by looking to whether "irrevocable liability to carry out the transaction" was incurred in the U.S. or if title to the securities was passed in the U.S. *Absolute Activist,* 677 F.3d at 69. As explained above, the ADRs at issue here meet each alternate requirement of *Absolute Activist*.

Defendants fail to cite *Absolute Activist*, the controlling Second Circuit precedent on this very issue, even once in their entire brief. Instead, they argue that the "relevant actions" in the Complaint took place on foreign soil and that the nature of ADRs is "predominantly foreign" (Dkt. 76 at 14-15), but these arguments are vestiges of the conducts and effects test that was rejected by the Supreme Court in *Morrison* in favor of a bright line test allows the application of § 10(b) to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Morrison*, 561 U.S. at 267. Indeed, at least one court rejected the very same arguments that Defendants make here:

> [D]efendants suggest that the Court employ an "economic reality" or "functional equivalent" test to determine whether the claims are barred under *Morrison.* But, in the Court's view, **the "functional equivalent" gloss that the *Elliot* and *Société Général* courts have developed is inconsistent with the bright line test set forth by the Supreme Court in *Morrison*, which focuses specifically and exclusively on where the plaintiffs purchase occurred.** The Supreme Court was clear in its holding that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." While defendants' contention that an investor could not purchase an RDS[4] in the United States without a corresponding overseas transaction may be true, it does not change the fact that a purchase in the United States still took place.

Phelps v. Stomber, 883 F. Supp. 2d 188, 208-209 (D.D.C. 2012) (internal citations omitted) (emphasis added). Here, the transactions of Tesco ADRs are undeniably domestic, because not

[4] *See Phelps*, 883 F. Supp. 2d at 208 (noting that ADRs "are similar to RDSs [Restricted Depositary Shares]").

only was "irrevocable liability to carry out the transaction" incurred in the U.S., but title to the ADRs also passed in the U.S., therefore satisfying *Absolute Activist* and *Morrison*.[5]

B. THE UNITED STATES IS THE PROPER FORUM FOR THIS ACTION

The U.S. is the appropriate forum for this action, so the Court should reject Defendants' motion to dismiss on the basis of *forum non conveniens*. The *forum non conveniens* doctrine permits a court, "in rare instances," to dismiss a claim properly venued and within its jurisdiction when proceeding would be so oppressive that the plaintiff must have filed there in order to harass the defendant. *Wiwa,* 226 F.3d at 100 (emphasis added). Contrary to Defendants' position, the *forum non conveniens* analysis "starts with 'a strong presumption in favor of plaintiff's choice of forum.'" *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)). Thus, "it is generally understood that, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *Id*. (quoting *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947)).

Defendants bear the burden of demonstrating the adequacy of the alternative proposed forum. *See Cyberscan Tech., Inc. v. Sema Ltd.*, 2006 U.S. Dist. LEXIS 90375, at *24 (S.D.N.Y. Dec. 13, 2006) (movant bears the burden of showing availability of adequate alternative forum). And, even if Defendants could establish the adequacy of an alternative forum, which they have not and cannot, they bear the additional burden of establishing that a balancing of public and private interest strongly favors dismissal. *See Gulf Oil*, 330 U.S. at 508; *Cyberscan*, 2006 U.S. Dist. LEXIS 90375, at *27. On these facts, Defendants cannot establish that this is the exceptional for the Court to disturb Plaintiff's legitimate choice of forum.

[5] To the extent Defendants argue that shares traded over-the-counter in the U.S. are somehow less domestic than shares traded on an official U.S. exchange, the Second Circuit forecloses this argument in *Parkcentral*, noting that if the swaps were linked to VW's unlisted ADRs in the U.S. instead of the foreign listed stock, the swaps would have been domestic transactions. *Parkcentral*, 763 F.3d at 207, n.9.

1. Plaintiff's Chosen Forum Is Entitled to Great Deference

While Defendants assert that Plaintiff's choice of forum "is entitled to little deference," D.E. 76 at 17, they wholly ignore the Second Circuit's controlling opinion in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (*en banc*), which sets forth the test that governs the degree of deference a court must give a plaintiff's choice of forum in this Circuit:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens.*

Id. at 71-72; *see also Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006).

Plaintiff's decision to sue in this forum rather than in England has been dictated by reasons that the law recognizes as valid. First, Plaintiff is suing at home, "present[ing] a situation in which courts should initially be at their most deferential." *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 231 (2d Cir. 2004). The case Defendants cite, *LaSala v. UBS, AG,* 510 F. Supp. 2d 213 (S.D.N.Y. 2007), is distinguishable on its facts, and in fact supports deference of Plaintiff's choice of forum. In *LaSala*, plaintiffs were two individuals "suing on behalf of a Trust whose governing document specifically authorize[d] litigation abroad." *Id*. at 224. Plaintiffs in *LaSala* had "already litigated abroad in the Isle of Man and Cyprus" and "therefore more closely resemble a corporation with substantial resources than ordinary citizens of comparatively modest means." *Id*. Here, by contrast, Plaintiff is an individual investor suing on behalf of a class of Tesco ADR purchasers, the majority of whom do not have the money or resources to pursue their claims abroad. The circumstances under which the court in *LaSala* limited the deference to plaintiffs' choice of forum are not present here.

Second, the Second Circuit has held that in securities fraud cases such as this, "plaintiffs offered a quite valid reason for litigating in federal court: this country's interest in having United States courts enforce United States securities laws." *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002). Defendants cite *In re European Aeronautic Defence & Space Co. Sec. Litig.*, 703 F. Supp. 2d 348, 361 (S.D.N.Y. 2010) ("*EADS*"), to argue that U.S. district courts have granted motions to dismiss on forum *non conveniens* grounds in securities cases (Dkt. 76 at 18). However, plaintiff in *EADS* purchased its securities on a foreign market, and therefore, under *Morrison*, United States securities laws did not apply in the first place. *EADS*, 703 F. Supp. 2d at 352 (noting that plaintiff "purchased its EADS shares in Europe" and that "the Complaint is bereft of any allegation that putative class members purchased EADS common stock or ADRs in the United States."). Thus, the "'strong presumption' that [plaintiffs'] forum choice is sufficiently convenient. . . is lessened when the dispute involves [foreign] transactions[.]" *Id*. at 361.

