UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE NOVAGOLD RESOURCES INC. SECURITIES LITIGATION	MASTER FILE 1:08-cv-07041 (DLC)
This Document Relates to:	Hon. Denise L. Cote
All Actions	**Oral Argument Requested**

LEAD PLAINTIFF'S OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Lead Plaintiff New Orleans Employees' Retirement System ("New Orleans" or "Lead Plaintiff") respectfully submits this Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss. In particular, defendants seek to dismiss Lead Plaintiff's claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "Securities Act") and Sections 10(b)(5) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), as alleged in the Corrected Consolidated Class Action Complaint (Docket No. 39) (the "Complaint").[1] For the reasons stated herein, defendants' motions to dismiss should be denied.

PRELIMINARY STATEMENT

On November 26, 2007, after using the October 2006 "final" feasibility study (the "Final Feasibility Study," "Final Study," or "Study") to inflate its stock price for the purpose of (i) defeating a hostile takeover bid and (ii) raising hundreds of millions of dollars from investors, the NovaGold Defendants finally admitted what they had known all along—their representations concerning the economic feasibility of the Galore Creek mine were false. ¶175. What investors

[1] Capitalized terms not defined herein shall have the same meaning as defined in the Complaint. References to "¶__" are to the corresponding paragraphs of the Complaint (Docket No. 39). Defendants NovaGold Resources Inc. ("NovaGold" or the "Company"), Galore Creek Mining Corp. ("GCMC"), Rick Van Nieuwenhuyse, CEO, ("Nieuwenhuyse"), Robert J. McDonald, CFO, ("McDonald"), Douglas Brown, Vice President of Business Development, ("Brown"), Peter W. Harris, Senior Vice President and COO, ("Harris"), and directors George Brack ("Brack"), Michael H. Halvorson ("Halvorson"), Gerald J. McConnell ("McConnell"), Clynton R. Nauman ("Nauman"), James L. Philip ("Philip") are collectively referred to as the "NovaGold Defendants." The period from October 25, 2006 to November 23, 2007, inclusive, is the "Class Period." References to "NG Br. at __" are to the NovaGold Defendants' and Galore Creek Mining Corporation's Motion to Dismiss (Docket No. 63). References to "Underwriter Defendants" are to Citigroup Global Markets Inc., ("Citigroup"), Citigroup Global Markets Canada Inc. ("Citigroup Canada"), RBC Dominion Securities Inc. ("RBC"), Scotia Capital Inc. ("Scotia"), Cormark Securities Inc. ("Cormark") and MGI Securities ("MGI"). References to "UW Br. at __" are to the Underwriter Defendant's Motion to Dismiss (Docket No. 55). References to the "Hatch Defendants" are to defendants Hatch Ltd. ("Hatch") and Bruce Rustad ("Rustad"). References to "Hatch Br. at __" are to the Hatch Defendants' Motion to Dismiss (Docket No. 47). References to "Ex. __" are to the Declaration of Joseph A. Fonti in Support of Lead Plaintiff's Opposition to Defendants' Motions to Dismiss. References to "NG Ex. __" are to the Declaration of Damion K.L. Stodola in Support of the NovaGold Defendants' and Galore Creek Mining Corporation's Motion to Dismiss the Corrected Consolidated Class Action Complaint (Docket No. 62).

learned that day was that the capital cost figure for constructing Galore Creek's critically important tailings and water diversion facilities were misstated by as much as ***800 percent***. ¶¶60-61, 175. Indeed, the magnitude of the true costs rendered Galore Creek worthless—in fact, the rate of return was negative—resulting in the immediate shut down of the project. ¶173.

With this news, the NovaGold Defendants' promises that they were well on their way to becoming a mining producer evaporated, along with management's credibility. Upon learning the truth, investors reacted harshly, sending NovaGold's share price plummeting $10.76, or over ***53 percent***, in a single day. ¶¶100, 181.

Faced with this reality, no defendant challenges loss causation, appropriately recognizing that the truth was first disclosed on November 26, 2007. Instead, their challenge to Lead Plaintiff's allegations centers on the arguments that the truth about Galore Creek was "irrelevant" or "immaterial," and, alternatively, "NovaGold disclosed precisely the risk about which plaintiff now complains." NG Br. at 19 n.8, 23-24; UW Br. at 18. Almost without more, the undisputed investor reaction to the revelation of the truth renders these arguments unavailing.

What is most revealing about the strength of defendants' arguments, however, is what they fail to include—the true facts. Notably absent from the 84 pages of briefing, and over 750 pages of exhibits they submit, is any discussion, quotation, or reference to the NovaGold Defendants' disclosure of the truth during NovaGold's conference call with analysts and investors on November 26, 2007 (the "November 26 Call"). ¶¶173-78 (quoting the November 26 Call). Ex. 1. During this unscripted call, the NovaGold Defendants admitted that the "***lion's share***" of the increased costs was due to the monumental water management and tailings challenges, Ex. 1—facts that were known, or at least recklessly disregarded, as early as February 2006. ¶174. Contrary to NovaGold's earlier press releases—and indeed defendants' motions to

dismiss filed last month—CEO Van Nieuwenhuyse was explicit about what did not cause the cost overruns and suspension of the mine: "currency [] changes are not significant" and the "scope did not change." Ex. 1 at 8, 17. The NovaGold Defendants were forced to specify that rather than the C$274 ***million*** attributed for water management and tailings work in the Final Feasibility Study, the true cost of that work was as much as 45 percent of the C$5 billion cost, or C$2.25 ***billion***—more than the cost stated in the Final Feasibility Study for the entire mine. Finding the "magnitude of underestimation [] shocking," analysts concluded that NovaGold's value was "fundamentally impair[ed]." Ex. 2 at 3.[2]

With the revelation of the truth on November 26, 2007 as the appropriate context, defendants' arguments that Lead Plaintiff's claims fail because they do not plead scienter, do not plead actionable false statements, or are time barred collapse under their own weight. *See* Parts I, II, and III.A, respectively. As detailed herein and in the Complaint, the NovaGold Defendants hijacked the Final Feasibility Study in order to evade a hostile bid from mining giant Barrick Gold Corp. ("Barrick"), knowing, or at least recklessly disregarding, that the Galore Creek mine faced monumental engineering challenges recognized no later than the Winter of 2005-06. Indeed, these defendants intentionally provided "stale" data to Hatch to ensure that the Final Study would "prove" that Galore Creek was economically viable, when in fact, due to water management and tailings issues, NovaGold's internal cost figures already revealed it was not. Not wanting to spend a dime of their own money, the NovaGold Defendants turned to using the Final Study as the basis for raising C$200 million in a secondary offering, at the very same time they commissioned a secret new feasibility study to assess the true cost of building the mine.

[2] *See* Parts II.A.1 and II.A.2, for discussion. Appendix A hereto sets forth information investors learned on November 26, 2007 and October 15, 2007. The side-by-side comparison provided in Appendix A serves to illustrate the deficiency in any argument that excludes mention of the November 26 Call.

Indeed, despite knowing that their own capital cost figure was quickly escalating, the NovaGold Defendants, through their statements and deceptive conduct, repeatedly concealed the truth. These facts are far from "immaterial" or "irrelevant." Instead, they constitute a violation of the securities laws.

SUMMARY OF ALLEGATIONS

Barrick Launches Hostile Bid for NovaGold

On July 24, 2006, Barrick instituted a hostile takeover bid for NovaGold, at US$14.50 per share. ¶63. In reaction to the news, NovaGold shares shot up ***nearly 39 percent***. ¶63. At the time of Barrick's hostile bid, the investing community was anxiously anticipating the "final" feasibility study on Galore Creek, NovaGold's most important mineral property and the project that was to launch the Company from mineral explorer to precious metal producer. ¶¶54, 70, 74. The NovaGold Defendants had promised that they would deliver the study by "early in the second half of 2006," but, unknown to investors, due to "monumental" engineering and logistical challenges plaguing the project, the NovaGold Defendants knew that the feasibility study would not be released until late in the fourth quarter of 2006. ¶¶57, 66, 74.[3]

Tailings Dam and Water Management Issues Plague Galore Creek

Construction of the tailings dam presented a significant challenge for NovaGold. ¶¶3, 60-61. According to Galore Creek's mine construction plan, tailings and waste rock storage would cover nearly four square kilometers, with the tailings dam reaching a height of 275 meters

[3] A "feasibility study" is an instrument that compares the amount and value of the minerals located at a particular site to the costs associated with extracting them from the ground. A "final" feasibility study is referred to as "bankable" because its level of accuracy is trusted by banking institutions when making decisions regarding project financing. *See* Glossary of Terms ("Glossary"), appended to the Complaint.

(approximately 90 stories), making it one of the tallest in the world. ¶60.[4] What was not disclosed was the other, and more significant, engineering challenge facing Galore Creek—colossal surface-water management issues. ¶¶3, 51-52, 60-61, 67. In order to construct a mine on the property, NovaGold would first have to re-channel the flow of the Galore Creek around the entire mine site (including the massive tailings dam) and then redeposit the water back into the creek bed over seven kilometers downstream. ¶61; Ex. 3 (map of the Galore Creek mine site). The "monumental" engineering challenges became a stark reality in the Winter of 2005-06, when NovaGold first witnessed the enormous amounts of snow, ice, and rain, experienced at Galore Creek, which would require a complete redesign to the surface water diversionary structures in order to handle the additional water volume. ¶61. Unbeknown to investors, the newly-discovered water management issues were the primary reason for the "final" feasibility study's delay. ¶60.

The NovaGold Defendants Usurp Hatch's Independence

In the face of the hostile Barrick bid, rather than risk further delay of the study and the possibility of an engineering conclusion that may render the mine "not feasible," the NovaGold Defendants usurped the Hatch engineers' independent assessment of the project and began driving the feasibility study's outcome. ¶68. To ensure that Hatch's study contained the conclusions that NovaGold needed to survive (*i.e.*, that Galore Creek was a "very low" cost economically feasible mine project), the NovaGold Defendants manufactured the design and cost figures to fit their needs and then directed Hatch to build its study around those conclusions.

[4] "Tailings" are the materials left over after the process of separating the valuable minerals from the worthless portion of the ore (*i.e.*, ore is the rock that contains minerals such as gemstones and precious metals that can be extracted through mining operations and an ore body refers to the collection of ore at a particular mining location.). "Waste Rock" is the portion of the mined area that does not contain valuable minerals. *See* Glossary.

¶¶68-69, 90. The NovaGold Defendants accomplished this by simply ignoring the newly-discovered water management issues, and forcing Hatch to use the now "stale" pre-Winter 2005-06 structural designs for the tailings and water diversion facilities. ¶68-80.

Barrick Raises Its Bid, Forcing NovaGold to Release The Purportedly "Final" Study

On October 24, 2006, Barrick forced the hand of NovaGold by increasing its tender offer to US$16 per share, which exceeded NovaGold's then-current price. ¶71. Despite representations on October 12, 2006, that Hatch's study was months away, ***the very next day***, the NovaGold Defendants, ¶70, unconstrained by the need to produce a legitimate feasibility study after usurping Hatch's professional independence, declared that the Final Feasibility Study was "complete." ¶72. In a press release entitled "***Final*** Feasibility Study Completed at NovaGold's Galore Creek Project" (Ex. 4 (emphasis added)), the NovaGold Defendants announced that the purportedly bankable Study "confirmed" the superior economic viability of a mine at Galore Creek, calculating "capital costs" at C$2.2 billion. ¶¶72, 105. Notwithstanding the fraudulent nature of the Study, NovaGold told the market that it was a bankable feasibility study, stating that "the cost estimates of the study ***reflect a +15%/-10% feasibility study level of engineering accuracy.***" ¶¶68-69, 72. By the time the Study was publicly released, however, NovaGold's own internal cost figure for mine construction at Galore Creek was at least C$2.7 billion, well-above the 15 percent cost collar, due in large part to the water management issues discovered in the Winter of 2005-06. In other words, the NovaGold Defendants rendered the Study "obsolete" before it was finalized. ¶¶66, 68, 79-80. With the purportedly "bankable" Study in hand, on November 8, 2006, the NovaGold Defendants defeated Barrick's hostile bid. ¶78.

Construction Costs Continue to Skyrocket

As the NovaGold Defendants would quickly learn, however, even their own internal C$2.7 billion figure missed the mark. ¶¶66-68, 80-82, 84. Shortly after infrastructure

construction operations began in late-2006, it quickly became "common knowledge" among all persons involved in construction operations at Galore Creek that costs were skyrocketing out of control. ¶¶81, 84. In early-2007, construction costs were escalating "across the board" with every facet of pre-construction operations "going over budget." ¶¶82, 84. In fact, it was so apparent that construction costs were escalating from "month-to-month," that everyone at the site, including the road construction crew, utilities contractors, and NovaGold's own infrastructure personnel, regularly discussed how the Final Study's cost figures were "completely out to lunch." ¶¶81-82.

