

10-1535-cv

Sheet Metal Workers Local No. 33 et al. v. CBRE Realty Fin., Inc. et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: June 1, 2011 Decided: July 26, 2011)

Docket No. 10-1535-cv

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PHILIP HUTCHISON, Individually and On Behalf of
All Others Similarly Situated,

Plaintiff,

SHEET METAL WORKERS LOCAL NO. 33, Lead Plaintiff,
ALFRED IVERS, Lead Plaintiff, WEST PALM BEACH
FIREFIGHTERS PENSION FUND,

Plaintiffs-Appellants,

-v.-

DEUTSCHE BANK SECURITIES INC., CITIGROUP GLOBAL
MARKETS INC., WACHOVIA CAPITAL MARKETS, LLC,
JMP SECURITIES LLC, CREDIT SUISSE SECURITIES
(USA) LLC,

Defendants,

CBRE REALTY FINANCE, INC., KEITH GOLLENBERG,
MICHAEL ANGERTHAL, RAY WIRTA,

Defendants-Appellees.

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1 Before: JACOBS, Chief Judge, LIVINGSTON, Circuit
2 Judge, and RAKOFF, * District Judge.
3

4 Plaintiffs-Appellants Sheet Metal Workers Local 33 et
5 al. appeal from an August 11, 2009 judgment of the United
6 States District Court for the District of Connecticut
7 (Underhill, J.), dismissing their putative securities class
8 action complaint pursuant to Federal Rule of Civil Procedure
9 12(b)(6) for failure to state a claim. The complaint
10 alleged that the securities issuer made false statements and
11 omissions of material facts in the registration documents
12 accompanying its initial public offering, in violation of
13 Sections 11, 12(a)(2) and 15 of the Securities Act of 1933.
14 We conclude that the alleged misstatements were not material
15 because the value of the transactions composed an immaterial
16 portion of the issuer's total assets. Affirmed.

17 SUSAN K. ALEXANDER (Sanford Svetcov, San
18 Francisco, CA and Samuel H. Rudman, David A.
19 Rosenfeld, and Evan J. Kaufman, New York, NY,
20 on the briefs), Robbins Geller Rudman & Dowd
21 LLP, San Francisco, CA, for Plaintiffs-
22 Appellants.
23

24 ROBERT S. FISCHLER (Justin J. Wolosz and David
25 T. Cohen, on the brief), Ropes & Gray LLP, New
26 York, NY, for Defendants-Appellees.
27

* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

1 DENNIS JACOBS, Chief Judge:

2
3 Defendant-Appellee CBRE Realty Finance, Inc. ("CBRE"),
4 a real estate financing company, floated its initial public
5 offering (the "IPO") in September 2006. Among the
6 purchasers were Plaintiffs-Appellants Sheet Metal Workers
7 Local No. 33 and other plaintiffs (collectively,
8 "Plaintiffs") in this action. They appeal from an August
9 11, 2009 judgment of the United States District Court for
10 the District of Connecticut (Underhill, J.), granting a Fed.
11 R. Civ. P. 12(b)(6) motion to dismiss their putative
12 securities class action complaint for failure to state a
13 claim. Plaintiffs alleged that CBRE and its Chief Executive
14 Officer Keith Gollenberg, Chief Financial Officer Michael
15 Angerthal, and Chairman of the Board Ray Wirta (the
16 "Defendants") made false statements and omissions of
17 material facts in the registration statement and prospectus,
18 concerning the impairment of two mezzanine loans. The
19 district court granted CBRE's motion to dismiss on the
20 ground of immateriality, because the loans were fully
21 collateralized at the time of the IPO. See Hutchison v.
22 CBRE Realty Fin., Inc., 638 F. Supp. 2d 265, 276 (D. Conn.
23 2009) ("Hutchison I"). A motion to replead was denied. We
24 affirm, albeit on somewhat different grounds.

BACKGROUND

Since this is an appeal from a Fed. R. Civ. P. 12(b)(6) dismissal, the following facts are drawn from Plaintiffs' Second Amended Class Action Complaint for Violations of Federal Securities Laws (the "Second Amended Complaint"), and are accepted as true. See Slayton v. Am. Express Co., 604 F.3d 758, 766 (2d Cir. 2010). We also rely on information derived from CBRE's filings with the Securities and Exchange Commission ("SEC") and other documents that are invoked by the complaint. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) ("[W]e may consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit.").