Because Defendants sought business opportunities in the United States by opening and operating grocery stores within the United States (¶26), sought interest of United States investors by issuing ADRs that required filing with the SEC (¶26), and because Plaintiff conducted the relevant ADR transactions within the United States (¶21), "a legitimate interest in trying this securities fraud litigation exists here." Plaintiff's choice of forum should receive deference.

2. Defendants Have Not Established that England Is an Adequate Alternative Forum, Nor Can They

Defendants submit a declaration from an English barrister in an effort to support their *forum non conveniens* argument. Unfortunately for Defendants, the declaration establishes that England is, in fact, **not** an adequate alternative forum. The lawyer explains that "an English Court would apply either English or US substantive law to the claims alleged by the plaintiffs."

Dkt. 79 at ¶13. Because "[t]he Exchange Act provides that courts of the United States 'shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder,'" an English Court could not apply the Exchange Act to the claims at issue. *Cleantech Innovations, Inc. v. NASDAQ Stock Mkt., LLC*, 2011 U.S. Dist. LEXIS 153142, at *5 (S.D.N.Y. Dec. 30, 2011) (quoting 15 U.S.C. § 78aa). The closest corollary to Section 10(b) in England is Section 90A and Schedule 10A of the Financial Services and Markets Act, but as explained by Defendants' lawyer, Schedule 10A would not apply to holders of Tesco ADRs. Dkt. 79 at ¶¶24-25 (Tesco ADRs "are not securities to which Section 10A applies. . . . In my opinion, therefore, purchasers or holders of Tesco ADRs could not bring a claim against Tesco under paragraph 3 of Schedule 10A").

Because English securities laws would not apply to the Tesco ADRs, Plaintiff and the class would need to bring individual tort claims against Tesco if they were to proceed in England. Dkt. 79 at ¶¶25-26, 34. Although not dispositive of the issue of adequacy, England has no class action device for such claims.[6] *Id*. at ¶¶34-35. Instead, England permits the High Court to make a Group Litigation Order where there a large number of similar claims, but may still require claims to proceed as test claims. *Id*. at ¶¶34-35. The class action device plays a very important and practical role in securities litigation, as bringing suit individually may not be economically feasible for class members with smaller losses. These practical concerns are exacerbated for U.S. plaintiffs litigating abroad, as not only would they have to coordinate to find an attorney in England, pay costs and fees to bring the case in England, but also pay Defendants' legal costs if the case is not successful. *Id*. at ¶37. The fact that the English court

[6] Courts have held that "lack of a class action mechanism is, however, an important factor to be weighed in determining the adequacy of an alternative forum." *In re Lernout & Hauspie Sec. Litig.*, 208 F. Supp. 2d 74, 92 (D. Mass. 2002); *see also Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1007-09 (D.N.J. 1996) (holding that Canada was an inadequate alternative forum because it failed to recognize the fraud-on-the-market theory and had an undeveloped class action procedure).

may issue an order that applies to multiple cases is no substitute for the class action device, especially where English Courts would not recognize the "fraud-on-the-market" presumption of reliance presenting insurmountable difficulties for Class members pursuing their claims. And, as pointed out by Defendants' lawyer, English law requires the unsuccessful party to pay the successful party's legal costs (CPR Rule 44.2(2)), thus making it even more difficult for an individual plaintiff in this action to pursue his or her claims in England. *Id*. at ¶37. Where Plaintiff's Tesco ADR transactions occurred in the United States and the Complaint alleges violations of the Securities Exchange Act, Plaintiff should not be forced to incur the extraordinary expense and inconvenience of litigating abroad in a forum that cannot apply the Act to Defendants' actions and requires Plaintiff to foot the bill if any plausible claims that could be individually brought do not succeed.

Finally, the fact that certain purchasers of Tesco ordinary shares traded on the English exchange have discussed the possibility of asserting claims under the Financial Services and Markets Act in England does nothing to support Defendants' argument that England is a suitable alternative forum for the claims in this case on behalf of purchasers of ADRs in the U.S. on the OTC. Dkt. 76 at 19-20. Not only would such a potential English case involve a different cause of action and different securities, but that case would involve an entirely different set of purchasers on the English market who would be suing in their home jurisdiction. Defendants have not met their burden to establish that England is an adequate alternative forum.

3. Defendants Do Not Show that the Relevant Private and Public Interest Factors Render this Court an Inconvenient Forum

As Defendants have not and cannot establish that England is an adequate alternative forum, the Court may end its analysis here and deny Defendants' motion to dismiss on *forum non conveniens* grounds. *See DiRienzo*, 294 F.3d 21, 29 ("A *forum non conveniens* motion

cannot be granted absent an adequate alternative forum."). Even if Defendants had or could establish England as an adequate alternative forum, however, they would still be unable to meet their additional burden of demonstrating that private and public interest factors "strongly favor dismissal." *Cyberscan*, 2006 U.S. Dist. LEXIS 90375, at *27.

In balancing public and private interests, great deference is owed to plaintiffs' choice of forum, which, "[u]nless the balance is ***strongly*** in favor of the defendant, . . . should rarely be disturbed." *Gilbert*, 330 U.S. at 508. Thus, with deference towards Plaintiff's choice of New York as the forum, "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the [alternative] forum significantly preferable." *Iragorri*, 274 F.3d at 74-5-75. Defendants must make a "clear showing that a trial in the United States would be so oppressive and vexatious to them as to be out of all proportion to plaintiffs' convenience." *DiRienzo*, 294 F.3d at 30; *see also Iragorri*, 274 F.3d at 75 (courts must "arm themselves with an appropriate degree of skepticism" in evaluating defendants' claims of inconvenience).

In this case, Plaintiff and Class members' strong private interests in pursuing their claims in this country and the powerful U.S. public interest in protecting U.S. investors and the integrity of U.S. markets in federal court significantly outweigh any negligible interests of Defendants. Defendants' principal argument is the purported inconvenience of obtaining witness testimony and documentary evidence in this jurisdiction. D.E. 76 at 20-21. Yet, Defendants' emphasis on live witness testimony is misplaced because it bears little weight on a *forum non conveniens* motion as this Circuit has long recognized the suitability of alternatives to live testimony. *See, e.g., DiRienzo*, 294 F.3d at 30 (recognizing use of videotaped depositions and letters rogatory as suitable alternatives to assess credibility); *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 211 (S.D.N.Y. 1999). Moreover, Defendants' concerns over the gathering of document discovery are

vastly overstated, as modern electronic discovery methods have all but eliminated any logistical burden in this regard. *See Livent*, 78 F. Supp. 2d at 211 ("[C]urrent computer technology… makes the documentary evidence factor far less important than it might have been in the past.").