NovaGold Secretly Commissions A New Feasibility Study

By the end of February 2007, the NovaGold Defendants determined that construction costs had increased to C$3.2 billion, or C$1 billion more than the figure identified in the Final Feasibility Study. ¶¶81, 96. Despite this knowledge, the NovaGold Defendants continued to publicly rely on the Final Feasibility Study's conclusions. ¶¶89-90. By this point in time, however, the NovaGold Defendants decided to institute a "new" feasibility study in an effort to determine the true capital costs required to construct a mine at Galore Creek. ¶83.

To this end, by March 2007, with knowledge of the Final Study's gross inadequacies, and in the face of ever increasing construction costs, the NovaGold Defendants engaged AMEC Americas Ltd. ("AMEC"), an international engineering firm and competitor of Hatch, to conduct a "new" feasibility study on Galore Creek. ¶¶83-87.

Despite Launching a New Study, NovaGold Uses The Final Study To Raise Capital

Relying exclusively on the Study as a "final" and "complete" bankable feasibility study, and the C$2.2 billion construction cost figure contained therein, on April 18, 2007, NovaGold launched a US$200 million secondary offering ("Secondary Offering") of its common stock. ¶¶90, 141-43. In doing so, the NovaGold Defendants, along with the Underwriter Defendants

and with the ***consent*** of the Hatch Defendants, issued the registration statement, Ex. 5, which included the Prospectus (defined at ¶208), Ex. 6, (collectively referred to as the "Registration Statement") as well as documents incorporated by reference therein. ¶213.

NovaGold Secures Additional Financing From (And a JV Partner in) Teck Cominco

After the Secondary Offering closed, the NovaGold Defendants continued to tout the Galore Creek project's "very low" cash cost in an effort to secure a joint venture partner. ¶¶85, 90. In May 2007, NovaGold and Teck Cominco ("Teck"), entered a joint venture agreement for the continued construction and ultimate operation of a mine at Galore Creek. ¶152. The agreement required Teck to fund C$520 million in construction costs up front, with each company responsible for fifty percent of construction cost funding thereafter. ¶¶8, 152.

With over C$750 million in financing now secured, the NovaGold Defendants shifted their focus to construction operations at Galore Creek, despite the fact that AMEC was at least months, and possibly years, away from determining the true capital cost of Galore Creek, with the possibility that the project may ultimately prove to be economically unviable. ¶¶8, 56, 68.

Truth Concealed, NovaGold States That AMEC has Been Engaged to "Update" the Study

On October 15, 2007, the NovaGold Defendants state, for the first time, that AMEC was on-site at Galore Creek, but instead of disclosing the true nature of AMEC's work (*i.e.*, conducting a "new" feasibility study on the project), they mislead the investing public by suggesting that AMEC was ***recently*** engaged to provide an "updated feasibility study." ¶¶83-87, 96, 166-67; Appendix A. The reason given for the update—that it was needed to secure additional project financing for construction operations through 2012—did nothing to undermine the Final Study. *See* Ex. 7; Appendix A. Indeed, the NovaGold Defendants carefully crafted their statements in order to conceal the fact that AMEC was actually hired in early-Spring of 2007 to conduct a ***new*** feasibility study on Galore Creek. ¶¶96, 166-67.

In addition, the NovaGold Defendants indicated that construction costs at Galore Creek could be higher than those contained in the NovaGold Defendants' prior misstatements. ¶¶95, 166. But, rather than detailing that NovaGold's own internal cost estimates were approaching C$3.7 billion, the NovaGold Defendants simply blamed the increases on various "external factors" that were beyond their control. ¶¶84, 95, 166.

In response to this news, several analysts reiterated their "Buy" recommendations, with one analyst concluding that the construction cost increase for Galore Creek would amount to ***only 10 percent***, ¶¶97, 169, well-within the Final Feasibility Study's cost collar. On October 16, 2007, NovaGold's share price declined ***US$0.41***, to US$18.54, moving back above its October 16 close within days. ¶¶97, 169; Appendix A.

The NovaGold Defendants Reveal The Truth

On November 26, 2007, the NovaGold Defendants for the first time disclosed that, far from the C$2.2 billion figure they had consistently relied upon since October 2006, the true capital cost for Galore Creek was approximately C$5 billion, an increase of ***144 percent***. ¶99. The NovaGold Defendants stated that the "lion's share of the increases" were due to the work necessary to complete the tailings dam and the water diversion structures, known since the Winter of 2005-06, and grossly misstated in the Final Feasibility Study. ¶¶174-76; Appendix A. The NovaGold Defendants also admitted that prior to the Secondary Offering in April 2007, AMEC was retained to perform a "new" feasibility study on Galore Creek. ¶¶99, 173. As a result of these disclosures, NovaGold's share price plummeted US$10.76, or over 53 percent, to US$9.48, from its close of US$20.24 a day prior. ¶10, 100, 181.

ARGUMENT

When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *In re WorldCom Inc. Sec. Litig.*, 294 F. Supp. 2d 392, 406 (S.D.N.Y. 2003) (citation omitted); *see also In re Openwave Sys. Sec. Litig.*, 528 F. Supp. 2d 236, 248 (S.D.N.Y. 2007); *In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 474 (S.D.N.Y. 2004) ("declin[ing] to interpret the PSLRA's 'strong inference' language so as to deprive plaintiffs of all reasonable inferences at the pleadings stage"); *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 332 (S.D.N.Y. 2003) ("Even under the PSLRA, the district court, on a motion to dismiss, must draw all reasonable inferences from the particular allegations in the plaintiff's favor."). In view of the Federal Rules of Civil Procedure's simplified pleading standards, "a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *WorldCom*, 294 F. Supp. 2d at 406 (citation omitted); *Thomas v. City of N.Y.*, 143 F.3d 31, 36-37 (2d Cir. 1998). As discussed in more detail below, the Complaint plainly states valid claims against the Exchange Act Defendants for violations of Sections 10(b) and 20(a) of the Exchange Act and against the Securities Act Defendants for violations of Sections 11, 12(a)(2), and 15 of the Securities Act.[5]

I. THE COMPLAINT STATES CLAIMS UNDER SECTION 10(b) AND RULE 10b-5 AGAINST THE EXCHANGE ACT DEFENDANTS

To adequately state a claim under Section 10(b), a private plaintiff must allege: (i) a misrepresentation or omission; (ii) of material fact; (iii) made with scienter; (iv) in connection

[5] Defendants NovaGold, Brack, Brown, Halvorson, Harris, MacDonald, McConnell, McFarland, Nauman, Van Nieuwenhuyse, Philip, Citigroup, Citigroup Canada, RBC, Scotia, Cormark, MGI, Hatch, and Rustad are collectively referred to as the "Securities Act Defendants." Defendants NovaGold, GCMC, Brack, Brown, Halvorson, Harris, MacDonald, McConnell, Nauman, Philip, and Van Nieuwenhuyse are collectively referred to as the "Exchange Act Defendants."

with the purchase or sale of a security; (v) upon which plaintiff relied; and (vi) that the alleged misrepresentation or omission was the proximate cause of plaintiff's injury. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). Tellingly, the Exchange Act Defendants—nor any of the defendants—challenge the fact that the alleged false and misleading statements caused Lead Plaintiff's and the Class's losses (*i.e.*, loss causation). Instead, their challenge as to the Exchange Act claims focuses on Lead Plaintiff's allegations of scienter. In this regard, the Complaint surpasses the pleading standard set forth in the Private Securities Litigation Reform Act ("PSLRA") and the law of this Circuit.[6]

A. Lead Plaintiff's Allegations, Taken Together, Raise a Strong Inference that the NovaGold Defendants Acted With Scienter

In actions brought under Section 10(b) and Rule 10b-5, a plaintiff must allege facts that give rise to a "strong inference" of scienter. *WorldCom*, 294 F. Supp. 2d at 411. In the Second Circuit, the requisite "strong inference" can be established either "(a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id.* (citation omitted); *see also Ganino v. Citizens Util. Co.*, 228 F.3d 154, 168-69 (2d Cir. 2000); *Rotham v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000). Specifically, the Second Circuit has identified four types of allegations that may support a strong inference of scienter:

> Where the complaint sufficiently alleges that the defendants: (1) benefited in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor.

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[6] As discussed at length below, in Part II, the Exchange Act Defendants also submit that as an initial matter their alleged false and misleading statements are not actionable under the Exchange Act, as well as the Securities Act, because they are protected under the PSLRA safe-harbor. As discussed in Part II (*infra*), this argument is unavailing.

Worldcom, 294 F. Supp. 2d at 412 (citation omitted). Moreover, defendants may be held liable when selected omissions render their statements materially misleading. *Worldcom*, 294 F. Supp. 2d, at 428; *see also In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 263 n.8 (S.D.N.Y. 2008) ("A duty to disclose arises with respect to . . . information necessary to prevent an affirmative statement from being materially misleading.").

In addition, a plaintiff need not plead scienter with "great specificity." *Ganino*, 228 F.3d at 169. Indeed, the Court of Appeals made clear that the PSLRA does "not require the pleading of detailed evidentiary matter in securities litigation" in order to plead scienter. *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001). Moreover, to endure the heightened pleading standard, "a plaintiff need not plead dates, times and places with absolute precision." *In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F. Supp. 2d 474, 488 (S.D.N.Y. 2004) (citations omitted). Indeed, scienter is adequately alleged when a plaintiff sets forth "facts showing that the defendant's conduct was highly unreasonable, representing an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *WorldCom*, 294 F. Supp. 2d at 412 (citation omitted).

The Complaint's Scienter Allegations Must be Weighed Holistically

In evaluating whether the Complaint alleges facts that give rise to a strong inference of scienter, the Court must determine whether "***all*** of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (emphasis in original) ("*Tellabs I*"); *accord WorldCom*, 294 F. Supp. 2d at 417 ("The allegations in the Complaint are entitled to be taken together to determine if the facts give rise to a strong inference of fraudulent intent.") (internal quotation omitted).

In *Tellabs I*, the Supreme Court cautioned that "[t]he 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.'" 127 S. Ct. at 2510. As long as the inference of scienter is "***at least as likely as***" any plausible opposing inference, the Complaint must be sustained at the pleading stage. *Id.*, at 2513 (emphasis added).

1. The Complaint Sets Forth Sufficient Evidence of Motive and Opportunity Further Supporting a Strong Inference as a Basis For Scienter

Motive entails "concrete benefits" that could be realized by Defendants' false statements and wrongful nondisclosures. *WorldCom*, 294 F. Supp. 2d at 412 (citation omitted). Generalized motives "possessed by virtually all corporate insiders," such as a desire to maintain or enhance a company's stock price, ***standing alone***, is insufficient to create a strong inference of scienter. *Id*. Where, however, a defendant's motive to elevate his company's perceived value is based on the need to use the stock price as leverage, the required strong inference of scienter has been satisfied. *See In re Interpublic Sec. Litig.*, No. 02 CIV. 6527 (DLC), 2003 WL 21250682, at *10 (S.D.N.Y. May 29, 2003) (finding defendants' motive sufficiently concrete because the inflated stock was used as consideration to acquire competing companies); *see also In re Time Warner Sec. Litig.*, 9 F.3d 259, 270 (2d Cir. 1993) (concluding that motive was sufficiently pled where company wanted to keep its stock price high directly prior to a stock offering in order to allow it to issue fewer shares and minimize dilution). Opportunity is the "means and likely prospect of achieving concrete benefits by the means alleged." *WorldCom*, 294 F. Supp. 2d at 412 (citation omitted).

Under *Tellabs I*, "allegations of defendants' motive in securities fraud cases may not be considered in isolation; rather, 'the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint.' In particular, a court must consider

'plausible nonculpable explanations for the defendant's conduct.'" *Openwave*, 528 F. Supp. 2d at 250 (quoting *Tellabs I*, 127 S. Ct. at 2510). Taken in context, the NovaGold Defendants' motive here gives rise to a strong inference of scienter, and is unchallenged by any competing nonculpable inference.

Motive To Inflate Shares to Fend Off Barrick's Hostile Takeover Bid

When Barrick initiated its hostile bid for NovaGold, corporate extinction is precisely what NovaGold was facing. On July 24, 2006, Barrick's unsolicited tender offer of US$14.50 per share (a nearly 25 percent premium over NovaGold's prior close of US$11.67) motivated the Exchange Act Defendants to take immediate action in order to save their company. ¶63. The Exchange Act Defendants quickly realized that the only way to defeat Barrick's bid was to convince NovaGold's shareholders that Barrick's US$14.50 per share tender offer did not reflect the "***true***" value of NovaGold. ¶¶66-67. For the Exchange Act Defendants, Galore Creek provided the perfect opportunity to inflate NovaGold's stock. ¶68-69.

If the NovaGold Defendants could provide ***proof*** that Galore Creek was economically viable, it would give them the necessary ammunition needed to defeat Barrick's purportedly undervalued bid. The "final" determination of Galore Creek's feasibility, however, was being delayed due to the "monumental" tailings and water management challenges plaguing the project. ¶¶66-67. The Exchange Act Defendants were fully aware of these unresolved issues at the time Barrick initiated its hostile takeover bid. ¶¶63, 66-67. So, as the Complaint specifically alleges, rather than risk further delay and the possibility of an engineering conclusion that would render Galore Creek "not feasible," the Exchange Act Defendants began directing Hatch's work to ensure the desired outcome. ¶68-69.