CBRE is a commercial real estate speciality finance company focused on originating, acquiring, investing, financing, and managing commercial real estate-related loans and securities. Its investment portfolio consists of: whole loans; subordinated interests in first mortgage real estate

1 loans; real estate-related mezzanine loans; commercial
2 mortgage-backed securities; and joint venture investments.

3 On September 26, 2006, CBRE filed an SEC Form S-11/A
4 Registration Statement (the "Registration Statement") for
5 its IPO. The Registration Statement offered 9,600,000
6 common shares to the public at \$14.50 per share. The
7 underwriters were granted an option to purchase up to an
8 additional 1,440,000 common shares at \$14.50 per share. The
9 SEC declared the prospectus effective on September 27, 2006.
10 The IPO raised approximately \$144 million.

11 At the time of the IPO, two mezzanine loans were
12 outstanding to developer Triton Real Estate Partners, LLC
13 ("Triton"). As defined in CBRE's prospectus, investments in
14 mezzanine loans "take the form of subordinated loans secured
15 by second mortgages on the underlying property or loans
16 secured by a pledge of the ownership interests in the entity
17 that directly or indirectly owns the property." The first
18 loan, with a carrying value of \$19.7 million, was made on or
19 about October 31, 2005 and was collateralized by The Rodgers
20 Forge, a 508-unit condominium conversion project in North
21 Bethesda, Maryland (the "Rodgers Forge Loan"). The second
22 loan, with a carrying value of \$31.8 million, was made on or

1 about November 8, 2005 and was collateralized by The
2 Monterey, a 434-unit condominium conversion project in
3 Rockville, Maryland (the "Monterey Loan," and together with
4 the Rodgers Forge Loan, the "Triton Loans").

5 The Second Amended Complaint alleges that Defendants
6 knew that these mezzanine loans were in trouble at the time
7 of the IPO. Triton had missed tax payments on both The
8 Rodgers Forge and The Monterey, sales were declining at both
9 condominiums, and The Monterey development was over budget.¹
10 CBRE had entered into an Intercreditor Agreement in or
11 around November 2005 with Freemont Investment and Loan
12 ("Freemont"), the senior lender on the Monterey Loan. Under
13 that agreement, CBRE and Freemont were required to keep each
14 other apprised of any developments with respect to The
15 Monterey, including whether the project was experiencing any
16 financial difficulties. According to a former regional
17 manager at Freemont, Triton had exceeded the construction
18 budget for The Monterey by approximately \$3-\$5 million by
19 the summer of 2006, and as a result of this "out-of-balance"
20 condition, Freemont stopped funding its senior loan on

¹ For this allegation, Plaintiffs relied on information from a confidential witness who had been a CBRE underwriter/financial analyst, and worked at CBRE from June 2005 to June 2007.

1 several occasions. During the summer of 2006, Freemont
2 discussed the "out-of-balance" condition with Triton;
3 pursuant to the Intercreditor Agreement, Freemont would also
4 have been required to inform CBRE.

5 Other allegations concerning Triton's troubles include:
6 cost overruns due to unforeseen asbestos removal and
7 unexpected mechanical and electrical issues at The Monterey;
8 mechanics liens filed against both projects, claiming non-
9 payment of contractors in mid-2006; Triton's solicitation of
10 additional funding from equity investors; and Triton's
11 default on payments to sub-contractors, which caused the
12 sub-contractors to halt construction on both projects.

13 The Second Amended Complaint alleges that CBRE's
14 Registration Statement was materially inaccurate because it
15 failed to disclose that the Triton Loans were "impaired" (a
16 defined term²). The Registration Statement reported that

² The Registration Statement defined "impairment" as follows:

Loans and other investments are considered to be impaired, for financial reporting purposes, when it is deemed probable that the Company will be unable to collect all amounts due according to the contractual terms of the original agreements, or, for loans purchased at a discount for credit quality, when the Company determines that it is probable that it will be unable to collect as anticipated.

1 CBRE had reviewed its portfolio of loans and did not
2 "identify any loans that exhibit[ed] characteristics
3 indicating that impairment ha[d] occurred."

4 On February 26, 2007, five months after the IPO, CBRE
5 "announc[ed] its financial results for the fourth quarter
6 [of 2006]." The press release indicated that as of December
7 31, 2006 CBRE had classified the Monterey Loan as
8 "non-performing" and that the Rodgers Forge Loan was on
9 CBRE's "watch list," but that CBRE "had no impairments or
10 loss reserves since inception." ("Non-performing" and "watch
11 list" are defined in the margin.³) Following the press
12 release, CBRE's common stock price dropped more than 18%
13 over the two-day period ending February 28, 2007.