Likewise, the public interest of maintaining this action in the U.S. to protect U.S. investors and the U.S. market outweighs and public interest in sending this action to England; at the very least, the competing public interests are neutral. Defendants' sole argument under the public interest factors is that Tesco is an English corporation and England has an interest in policing conduct within its own borders. Dkt. 76 at 22. Yet, the Tesco fraud damaged investors who traded in its securities in the U.S. market. ¶¶21-23. *See DiRienzo*, 294 F.3d at 33 ("[a] strong public interest favors access to American courts for those who use American securities markets. The fraud on the market theory itself illustrates investors' reliance on accurate and complete information. . . . [T]hese transactions are 'affected with a national public interest.'"). Defendants fail to meet their substantial burden on the sole public interest factor they argued. The U.S.'s compelling interest in this dispute greatly weighs in favor of this forum.

Balancing the relevant private and public interests, this American forum wins. Plaintiff's choice of forum would impose, at most, a slight hardship upon Defendants, who are a multi-billion dollar company and its top executives and board members and who have retained top-tier counsel in the U.S. and sent multiple representatives from multiple law firms to attend a status conference for which a single lawyer attended for Plaintiff. Transfer to England would impose not only great hardship on Plaintiff and the Class, it would be the "death knell" of their entire case. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 366 (S.D.N.Y. 2002). Defendants have fallen far short of meeting their "substantial burden" to establish that litigating this case in New York would be so "oppressive and vexatious" as to be

"out of all proportion to plaintiff's convenience." *Piper Aircraft*, 454 U.S. at 241.

C. THIS COURT HAS PERSONAL JURISDICTION OVER THE INDIVIDUALS

Defendants dispute that this Court has personal jurisdiction over Individual Defendants Clarke, McIlwee and Broadbent. To survive a motion to dismiss on this ground requires only that Plaintiff "make a prima facie showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir. 2006). "The Exchange Act permits nationwide personal jurisdiction" and thus "Plaintiffs need only plead that (1) the defendants had sufficient minimum contacts with the United States, and that (2) the assertion of jurisdiction is reasonable." *Absolute Activist Master Value Fund, Ltd. v. Ficeto*, 2013 U.S. Dist. LEXIS 45883, at *32 (S.D.N.Y. Mar. 28, 2013) (citing *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567-68 (2d Cir. 1996)). Plaintiff has alleged that Individual Defendants had minimum contacts with the U.S. sufficient to confer this Court with personal jurisdiction and the assertion of jurisdiction is reasonable.

1. Minimum Contacts

In determining whether a defendant had the requisite contacts with the U.S., courts look to both general jurisdiction—continuous and systematic contacts with the forum—and specific jurisdiction—"'single or occasional' acts in the forum" that "render that defendant answerable with respect to the acts." *Absolute Activist*, 2013 U.S. Dist. LEXIS 45883, at *33-34. Here, because specific jurisdiction is more at issue than general jurisdiction, the "inquiry must focus on the question of (1) whether the defendant has purposefully directed his activities toward the forum, and (2) whether the litigation arises out of or is related to the defendant's contacts with the forum." *In re DaimlerChrysler AG Secs. Litig.*, 247 F. Supp. 2d 579, 582 (D. Del. 2003). A plaintiff may show that the defendant caused effects in the forum by an act performed elsewhere, provided that such effects are the "direct and foreseeable result of the conduct outside the

territory." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998-1000 (2d Cir. 1975); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("Jurisdiction . . . may not be avoided merely because the defendant did not ***physically*** enter the forum State.").

With regard to Defendant Clarke, personal jurisdiction is established by his signing of Tesco's Form F-6 registration statement filed with the SEC for the issuance of ADRs, the securities that form the basis of this action. ¶27. *See In re Alstom SA Sec. Litig.,* 406 F. Supp. 2d 346, 399 (S.D.N.Y. 2005) ("The signing of documents filed with the SEC which form the basis for Plaintiffs' claims is sufficient contact with the jurisdiction to justify the Court's exercise of jurisdiction over [the Individual Defendant]."). Defendant Clarke's "signing of the Registration Statement was enough to put the defendant on notice of potential suit in the United States and shows purposeful availment" sufficient to confer personal jurisdiction over him. *In re CINAR Corp. Sec. Litig.,* 186 F. Supp. 2d 279, 305-06 (E.D.N.Y. 2002). Indeed, "[t]here is no clearer example of purposeful availment of the privilege of doing business in the United States than" registering with the SEC to "attract American investment." *Id*.

With regard to all the Individual Defendants, their minimum contacts with the United States are established by their participation in a conspiracy with Tesco, through the actions of the Individual Defendants, to defraud Tesco investors who purchased ADRs in the United States. "It is well established that 'the acts of a co-conspirator may be attributed to a defendant for the purpose of obtaining personal jurisdiction over the defendant.'" *Singer*, 585 F. Supp. at 302. "Many courts in this Circuit have asserted personal jurisdiction over absent defendants pursuant to a conspiracy theory." *Allstate Life Ins. Co. v. Linter Group Ltd.*, 782 F. Supp. 215, 221 (S.D.N.Y. 1992) (collecting Second Circuit cases and applying the conspiracy theory of personal jurisdiction in a case brought pursuant to the Exchange Act); *Absolute Activist*, 2013 U.S. Dist.

LEXIS 45883, at *40-41 n.13.

The *Linter* court held that to establish personal jurisdiction over a defendant based on a conspiracy theory, a plaintiff must: "(1) make a prima facie factual showing of a conspiracy; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious act pursuant to the conspiracy in this jurisdiction." *Id*. at 221. Plaintiff satisfies each element. *See, e.g.*, ¶¶81, 226, 230, 257-260, 273-275 (allegations that Individual Defendants were control persons of Tesco); ¶¶239-241 (allegations of motive); ¶¶126-196 (allegations of false and misleading statements, *e.g.*, tortious acts).