On October 12, 2006, NovaGold told its shareholders that it anticipated the release of the "final" feasibility study on Galore Creek by year-end. ¶57, 70. While the Exchange Act

Defendants were busy manipulating the feasibility study's economic conclusions, NovaGold's stock continued to trade above Barrick's bid price. On October 24, 2006, however, Barrick increased its tender offer to US$16 per share, surpassing NovaGold's previous close of US$15.35, and offering a premium of 37 percent over NovaGold's trading price prior to Barrick's initial bid. ¶71. In addition, Barrick declared that US$16 per share was its "best and final offer." ¶71. With NovaGold's stock price already reflecting a heavy takeover premium, the Exchange Act Defendants knew that they needed immediate, tangible proof of Galore Creek's feasibility and superior economics in order to sustain the bloated price of NovaGold's stock.

One day after Barrick increased its bid, and even though NovaGold recently announced that completion of the Galore Creek study was months away, the Exchange Act Defendants released the results of the Final Feasibility Study. ¶72. The Study, of course, "confirmed" the feasibility of a mine at Galore Creek, and highlighted the project as having one of the "lowest cash costs in the industry." ¶72, 105. As a result, the NovaGold Defendants were successful in sustaining NovaGold's elevated stock value created by Barrick's takeover bid. On November 8, 2006, Barrick's "best and final" tender offer was soundly rejected by NovaGold's shareholders. ¶78.[7]

[7] The NovaGold Defendants assert that statements such as "Galore Creek had one of the 'lowest' cash costs in the industry" are "immaterial expressions of optimism." NG Br. at 30 n.16. This argument simply ignores the allegations in the Complaint and the very nature and purpose of the Final Feasibility Study. As alleged in great detail throughout the Complaint, Galore Creek's "cash cost" was the single most critical element in determining the project's feasibility. Indeed, when the ***cash costs*** were purported to be C$2.2 billion (based on the "stale" data NovaGold provided to Hatch), the project was declared economically feasible, but when the ***true*** costs were revealed to be nearly C$5 billion, operations at Galore Creek were immediately suspended.

Motive To Inflate Stock Price to Diminish Dilutive Impact of Secondary Offering

The Exchange Act Defendants' motive to inflate NovaGold's stock price did not end with the defeat of Barrick's hostile takeover bid. With NovaGold's Secondary Offering on the horizon, the Exchange Act Defendants kept the air in NovaGold's stock through their continued public reliance on the "obsolete" Final Feasibility Study, in order to diminish the dilutive effect of the Secondary Offering. ¶¶79-80, 122, 124, 127, 130, 132, 134.

Motive is sufficiently pled where a defendant's "artificial enhancement" of the company's stock allows the company to "raise the needed capital at a higher [stock] offering price, thereby issuing fewer shares and lessening the dilutive effect." *Time Warner*, 9 F.3d at 270. Here, the Exchange Act Defendants repeated use of the C$2.2 billion construction cost figure, including in the Registration Statement, was motivated by the need to keep NovaGold's stock price at post-Barrick bid levels. Indeed, the Secondary Offering price was US$16.25, or US$0.25 above Barrick's "best and final" tender offer. ¶71, Ex. 8 (April 24, 2007 Press Release). NovaGold issued 12.5 million shares in the Secondary Offering, which raised US$200 million for the Company. ¶90. If, for example, NovaGold's share price had retreated to its pre-Barrick bid price (US$11.67), NovaGold would have needed to issue an additional 4.9 million (or 17.4 million) shares in order to raise the same amount of capital. ¶63. Issuing the additional 4.9 million shares would have resulted in a nearly 18 percent additional dilution of NovaGold's common securities, to the detriment of the Exchange Act Defendants whom held significant NovaGold common stock. ¶101-04.[8]

[8] In addition to the 12.5 million shares issued through the Secondary Offering, NovaGold issued 14.95 million shares on common equity through its initial public offering, which closed on February 8, 2006. Defendants Van Nieuwenhuyse and MacDonald, NovaGold's CEO and CFO (respectively), as set forth in the Complaint, were additionally motivated to participate in the fraud alleged herein due to their tremendous individual holdings of NovaGold common stock. ¶¶101-04.

2. The Fraud Centered on NovaGold's Core Operations, Creating A Strong Inference of Scienter

Where the false or misleading statements concern the ***core operations*** of a company, knowledge of the falsity "can be imputed" to defendants that are "key officers" within the company. *Atlas Air*, 324 F. Supp. 2d at 489-90. Moreover, "[s]uch officers may not ignore reasonably available data that would indicate that the statements they issued regarding the company's finances were materially false and misleading." *In re Winstar Commc'ns*, No. 01 CV 3014 (GBD), 2006 WL 473885, at *7 (S.D.N.Y. Feb. 27, 2006); *see also Atlas Air*, 324 F. Supp. 2d at 489.[9] Indeed, when a company's highest-ranking officers make statements concerning its "core business operations," comprehensive knowledge of those operations on behalf of the officers is "presumed." *In re Forest Labs. Sec. Litig.*, No. 05 CIV 2827 (RMB), 2006 WL 5616712, at *10 (S.D.N.Y. July 21, 2006); *see also Atlas Air*, 324 F. Supp. 2d 474, 489 ("[I]f facts that contradict a high-level officer's public statements were available when the statements were made, it is reasonable to conclude that the speaker had intimate knowledge of those facts or should have known of them.").[10]

Nothing Was More Central to NovaGold Than Galore Creek

During the Class Period, there was nothing more central to NovaGold's continued existence as an independent company than the economic feasibility of an operational mine at Galore Creek. Moreover, Galore Creek's feasibility and its purported superior economics were critical to the continued success of NovaGold. ¶88-90, 105.

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[9] Similar to the fraudulent conduct alleged in *Atlas Air* (where an airplane leasing company overstated the value of its planes) and *Winstar* (where a telecommunications company overstated sales of its telecommunication equipment and services), the Exchange Act Defendants misstatements and deceptive conduct regarding the economic viability of a mine at Galore Creek related to NovaGold's primary business function, *i.e.*, mining. *See Atlas Air*, 324 F. Supp. 2d, at 491; *Winstar*, 2006 WL 473885, at *8.

[10] *See, e.g.*, ¶¶106, 119-20, 122, 124, 130, 134-35, 138, 148-49, 152, 156, 168, 170.

In addition, the economic feasibility of Galore Creek represented a "major milestone" for NovaGold in its effort to move from explorer to producer, after years of failed attempts to achieve producer status. ¶74. In the late-1990s, after NovaGold's acquisition of Rock Creek, the Exchange Act Defendants became determined on shifting NovaGold's business from mineral exploration to mineral production. ¶49. The mineral production world, however, was not an easy one to infiltrate because it was dominated by large multinational corporations (such as Barrick), who looked down upon the "cowboys" of the exploration world. NovaGold's first few attempts, at Rock Creek and Donlin Creek, failed to elevate it to producer status. ¶50. Given the size of Galore Creek, however, the project presented the best, and almost certainly last, chance NovaGold had to break into the world of precious metal producers. ¶51.

The significance of Galore Creek was fully understood by the market. Upon releasing the Final Feasibility Study, which "confirmed" the economic viability of a mine at Galore Creek, one analyst commented that with proof of the project's feasibility now in hand, NovaGold should "be viewed by the investment community in an ***entirely new way***." ¶75. Another analyst noted that the determination of Galore Creek's economic viability adds "tremendous value" to NovaGold and its shareholders. ¶88.

As discussed above, months before the Class Period began, Barrick launched its hostile bid for NovaGold at a 25 percent premium. ¶62-63. Investors considered the prospect of an economically feasible mine at Galore Creek to represent ***at least half*** of NovaGold's value, ¶112, but without a bankable feasibility study, there was no "proof" of the value. ¶¶57, 66. One day after Barrick made its "best and final" tender offer for NovaGold, the NovaGold Defendants released the Final Feasibility Study's conclusions despite knowing, or at least recklessly disregarding, NovaGold's internal capital cost figures contradicted those contained in the Study.

¶66, 68, 71-72, 80. *See also* Part I.A.3 (*infra*). The economics of potential mining operations at Galore Creek, particularly with respect to the construction costs associated therewith, were not only at the *core* of NovaGold's business, but were the lynchpin to defeating Barrick's hostile takeover bid.

The critical importance of the Study, however, did not end with the defeat of Barrick's tender offer. In order to commence with mine construction at Galore Creek, NovaGold needed to raise an enormous amount of capital. To this end, the Exchange Act Defendants continued to publicly rely on the "very low" construction cost figures contained in the Final Feasibility Study in order to continually assure the investing public of Galore Creek's economic feasibility. ¶¶90, 127, 130, 132, 134, 137, 141, 149, 165. The Exchange Act Defendants released this information despite knowledge, or at least reckless disregard, of the Company's own drastically rising cost figures, and despite the fact that the Exchange Act Defendants retained AMEC to determine the ***true*** capital expenditure necessary to build a mine at Galore Creek. ¶¶79-85.

In sum, at each and every point in time during the Class Period, the single most critical fact for NovaGold was the economic viability of the Galore Creek project. Indeed, the Exchange Act Defendants do not (and cannot) refute the critical importance of the Galore Creek project to NovaGold, nor do they specifically deny they had knowledge of Galore Creek's escalating internal cost estimates.[11] Instead, they argue that any escalation in NovaGold's internal cost estimations are "irrelevant" in light of Hatch's conclusions and, therefore, the Exchange Act

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[11] With respect to allegations of NovaGold's scienter arising from its core operations, a strong inference is abundantly established separate and apart from any individual defendant. *See IMAX Sec. Litig.*, 587 F. Supp. 2d 471, 479 n.31 (S.D.N.Y. 2008) ("To sustain a securities fraud claim against a corporate defendant, plaintiffs may plead facts creating 'a strong inference that ***someone***,' other than a named defendant, "***whose intent could be imputed to the corporation acted with the requisite scienter***." (quoting *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Cap. Inc.*, 531 F.3d 190, 195 (2d. Cir. 2008)) (emphasis added).

Defendants had no "duty to disclose" such estimations, regardless of their materiality. NG Br. at 23-25, 27-30.

3. The Exchange Act Defendants Had Access To Information That Contradicted Their Public Statements

Flowing from the undisputed fact that the feasibility of the Galore Creek mine was core to the Exchange Act Defendants' operations—and in fact their continued survival—it is also undisputed that they had access to information that contradicted their public statements. Under such circumstances, the Exchange Act Defendants knew or, more importantly, should have known that they were misrepresenting material facts related to the corporation." *Atlas Air*, 324 F. Supp. 2d at 488; *see also Novak*, 216 F.3d at 308-09. "When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk." *Makor Issues & Rights , Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008) ("*Tellabs II*"); *see also In re Solv-Ex Corp. Sec. Litig.*, 210 F. Supp. 2d 276, 284 (S.D.N.Y 2000) (denying defendants' motion to dismiss where complaint alleged that defendants continued to "tout" the feasibility study's "thorough independent review" despite knowledge of its gross inadequacies).

In addition, "[a]llegations of recklessness have also been sufficient where the allegations demonstrate that defendants failed to review or check information that they had a duty to monitor, or ignored obvious signs of fraud." *WorldCom*, 294 F. Supp. 2d at 412 (citation omitted). Similar to claims involving a company's core operations, the law "does not require a plaintiff to reference internal company reports" when pleading that defendants were "reckless." *Atlas Air*, 324 F. Supp. 2d at 495 (citing *Scholastic*, 252 F.3d at 77.

The Exchange Act Defendants' false and misleading statements related to the ***finality*** of Hatch's Study, the ***economic feasibility*** of Galore Creek, and the ***adoption*** of the C$2.2 billion construction cost figure identified in the Study. ¶¶72, 105, 107, 122, 127, 130, 132, 134, 137,

148, 154, 156. Beginning well before the Class Period through its end, the Exchange Act Defendants knew, or at least recklessly disregarded, the fact that their statements were false. ¶¶79-97

Moreover, on numerous occasions throughout the Class Period, the NovaGold Defendants made statements confirming that the Galore Creek project was "on budget." ¶¶89, 124, 130, 137, 154, 156. In making these statements, the NovaGold Defendants had a duty to confirm their accuracy. As detailed above, it was "common knowledge" to everyone involved with construction operations at Galore Creek that the project was "significantly over budget very early in the process." ¶81-82. Therefore, even if this information was not specifically known to the Exchange Act Defendants—which they do not dispute—they had a duty to makes themselves aware of it, and by failing to do so they acted in reckless disregard of the truth. *Atlas Air*, 324 F. Supp. 2d at 491; *WorldCom*, 294 F. Supp. 2d at 412.