14 CBRE reported more bad news in the following months.

³ CBRE defined "non-performing" as:

(1) management determines the borrower is incapable of curing, or has ceased efforts towards curing the cause of a default; (2) the loan becomes 90 days delinquent; (3) the loan has a maturity default; or (4) the net realizable value of the loan's underlying collateral approximates our carrying value of such loan.

CBRE defined "watch list" as:

[A] review . . . designed to enable management to evaluate and proactively manage asset-specific credit issues and identify credit trends on a portfolio-wide basis as an "early warning system."

1 Its year-end 2006 Form 10-K (filed on or about March 26,
2 2007) reported that CBRE had advanced approximately \$1.7
3 million to protect its mezzanine loan position in The
4 Rodgers Forge. A May 7, 2007 press release disclosed that,
5 as of April 25, 2007, CBRE was no longer pursuing equity
6 real estate investments through joint ventures, and that on
7 May 4, 2007, CBRE foreclosed on the Rodgers Forge Loan. On
8 May 9, 2007, CBRE foreclosed on the Monterey Loan. CBRE
9 wrote down the value of both loans, and incurred a \$7.8
10 million impairment charge with regard to the write-down of
11 the Monterey Loan.

12 On January 15, 2009, Defendants moved to dismiss the
13 Second Amended Complaint pursuant to Fed. R. Civ. P.
14 12(b)(6), arguing that the Second Amended Complaint failed
15 to plausibly allege that the prospectus contained a material
16 misstatement or omission. On July 29, 2009, the district
17 court issued an order dismissing the Second Amended
18 Complaint for failure to state a claim. Judgment was
19 entered on August 11, 2009, dismissing the action and
20 closing the file.

21 The district court held that Plaintiffs did not
22 plausibly allege that the omissions concerning the Triton

1 Loans were material because, as reflected in CBRE's SEC
2 filings, the Triton Loans were fully collateralized by the
3 underlying real estate. Therefore, the district court
4 reasoned, "CBRE was not at risk" of a material loss on the
5 loans "at the time that the registration statement and
6 prospectus issued." Hutchison I, 638 F. Supp. 2d at 275.
7 The district court did not "rely on any quantitative
8 benchmarks to assess the materiality of the alleged
9 omissions at issue in this case." Id. at 277.

10 After the dismissal, Plaintiffs moved for
11 reconsideration or, in the alternative, for leave to file a
12 Proposed Third Amended Complaint. The motion was denied.
13 The district court found that Plaintiffs were attempting to
14 relitigate the issue of materiality, and that the
15 allegations they claimed had been overlooked had in fact
16 been considered. Hutchison v. CBRE Realty Fin., Inc., No.
17 07-cv-1599, 2010 WL 1257495, at *2 (D. Conn. Mar. 25, 2010)
18 ("Hutchison II"). In denying Plaintiffs' request for leave
19 to file a Proposed Third Amended Complaint, the district
20 court held that the proposed pleading added no relevant
21 factual allegations and would have been futile. Id. at *3.
22 Specifically, the district court noted that "[b]ecause the

1 Triton Loans were adequately collateralized at the time of
2 the IPO, there existed no risk of a loss to CBRE at that
3 time. The facts as pled in the Proposed Third Amended
4 Complaint fail once again to rectify the deficiencies
5 concerning the materiality of the omissions." Id. As a
6 separate ground for denying leave to amend, the court ruled
7 that Plaintiffs had inordinately delayed seeking leave to
8 amend (for a third time) by waiting until after the entry of
9 judgment dismissing the Second Amended Complaint, nearly two
10 years after the litigation began. Id. at *4.

11 12 **DISCUSSION**

13 "We review de novo the dismissal of a complaint under
14 Rule 12(b)(6), accepting all factual allegations as true and
15 drawing all reasonable inferences in favor of the
16 plaintiff." ECA & Local 134 IBEW Joint Pension Trust of
17 Chicago v. JP Morgan Chase Co., 553 F.3d 187, 196 (2d Cir.
18 2009). "Where, as here, dismissed claims arise under § 11,
19 we conduct a 'preliminary inquiry' into whether
20 [P]laintiffs' allegations are premised on fraud so as to
21 require satisfaction of the heightened pleading standards of
22 Fed. R. Civ. P. 9(b)." In re Lehman Bros. Mortg.-Backed