2. Personal Jurisdiction Over the Individual Defendants is Reasonable

Where, as here, "the plaintiff has made a prima facie showing of minimum contacts under the first prong, the exercise of personal jurisdiction is favored unless the defendant makes a showing that such an exercise of jurisdiction is unreasonable." *In re Alstom,* 406 F. Supp. 2d at 398. The determination of reasonableness in asserting personal jurisdiction depends on "whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice." *Metro. Life*, 84 F.3d 568 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In making this determination, courts weigh five different factors: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Metro. Life*, 84 F.3d at 568 (citing *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113-114 (1987)).

Here, any purported burden imposed on the Individual Defendants by litigating in this forum is vastly outweighed by Plaintiff's interest in maintaining this action in this Court and the United States' interest in enforcing its securities laws. If this Court does not entertain the federal securities claims brought in this action, Class members would be unable to obtain relief on a class-wide basis in England. *See In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 457 (S.D.N.Y. 2005) (denying motion to dismiss for lack of personal jurisdiction despite burden arguments, in light of substantial interest in enforcing U.S. federal securities laws). Accordingly, the Individual Defendants fail to make a "compelling case" that being subject to personal jurisdiction of the Court would be unreasonable or that it is even inappropriate.

D. THE COMPLAINT ADEQUATELY ALLEGES A SECTION 10(b) CLAIM

Defendants use just seven of their thirty-five pages in their brief to dispute the well-pleaded allegations of the Complaint while conceding that Tesco made false and misleading statements during the Class Period, and that Plaintiff adequately pleads loss causation. For the reasons explained below, Defendants' arguments that the Complaint does not plead that the Individual Defendants made false and misleading statements and that Plaintiff does not adequately plead scienter, fail.

1. Applicable Pleading Standards

When analyzing a complaint for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept "all well-pleaded, non-conclusory allegations in the complaint as true and draw[] all reasonable inferences in plaintiffs' favor." *New Orleans Emples. Ret. Sys. v. Celestica, Inc.*, 455 Fed. Appx. 10, 12 (2d Cir. 2011) (summary order). "Moreover, the existence of other, competing inferences does not prevent the plaintiff's desired inference from qualifying as reasonable unless at least one of those competing inference rises to the level of an 'obvious alternative explanation.'" *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d

109, 121 (2d Cir. 2013). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

2. The Complaint Adequately Alleges Materially False and Misleading Statements and Omissions

Defendants concede that the Complaint adequately pleads that Defendant Tesco made materially false and misleading statements during the Class Period (Dkt. 76 at 24 ("the complaint does allege that Tesco made misstatements—the incorrect results that the company has acknowledged")), yet they contest that the Complaint attributes any of the misleading statements and omissions to the Individual Defendants. *Id*. Despite Defendants' arguments to the contrary, which ignore that all three Individual Defendants signed Tesco's 2013 and 2014 Annual Reports from which the bulk of the alleged misrepresentations derive (*See* Miller Decl. Exh. 4 at pgs. 2, 9, and 23; and Exh. 5 at pgs. 2, 7, and 15), the Complaint attributes materially misleading statements and omissions to all three Individual Defendants.

a. All Three Individual Defendants Attested to the Accuracy of Tesco's Financial Results in the Company's Annual Reports

As alleged in the Complaint, each of the three Individual Defendants verified Tesco's financial results in the Company's annual reports; financial results that, by Defendants' own admission, were materially incorrect. Specifically, Tesco's 2013 Annual Report filed on May 23, 2013, contains a section entitled "Statement of Directors' Responsibilities," which contains the following statement:

> The Directors, whose names and functions are set out on pages 24 and 25 confirm that, to the best of their knowledge: the group financial statements, which have been prepared in accordance with IFRS, as endorsed by the EU, give a true and fair view of the assets, liabilities, financial position and profit of the Group

¶156.[7] Not only are the names of Defendant Clarke, McIlwee and Broadbent listed on pages 24 and 25, they are accompanied by their photographs. *See* Miller Decl. Exh. 4 at pg. 24-25. The above statement was false and misleading when made because Tesco's financial statements were not, in fact, prepared in accordance with IFRS. As alleged, Tesco masked its deteriorating profit margins in violation of IFRS by 1) recognizing premature and fictitious commercial income; 2) delaying accrual of costs; 3) overstating inventory; and 4) misrepresenting "trading profit" and "underlying profit." ¶6. Moreover, the financial results did not give a true and fair view of the assets, liabilities, profits and financial position of Tesco, because, as Defendants have admitted, Tesco reported "incorrect results that the company has acknowledged." Dkt. 76 at 24.

Defendants, citing *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011), argue that such "expressions of belief" are inactionable absent "facts showing that the statements were 'disbelieved by the [individual defendant[s] at the time.'" Dkt. 76 at 25. Defendants' argument not only misstates the controlling law on the actionability of opinion statements, but mischaracterizes the Individual Defendants' certifications of Tesco's financial reports, which are not statements of opinion. *See Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 2015 U.S. Dist. LEXIS 61516 (S.D.N.Y. May 11, 2015) ("use of the word 'believed' does not transform defendants' representation regarding Fremont's compliance with its underwriting guidelines into a statement of opinion. The first sentence is a straightforward statement of fact.").

Defendants' arguments that various alleged misrepresentations are inactionable statements of opinion fail. As an initial matter, the statements are not of opinion, but of fact.

[7] The 2014 Annual Report contains a similar statement of the directors, but Defendants argue that Defendant McIlwee had resigned by the issuance of the 2014 Annual Report and "therefore could not in any event be held responsible for the statement in that annual report." Dkt. 76 at 24 n.17. Although Defendant McIlwee may have resigned the month before the actual release of the 2014 Annual Report, the document nevertheless attributes the false and misleading statement to Defendant McIlwee. ¶¶185-186. In fact, the excerpt of the 2014 Annual Report that Defendants themselves cite bears Defendant McIlwee's signature. *See* Dkt. 77-3 at 5.