As specifically detailed herein, and in the Complaint, the allegations concerning the Exchange Act Defendants knowledge, or at least reckless disregard, of facts that contradict their public statements include:

- By the Winter of 2005-06, the Galore Creek mine faced monumental engineering, water management, and tailings challenges that were not disclosed until the end of the Class Period. ¶¶60-61, 67.

- By the Spring of 2006, the Exchange Act Defendants already knew that the true cost of developing the mine were well-above C$2.2 billion. CW4, a senior member of the Tahltan Nation who was involved in the development of Galore Creek since NovaGold first acquired the property in 2003 (¶48), learned in early-2006, that Company's internal estimate for bringing the Galore Creek mine to production was C$2.7 billion. ¶80. CW1 and CW3, both of whom were intimately involved in negotiating the February 2006 Participation Agreement, confirmed NovaGold's internal C$2.7 billion figure, which was already above the 15 percent, or C$2.53 billion, cost collar. ¶¶48, 66-68, 80.

- In the Summer of 2006, in the face of Barrick's hostile takeover bid, the Exchange Act Defendants hijacked Hatch's Feasibility Study. ¶¶68-69 (CW2).

- In October 2006, after Barrick raised its tender offer to US$16 per share, the Exchange Act Defendants released the Hatch Report knowing, or at least recklessly disregarding, the fact that it was "obsolete" when issued. ¶¶79-82 (CW4). In order to ensure Hatch's Study would conclude that the mine was feasible, the Exchange Act Defendants fed "stale data" that did not reflect the tailings and water management issues discovered in the Winter of 2005-06. ¶80. As CW2 explained, the Exchange Act Defendants "essentially came up with the design and cost figures they wanted to see in the Study" and forced the conjured conclusions on Hatch. ¶68.[12]

- In the Winter of 2006, soon after operations commenced at Galore Creek, NovaGold's internal construction cost estimates began escalating from "month-to-month" (¶¶81-82 (CW4 and CW5)) and continued to escalate "across the board" throughout the Class Period. ¶84 (CW6).

- In February or March 2007, AMEC had been retained to perform a new feasibility study, before Hatch's Study was described as the "final" feasibility study in the Registration Statement. ¶¶85-87 (CW6 and CW8), 144, 214.

- By the Spring of 2007, NovaGold's internal construction cost figures had increased to C$3.2 billion (more than C$600 million above the cost collar), according to CW4 (¶81), and it was "common talk around the job that [NovaGold's] initial budget was completely out to lunch." ¶82 (CW5). By early-Summer NovaGold's internal cost figures for Galore Creek reached C$3.7 billion (more than C$1 billion above the cost collar). ¶84 (CW7).

- On November 26, 2007, NovaGold admitted the Final Feasibility Study did not take into account the monumental water management and tailings issues that were known of before the Study was released. *See* Ex. CCC (November 26, 2007 Conference Call Transcript). During the call, Defendant Van Nieuwenhuyse admitted that: "We [*i.e.*, the Exchange Act Defendants] found this out in the course of conducting the more detailed engineering review which was done by AMEC ***earlier this year***." *Id.* (emphasis added).

Each of the allegations identified above was either known by, or readily available to, the Exchange Act Defendants. The Exchange Act Defendants were "not entitled" to make repeated statements concerning construction progress at Galore Creek, while ignoring "reasonably

[12] The NovaGold Defendants assert that Lead Plaintiff does not "allege any facts to challenge the independence" of Defendants Hatch and Rustad. As set forth directly above, and in the Complaint, Lead Plaintiff specifically alleges that the Exchange Act Defendants "usurped the Hatch engineers' independent assessment and began driving the feasibility study's outcome" in order to ensure that Galore Creek was determined to be economically feasible. ¶68. As such, the NovaGold Defendants' argument is without merit.

available" information indicating that their statements were "materially false or misleading." *Atlas Air*, 324 F. Supp. 2d at 491.

Tellingly, the Exchange Act Defendants do not dispute these allegations, but dismissively claim that the concealed truth was irrelevant and immaterial.

4. The Exchange Act Defendants Do Not Provide Any Competing Inference, Thus Lead Plaintiff's Allegations Are The Only Plausible Inference To Be Drawn

As discussed above, under *Tellabs I*, Lead Plaintiff's allegations of scienter establish the requisite strong inference that is "at least as compelling as any opposing inference one could draw from the facts alleged." 127 S. Ct. at 2510. The Exchange Act Defendants do not submit ***any*** competing inference—let alone one that is at least as plausible as the one inferred from Lead Plaintiff's allegations. *See Tellabs II*, 513 F.3d at 711. The absence of any argument that the Exchange Act Defendants were unaware NovaGold's own internal construction cost figures contradicted the Final Feasibility Study is appropriate, in view of the particularized scienter allegation above. *Id*. (finding that a strong inference of scienter is established in the absence of plausible alternatives).[13]

The NovaGold Defendants Always Spent Someone Else's Money

While not explicitly raising a competing inference, the Exchange Act Defendants suggest that their alleged wrong doing is belied by the fact that NovaGold and Teck continued to spend as much as C$78 million through the fall of 2007. NG Br. at 11, 29. To the contrary, as alleged in the Complaint, the Exchange Act Defendants had two clear goals following the release of the Final Feasibility Study: (i) raise $200 million from investors in a secondary offering, and

[13] The Exchange Act Defendants only contention as to the discrepancy between their internal cost figures and those disseminated in the Final Study is that they "could not ignore" Hatch's findings. NG Br. 23. The Exchange Act Defendants did ignore, however, their duty to disclose the truth and not issue materially false and misleading statements.

(ii) lure in a joint venture partner who would shoulder the financial burden. ¶8. In other words, the Exchange Act Defendants furthered their scheme by obtaining other people's money—Teck's and the Class member's. Tellingly, the Exchange Act Defendants did not use their own money to finance the Galore Creek mine.

Unable to Refute Strong Inference, the Exchange Act Defendants Misapply the Standard

Further to their failure to undermine the plausibility of Lead Plaintiff's allegations, the Exchange Act Defendants' counter argument are quite telling. Throughout their brief, the Exchange Act Defendants attempt to hold Lead Plaintiff to an inappropriate and, of course, higher standard for pleading scienter. For example, the Exchange Act Defendants attempt to hold Lead Plaintiff's allegations arising from the Confidential Witnesses, to a standard of needing to allege actual knowledge. NG Br. at 20-23. As detailed above, it is well settled that pleading of actual knowledge is not required to create a strong inference of scienter arising from confidential witnesses, or any other source. *See* Part I.A (*supra*). Notably, while attempting to elevate the pleading standard for confidential witness, the Exchange Act Defendants do not dispute that these allegations support a strong inference of conscious misbehavior or recklessness. NG Br. at 20-23. As detailed above, Lead Plaintiff's allegations arising from the confidential witnesses satisfy the standard.[14]

[14] While the NovaGold Defendants' refrain from challenging the credibility of the Confidential Witnesses alleged in the Complaint, they do appear to challenge the weight of allegations that are derived from these sources. In the Second Circuit, plaintiffs may rely on "confidential sources to plead facts giving rise to a strong inference of scienter" as long as the witnesses are described with "sufficient particularity" to support the probability that each witness "would possess the information alleged." *Atlas Air*, 324 F. Supp. 2d at 493 (internal quotations omitted). The confidential witnesses relied upon in the Complaint are all identified by (i) job title or position held, (ii) when they were on-site at Galore Creek or their association therewith, and (iii) the particular basis upon which their knowledge was formed. ¶48. Moreover, here, "the information that the confidential informants are reported to have obtained is set forth in convincing detail, with some of the information, moreover, corroborated by multiple sources." *Tellabs II*, 513 F.3d at 711.

II. LEAD PLAINTIFF'S CLAIMS ARE ACTIONABLE UNDER FEDERAL SECURITIES LAWS

A. The NovaGold Defendants' False Statements Are Actionable And Not Subject to the PSLRA's Safe Harbor

The Complaint sets forth three categories of materially false statements (and omissions) made by the NovaGold Defendants concerning the Final Feasibility Study and the construction costs figures identified therein. These false statements are also incorporated in the Registration Statement. ¶¶209-18. The categories include (i) statements concerning the ***finality*** of Hatch's Study (ii) statements regarding the ***economic feasibility*** of Galore Creek, and (iii) statements ***adopting*** the construction cost figures contained in the Final Feasibility Study. The NovaGold Defendants' statements, incorporated in these three categories, were false and misleading when made and are actionable under the securities laws. Any argument that these statements are shielded from liability by the PSLRA's safe harbor provision is unfounded. 15 U.S.C. § 78u-5; NG Br. at 13-26.

The PSLRA's safe harbor, which codified the common law "bespeaks caution doctrine," ***only*** applies to "forward-looking statements, and not to misrepresentations of present or historical fact." *Heller v. Goldin Reconstruction Fund, L.P.*, No. 07 CIV. 3704 (RJS), 2008 WL 5328430, at *11 (S.D.N.Y. Dec. 22, 2008) (citing *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 96-97 (2d Cir. 2004)). A forward-looking statement is defined as "projections, plans, or statements of future performance." *Schottenfeld Qualified Assocs., L.P., v. Workstream, Inc.*, No. 05 CV 7092 (CLB), 2006 WL 4472318, at *3 (S.D.N.Y. May 4, 2006) (citing the PSLRA's safe harbor provision, 15 U.S.C. § 78u-5(i)(l)).

"[A] mixed present/future statement is ***not entitled*** to the safe harbor with respect to the part of the statement that refers to the present." *Tellabs II*, 513 F.3d at 705. Moreover, the purpose of the "bespeaks caution" doctrine and the protection it affords to "forward-looking"

statements is aimed at warning investors of adversities that may arise "in dealing with the ***contingent and unforeseen*** future." *Stolz*, 355 F.3d at 96-97 (emphasis added); *see also Brody v. Stone & Webster Inc.*, 414 F.3d 187, 213 (1st Cir. 2005) ("we do not think Congress intended to grant safe harbor protection for such a statement whose falsity consists of a lie about a present fact"). Statements that relate to the future, but that implicate present, known facts are actionable if false. *See Novak*, 216 F.3d at 315.

Even assuming, *arguendo*, that any of the NovaGold Defendants' statements could be considered forward-looking, none of their statements were accompanied by "sufficiently balanced" cautionary language to make them not misleading. *Stolz*, 355 F.3d at 96-97. Moreover, the undisputed fact that when the truth was revealed, NovaGold's stock price dropped by ***53 percent***, vividly refutes defendants' argument that the risks that came to pass were fully disclosed. ¶100.

1. The NovaGold Defendants' False Statements Were Not Accompanied by Meaningful Cautionary Language

Without citing, quoting, or mentioning the November 26 Call, during which the NovaGold Defendants revealed the truth, defendants boldly argue that they "disclosed the ***precise*** risks" that led to the "suspension" of the Galore Creek project is itself misleading. NG Br. at 19 (emphasis added). Instead of confronting the corrective disclosure, defendants identify a laundry list of grossly inadequate warnings, none of which disclose the actual risk that materialized. *Id.*

Words of caution pertaining to future risk cannot insulate from liability the failure to disclose that the risk has already transpired. *See In re Prudential Sec. Inc. P'ships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y.1996) ("The doctrine of bespeaks caution provides no protection to

someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away.").

The PSLRA's safe harbor cannot be invoked unless the allegedly forward-looking statements "were sufficiently balanced by cautionary language" such that "no reasonable investor would [be] misled about the nature and risk of the offered security." *Stolz*, 355 F.3d at 96. Generalized language "warning that actual results may be materially different than the projections . . . does not come close to the cautionary language needed to render reliance on the misrepresentation unreasonable." *In re Vivendi Universal Sec. Litig.*, No. 02 Civ. 5571 (HB), 2003 WL 22489764, at *18 (S.D.N.Y. Nov. 4, 2003).

Moreover, the purported cautionary language must be "sufficiently specific with respect to the risks which eventuated for safe harbor to apply." *Vivendi*, 2003 WL 22489764, at *18. In addition, the PSLRA's safe harbor will not protect statements pertaining to purportedly future risk, when that risk has already come to pass. *See Prudential*, 930 F. Supp. at 72.

Laundry List of "Risk" Warnings Were Meaningless

As explicitly stated during the November 26 Call, operations at Galore Creek were suspended for one primary reason, "the tailing[s] dam and the water diversion structures were clearly underestimated" to a level that rendered the project economically infeasible. *See* Ex. CCC, at 4; Appendix A.[15] The NovaGold Defendants, however, dedicate 14 pages of their brief highlighting nearly 20 statements that do nothing more than warn of generalized risks, and none

[15] The Hatch Defendants argue that because misrepresentations concerned Galore Creek's tailings and water management facilities, estimates for which were prepared by Hatch's subcontractors, Defendants Hatch and Rustad are not liable under Section 11. The Hatch Defendants' position is unavailing because it is undisputed that both Hatch and Rustad ***consented*** to "to the inclusion and incorporation by reference of information derived from Hatch's Study in the Registration Statement." Exs. 9, 10. Moreover, the Hatch Defendants' consent was not limited to portions of the Final Feasibility Study attributable to them. *See* 15 U.S.C. § 77k(a)(4).

of which address the tailings and water management risks that were ***known*** throughout the Class Period.