1 Sec. Litig., --- F.3d ---, 2011 WL 1778726, at *4 (2d Cir.
2 May 11, 2011) (quoting In re Morgan Stanley Info. Fund Sec.
3 Litig., 592 F3d 347, 358 (2d Cir. 2010)). We will not,
4 however, apply the heightened pleading standard of Rule 9(b)
5 where the complaint sounds in negligence, rather than fraud.
6 See, e.g., Litwin v. Blackstone Grp., L.P., 634 F.3d 706,
7 715 (2d Cir. 2011). Here, Plaintiffs “expressly disclaim[]
8 any allegation of fraud . . . and [D]efendants do not
9 contend otherwise.” In re Lehman Bros., 2011 WL 1778726, at
10 *4. “Accordingly, we review the complaint[’s] sufficiency
11 under the notice-pleading standard, which requires
12 [P]laintiffs to assert enough facts to state a claim to
13 relief that is plausible on its face.” Id. (internal
14 quotation marks omitted). “A claim has facial plausibility
15 when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is
17 liable for the misconduct alleged.” Ashcroft v. Iqbal, 556
18 U.S. ----, 129 S. Ct. 1937, 1949 (2009).

19 **I.**

20 **A.**

21 Section 11 of the Securities Act provides a private
22 right of action to a person who purchased a security, either
23 directly from the issuer or in the aftermarket, if the

1 registration statement filed with the SEC contained either
2 misstatements or omissions of material facts. See 15 U.S.C.
3 § 77k(a). Similarly, Section 12(a)(2) imposes liability on
4 the issuer or seller of securities if the securities were
5 sold using a prospectus that contained a material
6 misstatement or omission. See id. § 77l(a)(2). "So long as
7 a plaintiff establishes one of the three bases for liability
8 under these provisions--(1) a material misrepresentation;
9 (2) a material omission in contravention of an affirmative
10 legal disclosure obligation; or (3) a material omission of
11 information that is necessary to prevent existing
12 disclosures from being misleading, see In re Morgan Stanley,
13 592 F.3d at 360--then, in a Section 11 case, 'the general
14 rule [is] that an issuer's liability . . . is absolute.'" Blackstone,
15 634 F.3d at 715-16 (quoting In re Initial Pub.
16 Offering Sec. Litig., 483 F.3d 70, 73 n.1 (2d Cir. 2007)).
17 Section 15 creates liability for individuals or entities
18 that "control[] any person liable" under Sections 11 or 12.
19 15 U.S.C. § 77o(a).

20 "Issuers are subject to 'virtually absolute' liability
21 under section 11," In re Morgan Stanley, 592 F.3d at 359
22 (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 382
23 (1983)), and plaintiffs alleging violations of Sections 11

1 and 12(a)(2) not need plead "scienter, reliance, or loss
2 causation," id. (citing Rombach v. Chang, 355 F.3d 164, 169
3 n.4 (2d Cir. 2004)).

4 Plaintiffs principally cite Item 303 of Regulation S-K,
5 17 C.F.R. § 229.303, as the disclosure obligation that was
6 breached.⁴ Item 303 requires that a registrant "[d]escribe
7 any known trends or uncertainties that have had or that the
8 registrant reasonably expects will have a material favorable
9 or unfavorable impact on net sales or revenues or income
10 from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii).
11 "The SEC's interpretive release regarding Item 303 clarifies
12 that the Regulation imposes a disclosure duty 'where a
13 trend, demand, commitment, event or uncertainty is both [1]
14 presently known to management and [2] reasonably likely to
15 have material effects on the registrant's financial

⁴ Plaintiffs assert that Defendants also breached a disclosure obligation created by Item 503 of Regulation S-K, 17 C.F.R. § 229.503. Item 503 requires that a registrant "[w]here appropriate, provide . . . a discussion of the most significant factors that make the offering speculative or risky." Id. § 229.503(c). On appeal, Plaintiffs advance no arguments unique to Item 503, focusing instead primarily on Defendants' disclosure obligations under Item 303. Moreover, to the extent we conclude that the impairment of the Triton Loans and Triton's financial difficulties prior to the IPO did not constitute facts "reasonably likely" to be material under Item 303, see Blackstone, 634 F.3d at 716, we similarly conclude that they were not among "the most significant factors" rendering CBRE's IPO "speculative or risky," 17 C.F.R. § 229.503(c).

1 condition or results of operations.'" Blackstone, 634 F.3d
2 at 716 (quoting Management's Discussion and Analysis of
3 Financial Condition and Results of Operations, Securities
4 Act Release No. 6835, Exchange Act Release No. 26,831,
5 Investment Company Act Release No. 16,961, 43 SEC Docket
6 1330 (May 18, 1989)).