Not only do the Individual Defendant affirmatively state that Tesco's financial statements "have been prepared in accordance with IFRS," but the phrase "to the best of their knowledge" does not connote uncertainty or optimism associated with traditional opinions that begin "we think" or "we're confident." ¶156. Even if these statements were considered opinions, which they are not, Defendants failed to disclose facts undercutting their opinions that rendered them unreasonable.

The law regarding statements of opinion was recently settled by *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), in which the Supreme Court of the United States rejected Defendants' argument—and the holding in *Fait*—that a statement of opinion is not actionable "[a]s long as it is sincerely held." *Omnicare*, at 1328. Instead, the Supreme Court held that a plaintiff may establish liability for even sincerely held opinions by showing that the statement's issuer "lacked the basis for making those statements that a reasonable investor would expect." *Id*. at 1333.

The Complaint sufficiently alleges, with support by well-positioned former employees and myriad news articles citing credible sources, that Defendants lacked the basis for asserting that Tesco's financial statements were prepared in accordance with IFRS, and gave "a true and fair view of the assets, liabilities, financial position and profit of the Group." Tesco violated IAS 2 and related IFRS requirements by recording tens or hundreds of millions of dollars in revenue or reductions to cost of sales before the products were actually sold, and when the Company recorded rebates and discounts to which it was not contractually entitled or otherwise not permitted to record. ¶¶83-121, 186. The Complaint—supported by reports from CW2, a former employee of Tesco; Tom Salmon, the former managing director at a Tesco supplier; and numerous news outlets—details a pervasive business practice at the Company whereby Tesco would bully its suppliers into accepting rebate agreements and other promotional arrangements

that Tesco would then use to boost their commercial revenue. ¶¶41-45. Using such tactics, Tesco violated IFRS by prematurely and unjustifiably recording commercial income revenue, which materially inflated the Company's profits during the Class Period. ¶¶90-97, ¶186.

Thus, even if the Individual Defendants' misrepresentations were considered expressions of opinion, under the Supreme Court's new, controlling framework for analyzing opinion statements outlined in *Omnicare*, each of the challenged statements and omissions is actionable.

b. Defendant Clarke Made Numerous Misrepresentations

Defendants cite six paragraph numbers in the Complaint and, without further explanation, seek to summarily dismiss all misstatements attributable to Defendant Clarke as inactionable "good faith expressions of corporate optimism." Dkt. 76 at 24. But allegations "go beyond claims of mere puffery" where Defendants "made specific statements...reflecting optimism, knowing they were contrary to the company's actual situation." *In re Xerox Corp. Sec. Litig.*, 165 F.Supp.2d 208, 218 (D. Conn. 2001).

The Complaint adequately alleges that Defendant Clarke's misrepresentations are specific statements that misrepresented the current condition of the Company. For example, Defendant Clarke affirmatively represented that Tesco's 3Q:13 financial results reported on December 5, 2012, particularly in the UK, were "positive" (¶138); that the Company's performance in the UK continued to improve through the holiday period (¶142); and that the Company "maintained [its] performance from the fourth quarter" of 2013 through the start of fiscal 2014 (¶160). These statements were materially false and misleading when made, because while Defendant Clarke made these statements, Tesco was improperly accounting for hundreds of millions of dollars in commercial income. *See, e.g.,* ¶138 (Tesco improperly accounted for £53 million in commercial income in the 2nd half of 2012/13); ¶161 (Tesco improperly accounted

for £26 million in commercial income in the 1st half of 2013/14).[8] Thus, any "improved performance" was based on falsified financial numbers, and therefore Tesco was not "on track" and "maintain[ing] our performance." *See Novak v. Kasaks*, 216 F.3d 300, 315 (2d Cir. 2000) (statements that inventory situation was "in good shape" or "under control" when defendants knew the contrary was true were false and misleading) (citation omitted); *In re GE Sec. Litig.*, 857 F. Supp. 2d 367 (S.D.N.Y. 2012) ("the mere fact that a statement uses conclusory, indefinite, and unverifiable terms, rather than expressing a reason in dollars and cents, does not compel a conclusion that it is immaterial as a matter of law.").

Defendants' "puffery defense fails because Defendants "made specific statements... knowing they were contrary to the company's actual situation." *In re Xerox Corp.*, 165 F.Supp.2d at 218; *In re GE*, 857 F. Supp. 2d at 387 ("once a company chooses to speak—as GE insistently did with respect to the high quality of GE Capital's portfolio—it has a duty to disclose any additional material fact necessary to make the statement [already contained therein] not misleading.") (internal quotation omitted).

3. Plaintiff Has Alleged Facts Giving Rise to a Strong Inference of Scienter

To state a claim under §10(b), a plaintiff must allege facts providing a strong inference that defendants acted with scienter. *ECA Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009). Plaintiff may plead a strong inference of scienter through "strong circumstantial evidence of conscious misbehavior or recklessness." *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 199

[8] Defendant Clarke also made misrepresentations that specifically refuted the improper practices undertaken by Tesco. For example, Clarke stated: "On promotions, we have chosen to reinvest for loyalty, helping customers manage their budgets on an ongoing basis rather than funding short term, indiscriminate couponing." ¶187. This statement was materially false and misleading because Tesco was, in fact, engaging in "indiscriminate couponing" in an effort to inflate the Company's gross sales margins and short-term profits; Tesco's untargeted promotions had nothing to do with helping customers manage their budgets. ¶188. Likewise, Defendant Clarke's statement that it would be "pointless" to draw conclusions from falling sales figures was materially false and misleading when made, because the Company's floundering sales figures reflected the true deteriorating state of Tesco. ¶¶191-92.

(2d Cir. 2009). "The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the smoking-gun genre, or even the 'most plausible of competing inferences.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007) (citation omitted). A complaint survives if, "[w]hen the allegations are accepted as true and taken collectively," a reasonable person would "deem the inference of scienter at least as strong as any opposing inference." *Id.* at 326. Courts are to review "all the allegations holistically." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1324 (2011). While a court may consider non-culpable competing inferences, those inferences must be derived *solely* from the four corners of the complaint. *Tellabs*, 551 U.S. at 324. If the competing inferences are equally plausible, the complaint must be sustained. *Id.* at 331; *City of Brockton Ret. Sys. v. Shaw Group. Inc.*, 540 F. Supp. 2d 464, 472 (S.D.N.Y. 2008) ("the 'tie . . . goes to the plaintiff'"). "Whether respondents can ultimately prove their allegations and establish scienter is an altogether different question." *Matrixx,* 131 S. Ct. at 1325.