Specifically, Defendants identify a laundry list of purportedly specific risks disclosed by NovaGold that they assert "ultimately materialized" in the suspension of the Galore Creek project. The list includes such risks as "uncertainty of capital costs, operating costs, production and economic returns" and the "increasing cost of construction services."[16] NG Br. at 17-18. The Defendants also point to the "four pages" of risks included in the Final Feasibility Study, which include items such as "project risks," "construction risks," and "operation risks."[17] In addition to these purported warnings being so overly broad as to render them meaningless, tellingly, defendants cannot point to a single disclosure that warned of Galore Creek's possible suspension, *i.e.*, the colossal underestimation of the tailings dam and the water diversion structures. *See* Ex. 1 at 4, 8, 10, 13-14.

Similar broad warnings were issued by NovaGold on October 15, 2007, when it announced that AMEC was conducting an "updated feasibility study" that may result in "significant increases to capital costs." ¶166, Ex. 11. Specifically, NovaGold warned that the cost increases were due to "escalating local and worldwide construction costs; further optimization of the project, . . . and the significant strengthening of the Canadian dollar against the U.S. dollar." *Id.* In response to these ***warnings***, NovaGold's share price ***dropped only US$0.41***, to US$18.54. Analysts had a similarly benign reaction, estimating that the

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[16] The purported risks identified by the Defendants also included broad items such as "commodity price fluctuations," "unanticipated difficulties with or interruptions in development, construction or production," and the "appreciation of the Canadian dollar." NG Br. at 17-18.

[17] The purported risks identified in the Final Feasibility Study included items such as "road limits [] may result in a change in shipping plans during construction," "water quality issues," and "slow tunnel progression," which in no way related to the issues that plagued, and eventually led to the suspension of, Galore Creek. NG Br. at 18; Hatch Br. at 6-7.

construction cost increase for Galore Creek would only be 10 percent, well-within the project's cost collar. ¶169.

The Truth Was Revealed in the November 26 Conference Call

Without a mere reference to the November 26 Call, in order to fit NovaGold's purported warnings to the facts of this case, defendants submit that Galore Creek was suspended due to "currency fluctuations, increased construction costs and changes to the scope and sequence of the project." NG Br. at 19. Defendants' assertion mischaracterizes the circumstances upon which the project was suspended as they repeatedly reference highly-selective portions of the carefully scripted November 26, 2007 Press Release (Ex. 12), while ignoring the primary reason for Galore Creek's suspension. *Id.*; Ex. 1 (November 26, 2007 Conference Call Transcript) ("[T]he largest portion of the capital cost increase is related to the complex sequencing of activities necessary to build the tailings dam and water management structures."); Appendix A.[18]

In fact, Defendants Van Nieuwenhuyse and Brown specifically disclaimed the impact of the "risk disclosures" identified in the NovaGold Defendants' brief (*See* NG Br. at 13-19; UW Br. 14-18.), noting that (i) the "scope" of the project did not change, (ii) colossal underestimations in the "tailings dam and water diversion structures," not "escalating local and worldwide construction costs" resulted in the project's suspension, and (iii) that ***currency fluctuations*** were "not significant" in the revised capital cost estimations:

> Analyst Haytham Hodaly (Salman Partners) ("Hodaly"): [D]id the scope of the actual tailings dam or water diversion structures and

[18] The NovaGold Defendants' "fraud by hindsight" argument, in which they assert that the risks that came to pass "were explicitly and repeatedly disclosed to investors" is baseless. NG Br. at 3. The entire argument is based on a straw-man tactic whereby the NovaGold Defendants hand-pick the ***reasons*** for Galore Creek's suspension, even though directly contradicted by their own statements, and then fit them into their overly-broad purported risk disclosures. *See* NG Br. at 13-19; UW Br. 14-18. The NovaGold Defendants' reliance on this type of tactic leaves little doubt as to why the November 26 Call transcript is nowhere to be found in their submissions.

costs associated with that actually change or were they clearly wrong the way they did them?

Van Nieuwenhuyse: I would say ***the scope did not change***. It was more in looking at a more detailed engineered review of how that work was going to get done. It was in that process that it was identified that the work would take longer, require more people and that is what has led to the significant increase in the cost.

* * *

Van Nieuwenhuyse: The ***lion's share of the cost increases*** are related to the escalating cost of the ***in valley works***.

* * *

Brown: The question was related to the cost of the tailings dam and water diversion structures as a percent of the overall estimate. I think it ***at least one-third if not 45% of the overall cost*** of the project right now.

Analyst Chantal Gosselin (Genuity Capital): Okay. And previously what was it? Or let's say in the feasibility study.

Brown: Roughly ***20%, 25%***.

* * *

Hodaly: How much of the increasing capital cost can be attributed to the stronger Canadian dollar? How much because of the complex sequencing of activities and tailings dam water diversion structure if you had to break it out?

Van Nieuwenhuyse: The currency -- ***the changes are not significant*** in terms of estimating the capital. They do have an effect or would have an effect on the operating costs but that is not really where our decision is based on. It is as you point out in the second half of your question there, ***it is the in valley works*** and the amount of time that was required to complete those works as they were envisioned in the feasibility study.

* * *

Hodaly: So I guess what we've done is we've seen in the industry and it is not just company specific, that most development projects have risen anywhere between 15% and 30% because of the currency. Would you say that is probably a reasonable number?

> Van Nieuwenhuyse: ***No***, we don't have a number but again, we think currency really affects more on the operating cost side and ***not on the capital cost side***.

See Ex. 1 at 4, 8, 10, 13-14 (November 26, 2007 Conference Call Transcript); Appendix A. This indisputable record, along with the side-by-side comparison of the relevant statements set forth in Appendix A, refutes defendants' recent characterization of the facts and the nature of their statements.

The Cost Figures Were Limited By a Collar

Defendants also assert that because NovaGold referred to the C$2.2 billion figure as an ***approximation*** that may increase ***significantly*** as the project moves forward, the Company sufficiently warned investors that Galore Creek could be economically infeasible. NG Br. at 13-18. The fact that the C$2.2 billion figure was an approximation, however, is not in dispute. Upon releasing the C$2.2 billion construction cost conclusion, the Defendants made it clear that the actual figure may be adjusted. Indeed, the C$2.2 billion figure came with a 25 percent ***cost collar*** (+15%/-10%), which was specifically identified in NovaGold's press release announcing the Final Feasibility Study's conclusions and it is referenced at least twice in the Study itself, as well as the Complaint. *See* ¶72; NG Ex. H; NG Ex. I at 13, 304. By the time the Final Study was released, however, NovaGold's internal cost figures (at C$2.7 billion by February 2006) rendered the C$2.2 billion cost figure materially misstated. *See Prudential*, 930 F. Supp. at 72.[19]

Therefore, defendants' citation to a litany of occasions where NovaGold states that the C$2.2 billion figure is an ***approximation*** and that costs could rise ***significantly*** is completely unavailing. NG Br. 14-15, 17-18. Defendants do not (and cannot) point to a single occasion

[19] NovaGold argues that the C$2.2 billion figure was derived by Hatch, so its own figures are "irrelevant." NG Br. at 23. The reality is, however, that the NovaGold Defendants made the figure their own, and are liable under the securities laws for doing so. ¶¶120, 127, 134, 137, 141, 149, 210.

during the Class Period in which NovaGold discloses that its own cost figures were materially above the delineated cost collar and could render Galore Creek economically infeasible. Obviously, NovaGold's prior generalized cautions regarding how project ***costs could increase materially*** did nothing to warn the investing public that Galore Creek may be economically infeasible. Therefore, the Defendants argument that they disclosed the "***precise risks***" associated with Galore Creek's suspension is simply wrong. NG Br. at 19 (emphasis added). Indeed, in addition to the share price collapse, in response to this news, industry analysts immediately slashed their price targets for NovaGold and expressed shock at the "magnitude of underestimation." *See* Ex. 2; Appendix A.

2. The NovaGold Defendants' False Statements Were Based Upon Present Fact

The statements that the NovaGold Defendants assert are subject to the PSLRA's safe harbor are precisely the kind of factual statements that the Second Circuit has concluded are subject to liability. Moreover, the NovaGold Defendants' statements, from the outset of the Class Period, including those in the Registration Statement, regarding the ***finality*** of Hatch's Study, the ***economic feasibility*** of Galore Creek, and the statements ***adopting*** the construction cost figures contained in the Final Feasibility Study were all false statements of present fact of the determination of the economic viability of the mine.[20]

[20] The NovaGold Defendants assert that the Complaint "disingenuously characterizes" construction cost figures in the past tense, implying that the costs figures referenced had already "been spent." NG Br. at 2, 16. The NovaGold Defendants position is unfounded. Throughout the Complaint, Lead Plaintiff repeatedly references NovaGold's C$2.2 (US$1.8) billion figure as a present fact regarding a future expenditure, often quoting the NovaGold Defendants themselves. *See, e.g.*, ¶120 (Defendant McDonald: "Now, the financing in front of you shows that ***based on the feasibility study***, and all of these amounts are in U.S. dollars, for Galore Creek, we have a total capital of about $1.8 billion."), ¶134 (McDonald: "You see the total capital for Galore Creek at approximately $1.8 billion or C$2.2 billion."), ¶149 (McDonald: "The total project financing cost [for Galore Creek] is about CAD2 billion, about CAD1.8 billion being construction cost itself."), *accord* ¶¶72, 89, 107, 127, 130, 132, 210.

(a) The Construction Cost Figures in the Final Feasibility Study Were Materially False

Far from a mere ***projection***, the NovaGold Defendants' represented throughout the Class Period that the Final Feasibility Study was a ***bankable*** Study. NovaGold defines a "bankable feasibility study" as a "comprehensive analysis of a project's economics to ascertain whether the project can profitably provide reasonable long-term returns to the participants." *See* Ex. 13 (NovaGold's July 25, 2006 Press Release); *see also* NG Br. at 6.

The Defendants' assertion that the Final Feasibility Study's "estimates" were "forward-looking" statements and subject to the PSLRA's safe harbor provision is simply wrong. NG Br. at 14-16. When the NovaGold Defendants released the C$2.2 billion figure with the cost collar, they were making a statement of present fact, *i.e.*, construction of a mine at Galore Creek ***will*** cost between C$1.98 billion and C$2.53 billion (+15%/-10% of C$2.2 billion). At the time these statements were made, NovaGold's internal cost figure was C$2.7 billion, if not substantially higher, thereby rendering the C$2.2 billion cost determination materially false when made. By the time the Registration Statement became effective on April 17, 2007, NovaGold's internal cost figure had increased to C$3.2 billion, or over ***45 percent*** (three times the cost collar) above the C$2.2 billion figure relied upon by the Exchange Act Defendants throughout the Class Period. ¶81.

(b) The Final Feasibility Study was Not "Final"

The NovaGold Defendants repeatedly stated during the Class Period that Hatch's Study was the "final" feasibility study to be performed on Galore Creek.[21] Specifically, on October 25, 2006, NovaGold issued a press release entitled: "***Final*** Feasibility Study Completed at

[21] The word "final" is defined as "not to be altered or undone" and "being the last in a series, process, or progress." *See* "*final.*" *Merriam-Webster Online Dictionary* (*http://www.merriam-webster.com/dictionary/final*) (last visited January 28, 2009).

NovaGold's Galore Creek Project." ¶72, 105; Ex. 4. Over the course of at least the next four months, the NovaGold Defendants continued to reference the ***finality*** Hatch's Study, for example:

> "On Galore Creek, the feasibility study, as I mentioned, ***is done***." ¶119 (Defendant Van Nieuwenhuyse on November 8, 2006 Conference Call).
>
> * * *
>
> "A ***final*** Feasibility Study for the Galore Creek project, completed by Hatch Ltd. in October 2006, provided Proven and Probable Reserves for NovaGold and ***confirmed the economics and mine plan of the Galore Creek project***." ¶127 (December 14, 2006 NovaGold Press Release).
>
> * * *
>
> "A ***final*** Feasibility Study for the Galore Creek project, completed in October 2006, provided substantial Proven and Probable Reserves for NovaGold and ***confirmed the economics and mine plan of the project***." ¶130 (February 9, 2007 NovaGold Press Release).
>
> * * *
>
> "A ***final*** Feasibility Study for Galore Creek was completed in October 2006." ¶132 (February 28, 2007 NovaGold Press Release, incorporated by reference in the Registration Statement).

Indeed, the Registration Statement itself, incorporates by reference a document attesting to the fact that Hatch's Study was the "final" study to be done on the project. ¶214. The first time the NovaGold Defendants disclosed that Hatch's Study would not be the "final" feasibility determination of Galore Creek's economic viability was on the morning of November 26, 2007, the day NovaGold's stock plummeted by more than 50 percent. ¶99-100.