As discussed below, the collective inference of scienter weighs heavily in Plaintiff's favor.[9] Defendants' purported innocent explanation (a "rogue fiefdom" within Tesco manipulated all Company financial results (Dkt. 76 at 31)) is not plausibly drawn from the allegations and only serves to underscore Defendants' culpability for their fraudulent actions, as demonstrated by the resignations or terminations of the highest level corporate officers or directors (*e.g.*, all three individual defendants -- the CEO, the CFO, and the Chairman) as well as eight other senior executives who were leaders of various segments within Tesco's UK food business, immediately after the Company announced the massive profit overstatement. Consistent with well-pleaded facts alleged in the Complaint, this was no rogue fiefdom; it was a massive and pervasive fraud orchestrated at the highest levels of the Company.

[9] Scienter is imputed to Tesco for the acts of the Individual Defendants. *See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Cap. Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) ("It is possible to raise the required [scienter] inference with regard to a corporate defendant without doing so with regard to a specific individual defendant.").

i. A Tesco Whistleblower, Former Employees, Suppliers, Tesco's Auditor Warnings and News Reports Support a Finding of Defendants' Scienter

The Complaint includes allegations supported by well-positioned former Tesco employees, and cites a number of reputable news reports that—through confidential sources of their own—indicate that Tesco's improper accounting practices were known to, or at the very least, recklessly disregarded by Defendants. *City of Brockton Ret. Sys. v. Avon Prods.*, 2014 U.S. Dist. LEXIS 137387, at *67-68 (S.D.N.Y. Sept. 28, 2014)(noting that an article citing a confidential source, just like a confidential witness, "may be probative of scienter"). For example, the whistleblower—described by new CEO David Lewis as a "reasonably senior person" at Tesco—who alerted Lewis to the Company's wrongful accounting practices and caused Tesco to issue the September 22, 2014 announcement of the profit overstatement had, according to an article in the The Sunday Times, raised accounting red flags while Defendant Clarke was still CEO. ¶11. According to an article in the International Business Times, the whistleblower had "been ignored for months." ¶11. The Daily Mail then reported that Lewis, after being tipped-off to possible accounting irregularities, was able to confirm over a single weekend that pervasive, substantial accounting problems existed and that a number of senior executives should be immediately suspended. ¶11. These allegations support the inference that Defendant Clarke was, at the very least, reckless in ignoring the whistleblower's caution. With regard to Defendant McIlwee, the BBC reported that McIlwee had sent an email to Tesco's senior finance team in April 2012 warning them that the Company had discovered a problem with the recognition of commercial income in Tesco's Polish business. ¶228.[10] The email

[10] Defendants' efforts to argue this allegation undermines scienter as to McIlwee because "it shows that Mr. McIlwee was seeking to address" the accounting issues (Dkt. 76 at 30) fail. The manner in which he internally addressed the issue with employees does not insulate McIlwee from 10(b) liability, as the accounting irregularities became a pervasive pattern and practice that distorted Tesco's Class Period financial reports; reports that McIlwee

specifically referenced that Tesco was recognizing future profits in the wrong accounting period in the same manner the SFO is currently investigating Tesco's UK business. ¶228.

Tesco's financial reports themselves indicate that Tesco's outside auditor, PricewaterhouseCoopers ("PwC"), identified some of the accounting irregularities and brought them to the Company's attention. With regard to the Company's "[r]ecognition of commercial income, PwC took the unusual step in Tesco's 2014 Annual Report, of noting that Tesco's practices give rise to a "risk of manipulation[.]" ¶12. This language did not appear in Tesco's 2013 Annual Report. ¶12. Despite Defendants' improper attempt to graft wholly-new facts onto the Complaint in violation of *Tellabs* by arguing that this statement was simply a product of a restructuring of the format of PwC's report (Dkt. 76 at 29 n.20), the more plausible inference drawn from the well-pleaded allegations is that PwC urged Tesco to make commercial income adjustments in 2013/14, and when the Company refused, PwC included a note indicating that PwC focused on this area of Tesco's accounting because of the risk of manipulation. ¶12.

Additional allegations in the Complaint detail the manner in which Tesco pressured its suppliers into various rebate arrangements that the Company would use to improperly account for commercial income and profits. For example, CW2, who served as Tesco's Interim Category Buying Manager in the Company's Procurement Division during the Class Period, stated that Tesco was a "bully" with its suppliers and would "batter" them until they gave Tesco rebates. ¶¶41-42. This conduct is confirmed by Tom Salmon, a former managing director of a Tesco supplier, who explained that Tesco would force the suppliers to pay for discounted items or else

himself approved. McIlwee's knowledge of the exact same improper accounting practices in the Polish segment supports the inference that he knew of the fraudulent conduct or was reckless to certify the accuracy of Tesco's financial reports with the potential that the same practices were occurring at the Company on a larger scale, "at least as likely" as Defendants' countervailing inference that Defendant McIlwee innocently rectified a small isolated issue in Poland. *Tellabs*, 551 U.S. at 326.

the Company would take the suppliers' items off the shelves. ¶¶43-44. These practices violated the Groceries Supply Code and led to an investigation by the GCA. ¶5.

Tesco's fraudulent conduct was part of corporate policy attributable directly to Defendant Clarke himself. According to an article entitled "Tesco's Darkest Hour: The Inside Track on Phil Clarke's Final Chapter," a former Tesco employee stated that Clarke "was putting huge pressure on people to deliver the numbers" and that "[t]he phrase that came out was, '***I don't care how you do it, just do it.***'" ¶234 (emphasis added). Defendant Clarke's statement demonstrates a conscious disregard for rules and regulations, evidencing, at a minimum, a level of recklessness sufficient to satisfy the scienter element at this stage. This disregard for rules and regulations is confirmed by CW1, who stated that Tesco's treatment of promotional pricing often did not comply with the legal team's guidance, but that Tesco management endorsed the noncompliant practices. ¶10. Moreover, the Sunday Telegraph reported a senior source stating that a "corruption of virtues" had made people go over lines that basic values suggest they shouldn't have." ¶233. These detailed and corroborative facts, when viewed together, sufficiently allege a cogent inference of scienter that is "at least as compelling as any opposing inference." *Tellabs*, 551 U.S. at 314.

ii. The Magnitude of the Accounting Fraud Supports Scienter

Tesco admitted that the Company overstated its profit expectations by a whopping £263 million in the first half of 2014/15 as a result of improper accounting practices that date back prior to February 2013. ¶74. An accounting misstatement of this type and magnitude does not develop overnight, nor by accident. *See In re Grand Casinos, Secs. Litig.*, 988 F. Supp. 1273, 1283 (D. Minn. 1997); *South Ferry LP v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008) ("[F]ederal courts certainly need not close their eyes to circumstances that are probative of

scienter viewed with a practical and common-sense perspective.").