Moreover, even on October 15, 2007, when the NovaGold Defendants first disclosed AMEC's presence at Galore Creek, they stated that AMEC was on-site merely to prepare an "updated" study, not a completely "new" assessment of Galore Creek's feasibility. ¶166-68;

Appendix A. Specifically, the NovaGold Defendants stated that AMEC was engaged to further NovaGold's plans to secure financing for Galore Creek through 2012, meaning that the NovaGold Defendants were making a present representation that the project was feasible, and said nothing to undermine the conclusions of the Final Feasibility Study. *See* NG Ex. AA; Ex. 7 (October 17, 2007 Conference Call Transcript).

Clearly, inclusion of the word "final" meant that, at the very least, the determination of Galore Creek's feasibility was ***final***. The Study would have been a ***three-year*** exercise in futility if it did not ultimately determine Galore Creek's economic feasibility. Moreover, by its own title ("Galore Creek Project Feasibility Study"), it is clear what the Study represented. NG Ex. I.

The Defendants' assertion that, despite headlines that declared it ***final***, the Study never "purported to be 'final'" is disingenuous. NG Br. at 8-9. Specifically, the defendants state that "final," when used in connection with a feasibility study, means only that the study "includes enough information to allow a financial institution to make a 'final' decision to proceed with financing the proposed project . . . [and] has nothing to do with the 'finality' of the study." NG Br. at 6-7. In other words, when NovaGold issued a press release entitled "***Final*** Feasibility Study Completed at NovaGold's Galore Creek Project," it was nothing more than an indication to nameless "financial institutions" that they now had the green light to decide whether to lend money to NovaGold for mine construction at Galore Creek. It would follow from defendants' argument, however, that NovaGold's shareholders—unlike the generic "financial institutions" from which NovaGold never sought, let alone received, financing—had no reasonable basis to rely on the Final Study in making their own investment decisions.

This assertion is not only unavailing, it is belied by the NovaGold Defendants' own statements and conduct with respect to the ***finality*** of Hatch's Study, *i.e.*, using the Study to fend off Barrick's hostile bid and to raise US$200 million in the Secondary Offering.

(c) Galore Creek Was Not an Economically Feasible Mine Project

The NovaGold Defendants' statements concerning the economic feasibility of Galore Creek constituted materially false statements of present fact when made. Throughout the entire Class Period, the NovaGold Defendants consistently stated that a mine at Galore Creek was economically feasible. ¶¶105 (October 25, 2006), 122 (November 14, 2006), 127 (December 14, 2006), 130 (February 9, 2007), 134 (March 2, 2007), 148 (April 25, 2007), 154 (June 1, 2007), 156 (July 16, 2007), 212 (Registration Statement). Moreover, not once during the Class Period did NovaGold disclose that its internal cost figures materially exceeded the C$2.2 billion figure identified in the Final Feasibility Study or that AMEC was retained to conduct a ***new*** study to determine the ***true*** feasibility of Galore Creek. *Cf.* ¶¶72, 105, 119, 127, 130, 132.

The Defendants' assertion that the feasibility assessment contained in the Hatch Report was a "forward looking" statement simply ignores the allegations in the Complaint and mischaracterizes their statements during the Class Period. NG Br. at 14-20. At no time during the class period did the NovaGold Defendants state that the Galore Creek project ***may*** or ***will likely*** prove feasible. Instead, the NovaGold Defendants repeatedly represented to the investing public that the Final Feasibility Study "confirms the economic viability" of a mine at Galore Creek. ¶¶105, 114, 125, 132, 143. As such, the NovaGold Defendants' statements constitute misrepresentations of "present fact" and are not subject to the PSLRA's safe harbor provision. *Stolz*, 355 F.3d at 96-97; *Heller*, 2008 WL 5328430, at *11.

3. To the Extent The NovaGold Defendants' Statements Were Forward Looking, They Knew The Statements Were False When Uttered

As discussed at length above, in Part I, during the Class Period, the NovaGold Defendants had actual knowledge concerning the falsity of their purportedly forward-looking statements. While the NovaGold Defendants submit that they provided ample cautionary language regarding the *finality* of Hatch's Study and the construction cost figures contained therein, "the safe harbor provision does not afford corporations a free pass to lie to investors." *In re AT&T Corp. Sec. Litig.*, Civ. No. 00-5364 (GEB), 2002 U.S. Dist. LEXIS 22219, at *41 (D.N.J. Jan. 28, 2002); *see also In re Oxford Health Plans, Inc.*, 187 F.R.D. 133, 141 (S.D.N.Y. 1999) (holding that statements based upon defendants' "beliefs" are actionable because there was "evidence that the defendants were aware of undisclosed facts that seriously undermined the accuracy of their alleged opinions or beliefs").

III. LEAD PLAINTIFF'S SECURITIES ACT CLAIMS ARE TIMELY AND ADEQUATELY PLED

Separate from Defendants' argument that their misstatements are not actionable under the PSLRA safe harbor, they raise two additional grounds for dismissal of the Securities Act claims brought under Sections 11 and 12(a)(2). First, the Securities Act Defendants who were first named in the complaint Lead Plaintiff filed on the November 21, 2008, alleging only violations of the Securities Act (the "Securities Act Complaint"), argue that these claims are time barred. Second, and in conflict with their Underwriter co-defendants, the NovaGold Defendants, joined by the Hatch Defendants, assert that the Complaint's Securities Act allegations "sound in fraud" and therefore must be dismissed for failure to satisfy the particularity pleading requirement under Fed. R. Civ. P. 9(b). NG Br. at 35-37. As detailed below, these arguments are unavailing, and Defendants' motions to dismiss the Securities Act allegations should be denied.

A. Lead Plaintiffs Sections 11 And 12(a)(2) Claims are Timely

The Defendants concede that the Securities Act claims against NovaGold, NovaGold officers Van Nieuwenhuyse, MacDonald, and Harris are timely. However, the NovaGold director defendants (Brack, Halvorson, McConnell, McFarland, Nauman, and Philip), defendant Brown, the Underwriter Defendants, and the Hatch Defendants (collectively, the "SOL Defendants") erroneously argue that any Securities Act claims asserted against them are time barred. Specifically, the SOL Defendants argue that the October 15 Press Release contained "storm warnings" that triggered Lead Plaintiff's duty of inquiry. In reality, as set forth in Parts II.A.1 and II.A.2 (*supra*), the October 15 Press Release's purported storm warning that AMEC was conducting an "updated feasibility study" that may result in "significant increases to capital costs," did nothing more than reiterate generalized risks that were already ***known*** in the market, and serve to conceal the truth (¶¶166-67; Appendix A). *See Newman v. Warnaco Group, Inc.*, 335 F.3d 187,194 (2d Cir. 2003) (finding that "benign explanation[s]" of known business risks are insufficient to put plaintiffs on inquiry notice).

In the Second Circuit, resolving the ***factual*** issue of whether a plaintiff was on inquiry notice is "often inappropriate for resolution on a motion to dismiss." *Staehr v. The Hartford Fin. Serv. Group, Inc.*, 547 F.3d 406, 412 (2d Cir. 2008) (citations omitted). Moreover, in "moving to dismiss a federal securities lawsuit on statute-of-limitations grounds, defendants bear a heavy burden in establishing that plaintiffs were on inquiry notice." *In re Alcatel Sec. Litig.*, 382 F. Supp. 2d 513, 523 (S.D.N.Y. 2005). Indeed, inquiry notice may be found as a matter of law ***only***

when uncontroverted evidence clearly demonstrates when the plaintiff should have discovered the fraudulent conduct." *Staehr*, 547 F.3d at 427 (emphasis added).[22]

Here, the SOL Defendants fail to satisfy the requisite "heavy burden" because they cannot establish, as a matter of law, that the October 15 Press Release put Lead Plaintiff on inquiry notice of the fraud alleged herein. Moreover, by virtue of not disputing loss causation, the SOL Defendants recognize that the first and only revelation of the truth occurred on November 26, 2007. Because it is undisputed that the SOL Defendants were properly served with a summons and the Securities Act Complaint, filed on November 21, 2008, Lead Plaintiff's claims against the SOL Defendants are timely under the governing one-year statute of limitations. *See* 15 U.S.C. § 77m.

1. Storm Warnings Must be Probative of an Actionable Claim to Trigger a Duty of Inquiry

As the Second Circuit reiterated in its most recent case on inquiry notice, the statute of limitations begins to run when a plaintiff "obtains actual knowledge of the facts giving rise to the action or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge." *Staehr v. The Hartford Fin. Serv. Group, Inc.*, 547 F.3d 406, 411 (2d Cir. 2008) (citations omitted). To put a plaintiff on inquiry notice, storm warnings must make the existence of wrongdoing "probable, not merely possible" and "relate[] directly to the misrepresentations and omissions … later allege[ed] in [the] action against the defendants." *Newman*, 335 F.3d at 193 (citation omitted). Moreover, a plaintiff's duty of inquiry "is ***not*** triggered unless plaintiffs were able to perceive the general fraudulent scheme on the basis of available information." *In re Alcatel*, 382 F. Supp. 2d at 526 (emphasis added). Even when

[22] Defendants' argument that any claims against the SOL Defendants are time barred is nothing more than a "truth-on-the-market defense," which is "intensely fact-specific and is rarely an appropriate basis" for dismissing a securities fraud complaint at the pleading stage. *Ganino*, 228 F.3d at 167.

storm warnings are present, investors may not be placed on inquiry notice "because the warning signs are accompanied by reliable words of comfort from management." *Openwave*, 528 F. Supp. 2d at 245 (citations omitted).

(a) The October 15 Press Release Did Not Put Lead Plaintiff on Inquiry Notice

As detailed in Parts II.A.1 and II.A.2 (*supra*), on October 15, 2007, NovaGold announced that AMEC was conducting an "updated feasibility study" that may result in "significant increases to capital costs." ¶166; Ex. AAA. The explicit purpose for this update was to support project financing well-beyond 2008, which is consistent with the project's purported economic viability. Specifically, NovaGold stated that the potential cost increases were due to "escalating local and worldwide construction costs; further optimization of the project, . . . and the significant strengthening of the Canadian dollar against the U.S. dollar." *Id.*; Appendix A. Nothing in these statements is indicative of a securities fraud claim and these purported storm warnings do not touch on the ***truth*** that came to pass. In fact, at least one analyst estimated that the resulting construction cost increase for Galore Creek would be only 10 percent, well-within the Final Study's cost collar of 15 percent. ¶169.

Conversely, on November 26, 2007, operations at Galore Creek were suspended because "the tailing[s] dam and the water diversion structures" were underestimated to a level that rendered the project economically infeasible. *See* Ex. CCC, at 4 (November 26, 2007 Conference Call Transcript); Appendix A. The colossal underestimation in the tailings and water diversion facilities did not relate in any way to the purported storm warnings contained in the October 15 Press Release. Tellingly, on November 26, 2007, in response to this first meaningful disclosure concerning the ***true*** economic condition of Galore Creek, NovaGold's stock ***dropped US$10.76***, whereas, it ***dropped only US$0.41*** when NovaGold issued the October 15 Press

Release. ¶100. Indeed, as reflected in Appendix A, a factual comparison between the November 26, 2007 disclosures and the statements in the October 15 Press Release unravel any argument that storm warnings were meaningfully present in the latter.[23]

(b) NovaGold Management Tempered its Risk Disclosures with Words of Comfort

In addition to the absence of any disclosure of the truth, the NovaGold Defendants' words of comfort in the October 15 Press Release "dissipat[ed] [any] duty of inquiry" by Lead Plaintiff. *Openwave*, 528 F. Supp. 2d at 245 (citations omitted); *see also In re Espeed, Inc., Sec. Litig.*, 457 F. Supp. 2d 266, 285 (S.D.N.Y 2006) (finding that company's assurances and words of comfort tempered storm warnings about an innovative new product and "preclud[ed] a finding as a matter of law that press articles gave rise to a duty of inquiry"). In the October 15 Press Release, NovaGold touted the "exceptional progress" and "significant advancements [] made at Galore Creek" during the prior quarter. Ex. 11. Specifically, NovaGold highlighted that "construction [was] progressing on schedule." *Id.*; Appendix A. In addition, NovaGold tempered its risk disclosures concerning increased capital costs by stating that any increases are expected to be "partially offset by improvements in operating costs." ¶66; Appendix A. As

[23] Defendants reliance on *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148 (2d Cir. 2003), *Shah v. Meeker*, 435 F.3d 244 (S.D.N.Y. 2006); *In re MBIA Sec. Litig.*, No. 05 CIV. 3514(LLS), 2007 WL 473708 (S.D.N.Y. Feb. 14, 2007) for the assertion that the October 15 Press Release provided sufficient storm warnings is misplaced. Unlike the vague and misleading press release alluded to here, the cases relied upon by the SOL Defendants show the exacting level of detail needed to put a plaintiff on inquiry notice of fraud. In *LC Capital Partners*, the court concluded that inquiry notice was triggered by three "substantial reserve charges" taken during a short period of time that should have alerted an investor that the company was under-reserved. 318 F.3d, at 155. In *Shah*, the court found plaintiffs to be on inquiry notice after an article was published providing specific examples that set out in "great detail" the improper business practices that later formed the basis of plaintiff's complaint. 435 F.3d at 250-51. Finally, in *MBIA*, the court concluded that the plaintiff was placed on inquiry notice after analyst reports, newswires, press release and finally a 66-page research report issued by a hedge fund all detailing the improper accounting for reinsurance that formed the basis of plaintiff's complaint.

discussed at length above, the truth about the economic viability of Galore Creek was not revealed until November 26, 2007. *See* Part II.A.1 (*supra*).

B. The Securities Act Allegations Sound In Negligence And Satisfy The Notice Pleading Standard of Rule 8

The NovaGold Defendants, standing alone, seek dismissal of the Securities Act claims on the basis that the Complaint's allegations sound in fraud, and fail to meet the pleading standard of Fed. R. Civ. P. 9(b). As the Second Circuit, and this Court, have recognized, however, "[f]raud is not an element or a requisite to a claim under Section 11 or Section 12(a)(2) of the Securities Act" and "a plaintiff need allege no more than negligence to proceed under [Section] 11 and [Section] 12(a)(2)." *Rombach*, 355 F.3d at 171; *In re WorldCom Inc. Sec. Litig*., No. 02 CIV 3288 (DLC), 2004 WL 1435356, at *3 n.4 (S.D.N.Y. June 28, 2004). With respect to the Securities Act allegations at issue here, this proposition is well-summarized as follows:

> In contrast to the Exchange Act Claims, the Complaint expressly states that the Section 11 and 12(a)(2) claims "are not based on any allegations of knowing or reckless conduct on behalf" of the Underwriter Defendants ***or any other defendant***, and Plaintiff "specifically disclaims … any reference to or reliance upon allegations of fraud" in connection with these claims. [] ¶207. Accordingly, the allegations supporting the Exchange Act Claims, as set forth in Paragraphs 47 through 205 of the Complaint, ***do not apply*** to Plaintiffs Section 11 and 12(a)(2) claims…."

UW Br. at 5 (emphasis added). Lead Counsel cannot take credit for this succinct and correct argument. Instead, this passage comes from the Underwriter Defendants, who expressly agree that the Securities Act allegations sound in negligence.[24]

[24] The purpose of subjecting claims that sound in fraud to the heightened pleading requirements of Fed. R. Civ. P. 9(b) is "to provide defendants with fair notice of the claim" and to protect "a defendant's reputation." *Rombach*, 355 F.3d at 171. Here, as a matter of pleading and practicality, that purpose would not be served. To the extent the NovaGold Defendants' statements in the Registration Statements are the subject of the Exchange Act claims, compare ¶¶140-46 to ¶¶209-18, the NovaGold Defendants do not

(continued . . .)

In conflict with their co-defendants, the NovaGold Defendants would have the Court believe that every complaint that asserts both Securities and Exchange Act claims, by default, is governed by Fed. R. Civ. P. 9(b) pleading requirements. In reality, however, courts only impose the higher pleading standard when a plaintiff alleges both Securities Act and Exchange Act claims, but makes "no effort" to "assert any claim of negligence on the part of the [defendants], nor [] specify any basis for such claim." *Rombach v. Chang*, No. 00 CV 0958 SJ, 2002 WL 1396986, at *4 (S.D.N.Y. June 7, 2002); *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 632 (S.D.N.Y. 2007) (noting "that the Second Circuit did not intend *Rombach* as an instruction that all [Section] 11 pleading should be subjected to the Rule 9(b) standard … [n]or can the Second Circuit have intended that all allegations directly reproducing the language of [Section] 11 be subject to Rule 9(b)."). In other words, a plaintiff may "not 'require[] [the Court] to sift through allegations of fraud in search of some 'lesser included' claim of strict liability." *Rombach v. Chang*, 335 F.3d 164, 176 (2d Cir. 2004) (citation omitted).

The allegations here stand in stark contrast. The Securities Act allegations are set forth in a stand-alone portion of the Complaint, separately setting forth all the allegations, including the counts, that form the basis of the Securities Act claims. *Compare* ¶¶47-205, *with* ¶¶206-257; *see, e.g., Refco*, 503 F. Supp. 2d at 632 (pleading of Section 11 and Section 12(a)(2) claims governed by Rule 8(a) where the complaint was structured "to draw a clear distinction between negligence and fraud claims"); *see also In re Suprema Specialties Sec. Litig.*, 438 F.3d 256, 272-73 (3d Cir. 2006) (Section 11 and Section 12(a)(2) claims are not "contaminate[d]" by fraud when pled separately.) The preface to Lead Plaintiff's Securities Act allegations states that the

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(. . . continued)
dispute that the allegations satisfy the pleading requirement of Fed. R. Civ. P. 9(b), thereby waiving the argument that they do not have sufficient notice of the particularized fraud allegations made against them.

claims asserted under the Securities Act are premised in "strict liability and negligence" rather than fraud. ¶¶206, 219, 237, 248. *See Garber v. Legg Mason*, 537 F. Supp. 2d 597, 612 (S.D.N.Y. 2008) (Rule 8(a) governed Securities act allegations which "clearly 'sound in negligence,'" did not "rely on fraudulent acts," and "allege[d] no fraudulent intent.").

Further, Lead Plaintiff's Section 11 and 12(a)(2) allegations track the plain language of the Securities act and state "materially false and misleading and omitted to state material facts necessary to make it not misleading." *See* 15 U.S.C. § 77k; *see, e.g.*, ¶¶209, 211, 227-33, 242-44, 246, 250-51. Indeed, the stand-alone nature of the Securities Act allegations is obvious, as they are virtually identical to those contained in the Securities Act Complaint, which contained no allegations of fraud whatsoever. Thus, the Complaint's Securities Act claims sound in negligence, and are adequately pled under Fed. R. Civ. P. 8(a).[25]

IV. THE COMPLAINT STATES CLAIMS UNDER SECTION 15 OF THE SECURITIES ACT AND SECTION 20(a) OF THE EXCHANGE ACT

Defendants move to dismiss Lead Plaintiff's control person liability claims pursuant to Section 15 of the Securities Act and Section 20(a) of the Exchange Act on the sole basis that

[25] While the NovaGold Defendants attempt to characterize the Complaint's stand-alone Securities Act allegations as containing merely some superficial disclaimer, NG Br., at 35-36, the cases they cite for this proposition contradict their argument. *See, e.g., In re IPO Sec. Litig.*, 241 F. Supp. 2d 281, 341-342 (S.D.N.Y. 2003) ("Because a Section 11 claim is not a fraud claim, Rule 8(a) applies. That the same factual allegations also give rise to a Rule 10b-5 claim is irrelevant to this analysis."); *see also In re Scottish Re Group Sec. Litig.*, 524 F. Supp. 2d 370, (S.D.N.Y. 2007) ("not decid[ing]whether the Complaint sounds in fraud for purposes of determining whether Rule 8(a) or Rule 9(b) governs."). Furthermore, other cases the NovaGold Defendants quote set a stark contrast between allegations that sound in fraud from those here that are set apart in a virtually independent complaint. NG Br., at 35-36 (quoting *In re Marsh & McLennan Sec. Litig.*, 501 F. Supp. 2d 452, 492 (S.D.N.Y. 2006) ("[a]llowing plaintiffs to allege fraud over nine-hundred paragraphs and then withdraw those claims for eight paragraphs in order to state a Section 11 claim eviscerates Rule 9(b)'s mandate to 'safeguard a defendant's reputation from improvident charges of wrongdoing."); *In re Alstom Sec. Litig.*, 406 F. Supp. 2d 402, 410-411 (S.D.N.Y. 2005) ("Having made these broad averments portraying a pervasive and overarching scheme of fraud, one that apparently imbuses [sic] all of their specific causes of action, and attendant claims of losses, Plaintiffs then attempt to retreat, apparently to escape the particularity requirement….).

Lead Plaintiff has failed to plead primary violations of the Securities and Exchange Act, respectively. As detailed in the Complaint and argued above, Lead Plaintiff has adequately established primary violations of the securities laws.

To establish control person liability, a plaintiff must allege a primary violation under the securities laws and that the defendant controlled the primary violator. *WorldCom*, 294 F. Supp. 2d at 410, 415; 15 U.S.C. §§ 77o, 78t(a). As is the case here, a plaintiff who adequately pleads primary violations of Section 10(b), Section 11, and Section 12(a)(2) has satisfied the first element of control person liability under Sections 20(a) or Section 15, respectively. *WorldCom*, 294 F. Supp. 2d at 415. Pleading control is governed by Rule 8, which at the pleading stage simply requires "[a] short plain statement that gives the defendant fair notice of the claim that the defendant was a control person and the ground on which it rests its assertion that defendant was a control person." *WorldCom*, 294 F. Supp. 2d at 415-16. Individual Defendants have not challenged Lead Plaintiff's pleading of control and thus have effectively conceded the issue of control at this stage of the litigation. In any event, the arguments above and the well-pleaded Complaint, ¶¶201-05, 248-57, easily satisfy the requirements of control person liability.[26]

V. DEFENDANT RUSTAD HAS BEEN PROPERLY SERVED IN THIS ACTION

Counsel for Defendant Rustad recently advised Lead Counsel that Rustad acknowledges proper service of process in this action and informed Lead Plaintiff that Rustad will no longer pursue this argument.[27]

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[26] In the alternative, the issue of control person liability is necessarily "a fact-intensive inquiry, and generally should not be resolved on a motion to dismiss." *Hall v. Children's Place Retail Stores*, 580 F. Supp. 2d 212, 235 (S.D.N.Y. 2008) (citations omitted). Defendants' motion to dismiss Lead Plaintiff's Section 20(a) and Section 15 claims must be denied.

[27] Counsel for Hatch also challenge Lead Plaintiff's "standing" and refers the Court to the Underwriters' "Memorandum of Law," but no such argument exists therein.

VI. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION; IT IS PREMATURE TO DEFINE THE CLASS

It is undisputed that the Court has subject matter jurisdiction in this action. What the Defendants raise at this early juncture under the guise of subject matter jurisdiction is a dispute over the definition of the Class. Specifically, they do not dispute that the Class consists of (i) American investors who purchased NovaGold stock either on the American Stock Exchange ("AMEX") or the Toronto Stock Exchange ("TSX") and (ii) foreign investors who purchased NovaGold's stock on the AMEX. The Defendants contend, however, that the Class definition should exclude non-American investors who purchased NovaGold's stock on the TSX, and who maintain only claims under the Exchange Act. While the Complaint alleges a sufficient basis for subject matter jurisdiction over the entire Class, making such a determination is premature.[28]

With respect to subject matter jurisdiction over the non-American purchasers on the TSX, the parties agree that the appropriate inquiry is whether the Complaint alleges sufficient U.S.-based conduct on the part of the Defendants (*i.e.*, the conduct test).[29] A dispute remains, however, as to the extent of U.S.-based conduct alleged and as to when this determination should be made. Even in cases such as this one, where the Complaint adequately alleges sufficient U.S.-based conduct, courts, including this Court, have wisely deferred the determination on the

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[28] It appears that defendants, and in particular the Underwriter Defendants, do not assert that the Court does not have subject matter jurisdiction over all members of the putative Class who purchased or otherwise acquired NovaGold shares pursuant to the Registration Statement, giving rise to claims under the Securities Act. Such a position is sensible in view of the fact that Citigroup Global Markets, Inc., a New York corporation, was the lead underwriter for the Secondary Offering, thereby providing an indisputably sufficient degree of U.S.-based conduct.

[29] The Second Circuit applies the conduct test in assessing whether a U.S. court has subject matter jurisdiction over foreign plaintiff who purchased on a foreign exchange. *Morrison v. Nat'l Austl. Bank*, 547 F.3d 167, 172 (2008). Subject matter jurisdiction under the conducts test is established when acts within the U.S. are "more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad." *Morrison*, 547 F.3d at 171. Importantly, determining whether acts within the U.S. satisfy the conducts test is an "involved undertaking," turning on the factual record. *Morrison*, 547 F.3d at 171.

definition of the class until class certification. *See In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 560-569 (S.D.N.Y. 2008); *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 120-121 (S.D.N.Y. 2008) (addressed subject matter jurisdiction over Canadian purchasers on the TSX at class certification.); *In re Flag Telecom Holdings, Ltd. Sec. Litig*, 245 F.R.D. 147, 173-174 (S.D.N.Y. 2007), *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F.Supp.2d 158, 169 (S.D.N.Y. 2003); *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855, 2003 WL 22077464, at *7 (S.D.N.Y. 2003).