The size of the restatement, which Tesco has conceded was primarily attributable to "accelerated recognition of commercial income and delayed accrual of costs," bolsters the inference that Defendants Clarke, McIlwee and Broadbent knew or recklessly disregarded that the Company's Class Period financial statements were materially incorrect and that their positive statements regarding Tesco's financial position were materially false and misleading. ¶2; *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 73 (2d Cir. 2001) (finding that the size of a charge taken after the class period supported the inference that the fraud did not develop "only in that month, but throughout the class period."); *Freedman v. Weatherford Int'l Ltd.*, 2013 U.S. Dist. LEXIS 135149, at *16 (S.D.N.Y. Sept. 19, 2013) ("[T]he magnitude of the [$500 million] error is further supportive of defendants' scienter"); *In re Scottish Group Sec. Litig.*, 524 F. Supp. 2d 370, 394 (S.D.N.Y. 2007) ("the fact that there was a large, $112 million 'surprise' valuation…also provides some circumstantial evidence of scienter.").

iii. Executive Resignations and Firings Support a Finding of Scienter

In addition to the sheer size and scope of the accounting misstatement, the resignations of numerous Tesco executives, including all three Individual Defendants, are "highly unusual and suspicious facts" that support the inference of scienter. *In re Scottish*, 524 F. Supp. 2d at 370 n. 176 ("the resignations of [individual defendants], although not sufficient in and of themselves, add to the overall pleading of circumstantial evidence of fraud."). Here, not only did all three Individual Defendants resign in connection with the accounting scandal, but eight other senior executives who were leaders of various segments within Tesco's UK food business, were asked to resign immediately after the Company announced the overstatement. *See In re Sadia, S.A. Sec. Litig.*, 643 F. Supp. 2d 521, 534 (S.D.N.Y. 2009) (resignation of two individual defendants

shortly after company suffered major losses and stock price drop provided basis to infer conduct of company's officers and agents was "highly unreasonable" and "an extreme departure from the standards of ordinary care."); *In re Am. Int'l Group, Inc.*, 741 F. Supp. 2d 511, 533 (S.D.N.Y. 2010). Indeed, Defendant Broadbent's admission to investors upon resignation that he was "deeply disappointed" over the accounting problems and considered the situation a "matter of profound regret" bolsters the inference of his culpability and that of the Company. *Varghese v. China Shenghuo Pharm. Holdings*, 672 F. Supp. 2d 596, 608 (S.D.N.Y. 2009) (plaintiffs adequately pled scienter where resignation email discussed same issues alleged in fraud).

iv. Investigations by Regulatory Bodies Support a Finding of Scienter

Various regulatory bodies—including the FCA, FRC, SFO, and GCA—have undertaken investigations of Tesco's accounting and operational conduct related to the profit overstatement. ¶5. The pending investigations further bolster the inference of scienter. *See In re Gentiva Secs. Litig.*, 932 F. Supp. 2d 352, 380 (E.D.N.Y. 2013) ("[C]ourts have considered a governmental investigation as one piece of the puzzle when taking a holistic view of the purported facts as they relate to scienter.") (internal quotation marks omitted); *Washtenaw County Emples. Ret. Sys. v. Avid Tech., Inc.*, 28 F. Supp. 3d 93, 115 (D. Mass. 2014) ("[T]he government investigation can be seen as one more piece of the puzzle, a series of circumstances that add up to a strong inference of scienter."); *In re Bristol Myers Squibb Co. Secs. Litig.*, 586 F. Supp. 2d 148, 168 (S.D.N.Y. 2008). In particular, the investigations by the FRC—the UK's independent regulator responsible for promoting high quality corporate governance and reporting to foster investment—and the SFO—which prosecutes those who commit serious or complex fraud—support inference of Defendants' scienter.

v. Post-Class Period Events and Company Admissions Support a Strong Inference of Scienter

After Tesco announced the overstatement of profits on September 22, 2014, a string of Company admissions confirm the fraud and support a finding of scienter. *See In re Scholastic*, 252 F.3d at 72 ("Any information that sheds light on whether class period statements were false or materially misleading is relevant."); *see also Inst. Investors Group v. Avaya*, 564 F.3d 242, 249, n.13 (3d Cir. 2009) ("[B]oth post-class-period data and pre-class data could be used to 'confirm what a defendant should have known during the class period.'").

In addition to shedding additional light on the magnitude of the accounting errors, Tesco has made compelling admissions regarding the manner in which these accounting irregularities took place. For instance, on January 8, 2015, new CFO Alan Stewart responded to a question from a JP Morgan analyst regarding how much commercial income would be recovered in 2015/16, stating, "we've said that this is an uncertainty" or, in other words, none of the reverse commercial income would be recovered in 2015/16 because it was mostly fictitious. ¶216. Moreover, Tesco has since admitted that it violated the groceries code, stating, among other things: "Regrettably, we have concluded that there have been a number of instances of probable breaches of the Code which fall short of the high standards we expect to uphold with our suppliers." ¶220. These admissions further bolster the inference of scienter.

vi. Defendants' Motive

Plaintiff also pleads allegations of Defendants' strong personal incentives to misrepresent Tesco's financial condition. Defendants' suggestion that Plaintiff cannot successfully plead scienter without allegations of stock sales is contrary to the Supreme Court's direction that motive allegations are not required. *See* Dkt. 76 at 26; *Tellabs*, 551 U.S. at 325; *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1191 n.12 (10th Cir. 2003) ("We will not . . . infer from the fact that they did not sell their Novell stock that they lacked motive to defraud investors."). Here,