In contrast to the current stage of the litigation, class certification will occur after sufficient discovery, allowing for the Court to weigh the facts and evidence supporting subject matter jurisdiction over particular members of the Class. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27, 41 (2d Cir. 2006). Indeed, where the question of subject matter jurisdiction arises, the reviewing court should be "mindful of not depriving plaintiffs of their day in court with a premature order dismissing the case." *In re Vivendi Universal S.A. Sec. Litig.*, No. 02-CV-5571 (HB), 2004 WL 2375830, at *7 (S.D.N.Y. Oct. 22, 2004). Consistent with the Court's Individual Practice In Civil Cases 3A, which provides for statements as to the basis for subject matter jurisdiction to made in a joint pretrial order, "the factual basis for a court's subject matter jurisdiction may remain an issue through trial…." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 121 (2d Cir. 1998).[30]

Nevertheless, despite the NovaGold Defendants' ignoring the allegations and asserting that the only alleged U.S.-based conduct was NovaGold's filings with the SEC, the conduct giving rise to Lead Plaintiff's and the Class's Exchange Act claims took place extensively in the

[30] Defendants citations to *In re SCOR Holdings (Switzerland) AG Litig.* 537 F. Supp. 556 564-565 (S.D.N.Y. 2008) and *Nathan Gordon Trust v. Northgate Exp., Ltd.*, 148 F.R.D. 105, 108 (S.D.N.Y. 1993) are unavailing. Both cases actually decided subject matter jurisdiction over non-U.S. investor purchasers at class certification.

United States. For instance, during the Class Period, NovaGold utilized Citigroup, a New York based investment bank, as the lead underwriter for the $200 million secondary offering, ¶¶31, 90, 225, NovaGold held an investor conference in the United States, such as the October 23, 2007 New Orleans Investment Conference at which the NovaGold Defendants touted Galore Creek, ¶172, analysts at financial institutions such as Citibank and Bear Stearns reported in the United States on NovaGold's conduct, ¶97, Appendix A at A-1, the NovaGold Defendants held quarterly earnings releases, conference calls disseminated in the United States, and made extensive filings with the SEC, including the Registration Statement, ¶¶95, 138, 140, 208.[31] Furthermore, as much as three-quarters of the trading volume in NovaGold shares was on the AMEX. This conduct artificially inflated NovaGold's stock price on the AMEX and TSX, ¶181, which both declined in tandem when the truth was revealed.[32]

[31] As pled, NovaGold's significant U.S. conduct is well beyond the mere filing of SEC filings and press releases distinguished in cases the NovaGold Defendants cite, including *In Pozniak v. Imperial Chem. Indus. PLC*, No. 03 Civ. 2457, 2004 WL 2186546, at *1-*3 (S.D.N.Y. Sept. 28, 2004) and *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d at 1 (D.D.C. 2000). Furthermore, defendants' reliance on *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453 (S.D.N.Y. 2008) is misplaced. In actuality, *AstraZeneca* found sufficient fraudulent U.S. conduct evidenced by not only press releases and SEC filings but also the Annual Business Review, medical conferences, several meetings with analysts and investors as well as communications with the FDA. *Id.* at 465.

[32] Should the Court be inclined to decide subject matter jurisdiction at the pleading stage, Lead Plaintiff respectfully requests that it be granted limited discovery to further develop the record of NovaGold's U.S. conduct. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, No. 05 Civ. 9016 (SAS), 2006 WL 708470, at *6 (S.D.N.Y. Mar. 20, 2006) ("Jurisdictional discovery 'should be granted, where pertinent facts bearing on the question of jurisdiction are controverted … or where a more satisfactory showing of the facts is necessary.'"); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 493 (S.D.N.Y 2001).

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully submits that the Court should deny Defendants' motions to dismiss. Should the Court grant any part of Defendants' motions, Lead Plaintiff respectfully requests leave to file an amended complaint.

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APPENDIX A*
COMPARISON OF DISCLOSURES RELATING TO OCTOBER 15, 2007[1] VERSUS NOVEMBER 26, 2007

INVESTOR REACTION	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
NovaGold's stock ***dropped US$0.41***, to US$18.54 on October 16, 2007, from its close of US$18.95 a day prior. Nine days later, on October 25, 2007, NovaGold's stock price climbed back above its October 15 price, closing at $18.98. ¶97	NovaGold's stock ***dropped US$10.76 – over 53 percent*** – to US$9.48 on October 26, 2007, from its close of US$20.24 a day prior, on volume of over 29 million shares, more than 24 times the daily average during the Class Period. ¶181
ANALYST REACTIONS	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
MGI Securities report entitled *Q3/07 Results – Time Value Benefits Offset by Cap-Ex Creep* reiterating "***Buy***" rating. Ex. 14 at 1. RBC Capital Markets report entitled *NovaGold Faces Industry-Wide Capex Increases* reporting "[w]e estimate an ***additional 10% in capex*** for the JV, to US$2.2 billion, and we have ***slightly increased*** our estimate for required debt financing." Ex. 15 at 1. Bear Stearns report entitled *Making the Transition* stating "[o]ur analysis indicates a potential of ***19% upside in NovaGold Resources' shares***…. Management has ***achieved important milestones*** during 2007 regarding its major copper mine development at Galore Creek." Ex. 16 at 5. Citigroup report entitled *3Q/07: District Development, or District Court?* reporting "AMEC has been hired to complete an ***independent*** feasibility update, targeted for 1H/08. The intent is to support project financing and update scope…. Think big – In light of these conditions we would not be surprised if the Galore capex bill ***ultimately*** crests US$3.0 bln…. On the other hand, involvement of major cash-rich partner Teck would ***seem to guarantee construction***." Ex. 17 at 4.	MGI Securities report entitled *Galore Creek Hits a Snag – CapEx Escalation Shelves Project* ***slashing its price target*** for NovaGold ***by over 30 percent***, from C$24.50 to C$17.00. Ex. 18 at 1. RBC Capital Markets report entitled *Target Reduced on Suspension of Development at Galore Creek* ***cutting NovaGold's price target by nearly 40 percent***, from US$21.00 to US$13.00. Ex. 19 at 1. Bear Stearns report entitled *Startling Construction Cost and Schedule Disclosure at Galore Creek - Adjusting Rating to Peer Perform* "***lowering [NovaGold's] investment rating***" from Outperform to Peer Perform. Ex. 20 at 1. Citigroup report entitled *Surprise Construction Halt Slashes Asset Value* finding that the "***magnitude of underestimation is shocking***" and that "[t]he ***Galore shut-in fundamentally impairs the value of NovaGold***." Ex. 2 at 1. Salman Partners report entitled *Winter Review Brings Indefinite Freeze to Further Construction at Galore Creek* ***removing all "value for Galore Creek*** from our valuation of NovaGold in light of the ***dramatic estimated increase*** to Galore Creek development costs." Ex. 21 at 1.

* Emphasis added to all quotations set forth in Appendix A.

[1] Also reflects NovaGold Defendants' statements during the analyst conference call on October 17, 2007 (the "October 17 Call"), Ex. 7.

STATUS OF GALORE CREEK DEVELOPMENT:	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"Galore Creek construction progressing well." "During an exciting time of rising metals prices and increased market recognition, NovaGold is pleased … [w]ith ***exceptional progress*** at Galore Creek and … ***continues to advance toward its goal*** of becoming a low-cost, mid-tier gold and copper producer." "Significant advancements were made" and "***construction is progressing on schedule.***" "[F]ull construction to begin as early as possible in the spring." Ex. 11 at 1-2. Van Nieuwenhuyse: "The Galore Creek construction ***is proceeding in accordance with the previously announced timelines***. We do not expect any significant changes as of right now. We are working on an updated feasibility study which we expect to have done the second half of next year. Ex. 7 at 4.	Van Nieuwenhuyse: We have "[decided] to ***suspend construction*** activities at the Galore Creek." Ex. 1 at 2. Don Lindsay, Teck Cominco, President: "the construction schedule underlying the ***original feasibility study could not be met*** and that certain costs particularly related to [civil work] were seriously underestimated." Ex. 1 at 3.

RELIABILITY OF THE FINAL FEASIBILITY STUDY	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
No comment regarding the Final Feasibility Study conducted by Hatch. Although NovaGold warned that the "updated feasibility study is expected to result in significant increases to capital costs," the October 15 Press Release provided no indication that those increases would be beyond the 15 percent cost collar. Ex. 11 at 3. Furthermore, the update was part of plans to obtain future financing for 2008-2012, and did not touch upon the integrity of the Final Feasibility Study. Ex. 7 at 2.	Don Lindsay, Teck Cominco President: "We put a team together in December of 2006 shortly after the October feasibility study from Hatch came out and spent essentially six months working on reviewing the project with a number of our senior people involved, quite a number. There was a very solid presentation made to the Board before making the decision. And there were representatives from multiple functions within the company involved. Having said that, clearly if we had to do it over again ***we would have spent a lot more time on the civil works*** and that aspects of it because while we relied fairly heavily on the Hatch feasibility study as people do in the industry, ***it is clear that there was more work that could've been done on that***." Ex. 1 at 17-18.

CAPITAL COSTS	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"The ***updated feasibility study*** is expected to result in ***significant increases to capital costs***…" "The updated feasibility study is targeted to be complete in the first half of 2008, but revised costs for the project may be available earlier than that." Ex. 11 at 3.	Don, Lindsay, Teck Cominco President: "capital costs could ***approach as much as $5 billion***." Ex. 1 at 3. Brown: "***As we began to study*** the construction of the tailings dam and some of the large water diversion structures in more detail, ***we've recognized*** that those activities need to be sequenced in a highly complex fashion. That has led to a significant increase in costs particularly in indirects related to overheads and general management." Ex. 1 at 14. Brown: "The question was related to the cost of the tailings dam and water diversion structures as a percent of the overall estimate. I think it ***at least one-third if not 45% of the overall cost*** of the project right now," as compared to a cost of $274 million, or 15 percent, in the Final Feasibility Study. Ex. 1 at 13-14.

STATED CAUSES OF COST INCREASE	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"escalating local and worldwide construction costs." Ex. 11 at 3.	Van Nieuwenhuyse: "clearly the ***lion's share*** of the increases we're seeing are related to two major factors, overall industry inflationary pressures on wages and materials; but additionally, the [in valley] works, specifically the ***tailing dam and the water diversion structures were clearly underestimated*** in terms of the time and the labor necessary to complete those work. ***We found this out*** in the course of conducting the more detailed engineering review which was done by AMEC ***earlier this year***" Ex. 1 at 7.

STATED CAUSES OF COST INCREASE (CONTINUED)	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"the significant strengthening of the Canadian dollar against the U.S. dollar" Ex. 11 at 3.	Van Nieuwenhuyse: "The ***currency*** —the ***changes are not significant in terms of estimating the capital***. They do have an effect or would have an effect on the operating costs but ***that is not really where our decision is based on***. It is as you point out in the second half of your question there, ***it is the in valley works*** and the amount of time that was required to complete those works ***as they were envisioned in the feasibility study***." Ex. 1 at 8.
"f]urther optimization of the project, including potential modification of grind size" Ex. 11 at 3.	* * * Haytham Hodaly, Salman Analyst Q: "did the scope of the actual tailings dam or water diversion structures and costs associated with that actually change or were they clearly wrong the way they did them?" Van Nieuwenhuyse: "I would say ***the scope did not change***. It was more in looking at a more detailed engineered review of how that work was going to get done. It was in that process that it was identified that the work would take longer, require more people and that is what has led to the significant increase in the cost." Ex. 1 at 17.

AMEC'S ROLE	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"The Galore Creek Mining Corporation ***has engaged*** AMEC Americas Limited to ***prepare a feasibility study update*** for the project with results targeted in the first half of 2008." The feasibility study update would, "amongst other things, support the project financing of Galore Creek," for 2008-2012. Ex. 11 at 2-3.	"In ***April 2007***, ***NovaGold retained*** AMEC Americas Limited ("AMEC"), an independent engineering firm, ***to review the October 2006 Galore Creek Feasibility Study*** and commence project engineering. The review covered the entire project with a ***focus*** on construction of the mine facilities and ***tailings and water management structures***." Ex. 12 at 1. Van Nieuwenhuyse: "***We found this out*** in the course of conducting the more detailed engineering review which was done by AMEC ***earlier this year.***" Ex. 1 at 4.

FUNDING STATUS	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"As of October 12, 2007, NovaGold anticipates funding its planned activities for 2007 from available cash. Teck Cominco's funding of construction costs for Galore Creek is currently expected to cover costs until at least mid-2008." Ex. 11 at 4. Don MacDonald, CFO: "Back to Galore Creek, it's a very large project and so looking forward we are already working on various financing packages particularly with Citigroup's Project Finance Group to cover expenditures over the period 2008 through 2012." Ex. 7 at 2.	NovaGold has expended $400 million, $200 million from their IPO and $200 million from the secondary offering. Ex. 1 at 8; ¶¶8, 90.

POTENTIAL OFFSETS	
OCTOBER 15, 2007	**NOVEMBER 26, 2007**
"The high capacity 287-kV Northwest Transmission Line power line would provide increased flexibility, power stability and capacity … ***at no additional cost***." Ex. 11 at 2. "Capital cost increases are expected to be partially ***offset by improvements in operating costs.***" Ex. 11 at 3.	Don Lindsay, Teck Comino President: "There is no question that when you add $2 billion or more in capital costs from our point of view [Net present Value]] turned negative and that was important to us." In otherwords, Galore Creek was worse than infeasible; it would operate at a loss over the long-term if the project continued. Ex. 1 at 10.