Plaintiff alleges that Defendants Clarke and McIlwee were personally motivated to misrepresent Tesco's financial condition because their executive bonuses were largely tied to the financial performance of Tesco. ¶239. *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 185 (S.D.N.Y. 2003) (allegations that Company's CEO was given a specific concrete benefit in the form of a bonus for boosting company's EBITDA were a sufficient to basis to infer CEO had a motive to promulgate alleged falsehoods.); *Schottenfeld Qualified Assocs., L.P. v. Worsktream, Inc.*, 2006 U.S. Dist. LEXIS 96035 (S.D.N.Y. May 3, 2006)(held plaintiffs sufficiently pled scienter where complaint alleged that individual defendant was awarded cash bonuses, based on gross revenue growth). Tesco's 2014 Annual Report explains that "[a]t least 70% of the bonus will be based on financial performance. . . . Normally around 30% of the bonus is paid for threshold performance, around 50% of the bonus is paid if target levels of performance are delivered with the full bonus being paid for delivering stretching levels of performance." ¶239. Stuart Chambers, chairman of the Remuneration Committee at Tesco, stated in May 2013 with regard to the 2013-14 annual executive bonuses that "bonuses will only be paid if profits have grown." ¶239. Tesco itself later effectively admitted that its executive compensations structure motivated McIlwee and Clarke to push the envelope with Tesco's accounting by changing the executive bonus to prioritize long-term sales growth over short-term profit. ¶240. After the bonus restructuring, new CEO Lewis' April 2015 commented that Tesco would no longer be "slavishly driven" to hit financial targets in the wake of Tesco's accounting scandal. ¶240. Thus, Tesco itself has admitted that its previous executives were motivated to falsify the Company's financial results and has since reformed its executive compensation structure to mitigate such incentives.

vii. Corporate scienter

Plaintiffs also sufficiently plead a strong inference of scienter by alleging facts supporting a finding of corporate scienter. Under the corporate scienter doctrine, materially false and misleading statements and omissions that "would have been approved by corporate officials sufficiently knowledgeable about the company" can lead to a strong inference of corporate scienter "without being able to name the individuals who concocted and disseminated the fraud." *Makor Issues & Rights, LTD., v. Tellabs*, 513 F.3d 702, 710 (7th Cir. 2008). The Second Circuit has explicitly endorsed the corporate scienter doctrine. *Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital, Inc*., 531 F.3d 190, 195 (2d Cir. 2008).

In *Pa. Pub. Sch. Emples. Ret. Sys. v. Bank of Am. Corp.,* 874 F. Supp. 2d 341, 365 (S.D.N.Y. 2012), this District held that "[w]hile Plaintiff's allegations are not sufficient to allege scienter as to the Executive Defendants, several of the allegations, taken together, raise a strong inference of scienter as to BoA." In so holding, the court found that allegations that senior managers saw audit reports indicating errors was enough to impute that knowledge to the Company. *Id*. Here, like in *Bank of America*, the Complaint contains facts that impute knowledge of accounting fraud to Tesco through its senior management. Not only does the Complaint contain detailed factual allegations that indicate that Defendants Clarke, McIlwee and Broadbent knew about the accounting fraud, but other allegations indicate that other senior management personnel knew about it also. For example, Chris Bush, who was Tesco's former U.K. managing director and had worked for the Company for 32 years, was integral to the Company's financial statement preparation and was forced to resign because he was involved in activities regarding improper booking of business costs. ¶233. Also like in *Bank of America*, the size and scope of the fraud lead to the conclusion that the Company and its executives were aware of it. These facts simply do not support Defendants' contention that the accounting

misconduct was only known to a "small group" within Tesco that did not include the Individual Defendants. If that was the case, Defendant Broadbent, upon announcing his resignation, would not have said that he was "deeply disappointed" about the accounting irregularities" and called the situation a "matter of profound regret."

viii. The Inference of Culpable Conduct Is At Least as Compelling as Any Alternative Non-Culpable Inference

Considering all the foregoing allegations holistically, the culpable explanation of Defendants' allegedly false and misleading statements and omissions regarding Tesco's improper accounting practices during the Class Period is at least as compelling as any nonculpable alternatives. *See Heller v. Goldin Restructuring Fund, L.P.*, 590 F. Supp. 2d 603, 620 n. 14 (S.D.N.Y. 2008) ("[Under *Tellabs*], if an inference of non fraudulent intent is equally permissible as any inference of fraudulent intent, the complaint is properly pleaded."). In fact, the only nonculpable alternative put forth by Defendants is the counterintuitive explanation that Defendants Clarke, McIlwee, and Broadbent—Tesco's CEO, CFO, and Chairman of the Board, respectively—in addition to the eight other senior Tesco executives who resigned or were ousted as a result of the massive profit overstatement, constituted a "rogue fiefdom" that perpetrated this fraud. Dkt. 76 at 31. This is not an innocent explanation at all, but one that concedes scienter for the Individual Defendants and the Company.

Thus, even by Defendants' own characterization, Plaintiff adequately pleads scienter.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety[11]. In the event that all or any portion of Defendants' motion to dismiss is granted, Plaintiff respectfully requests leave to amend pursuant to Fed. R. Civ. P. Rule 15.

[11] Plaintiff has adequately pleaded the underlying § 10(b) claims with legal sufficiency, and thus, secondary liability under § 20(a) is also adequately pleaded.

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_Kim E. Miller_____
Kim E. Miller
KAHN SWICK & FOTI, LLC
250 Park Avenue, Suite 2040
New York, NY 10177
Telephone: (212) 696-3730
Fax: (504) 455-1498
Kim.miller@ksfcounsel.com

-and-

Lewis S. Kahn
J. Ryan Lopatka
206 Covington Street
Madisonville, LA 70447
Phone: (504) 455-1400
Facsimile: (504) 455-1498
lewis.kahn@ksfcounsel.com
j.lopatka@ksfcounsel.com

Lead Counsel for Lead Plaintiff Stephen Klug

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2015, I filed the foregoing upon all counsel of record by using the CM/ECF system. The CM/ECF system will provide service of such filing(s) via Notice of Electronic Filing (NEF).

/s/ Kim E. Miller
Kim E. Miller