7 **B.**

8 The Triton Loans were \$51.5 million out of a total
9 investment portfolio of more than \$1.1 billion; but, as
10 Plaintiffs emphasize, the Triton Loans made up a much larger
11 proportion--approximately 25%--of CBRE's mezzanine loan
12 portfolio.

13 To determine whether a misstatement or omission is
14 material is an "inherently fact-specific" inquiry. Basic v.
15 Levinson, 485 U.S. 224, 236 (1988). A fact "'is material if
16 there is a substantial likelihood that a reasonable
17 shareholder would consider it important in deciding how to
18 [act].'" Id. at 231 (quoting TSC Indus., Inc. v. Northway,
19 Inc., 426 U.S. 438, 449 (1976)). That is to say "there must
20 be a substantial likelihood that the disclosure of the
21 omitted fact would have been viewed by the reasonable
22 investor as having significantly altered the 'total mix' of
23 information made available." TSC Indus., Inc., 426 U.S. at
24 449.

1 "[W]e have consistently rejected a formulaic approach
2 to assessing the materiality of an alleged
3 misrepresentation." Ganino v. Citizens Utils. Co., 228 F.3d
4 154, 162 (2d Cir. 2000). "In both Ganino and [JP Morgan],
5 we cited with approval SEC Staff Accounting Bulletin No. 99,
6 64 Fed. Reg. 45,150 (1999) . . . , which provides relevant
7 guidance regarding the proper assessment of materiality."
8 Blackstone, 634 F.3d at 717. According to SEC Staff
9 Accounting Bulletin No. 99 ("SAB No. 99"), "[t]he use of a
10 percentage as a numerical threshold such as 5%, may provide
11 the basis for a preliminary assumption" of materiality, but
12 a bright line percentage "cannot appropriately be used as a
13 substitute for a full analysis of all relevant
14 considerations." 64 Fed. Reg. at 45,151. Among useful
15 qualitative factors are (1) "whether the misstatement
16 concerns a segment or other portion of the registrant's
17 business that has been identified as playing a significant
18 role in the registrant's operations or profitability," 64
19 Fed. Reg. at 45,152, and (2) whether management expects
20 "that the misstatement will result in a significant market
21 reaction," JP Morgan, 553 F.3d at 198.

1 contractually-mandated discussions with CBRE, Plaintiffs
2 allege, should have apprised CBRE that the Monterey Loan was
3 impaired, or at least likely to be impaired.

4 Because we are at the pleading stage, we accept
5 Plaintiffs' allegations as true and draw all reasonable
6 inferences in Plaintiffs' favor. See Johnson v. Rowley, 569
7 F.3d 40, 43 (2d Cir. 2009) (per curiam). Therefore, because
8 Freemont was aware of cost overruns at The Monterey and
9 because the Intercreditor Agreement required Freemont to
10 disclose potential default events to CBRE, a plausible
11 inference may be drawn that CBRE was aware of the cost
12 overruns and was thereby aware of an existing trend, event
13 or uncertainty under Item 303. 17 C.F.R.

14 § 229.303(a)(3)(ii); see Blackstone, 634 F.3d at 716
15 (observing that Item 303 "imposes a disclosure duty where a
16 trend, demand, commitment, event or uncertainty is both [1]
17 presently known to management and [2] reasonably likely to
18 have material effects on the registrant's financial
19 condition or results of operations.") (internal quotation
20 mark omitted). "[T]he sole remaining issue is whether the
21 effect of the 'known' information was 'reasonably likely' to
22 be material for the purpose of Item 303 and, in turn, for

1 the purpose of Sections 11 and 12(a)(2).” Blackstone, 634
2 F.3d at 716.

3
4 **III.**

5 The district court, eliding any discussion of the
6 traditional quantitative and qualitative factors used to
7 assess materiality, instead dismissed the Second Amended
8 Complaint on the sole ground that the alleged misstatements
9 and omissions were not material because the Triton Loans
10 were adequately collateralized at the time of the IPO. See
11 Hutchison I, 638 F. Supp. 2d at 275-76. While this bright
12 line rule has considerable appeal, this is not a case in
13 which we should consider adopting it, because the
14 unambiguous wording of the Registration Statement defines
15 “impairment” in a way that discounts any issue of
16 collateralization: “Loans and other investments are
17 considered to be impaired, for financial reporting purposes,
18 when it is deemed probable that the Company will be unable
19 to collect all amounts due *according to the contractual*
20 *terms of the original agreements*” (emphasis added).
21 Even assuming the Triton Loans were fully collateralized, a
22 loan default would result in (at least) a temporary loss to

1 CBRE because in the event of a default, CBRE would have to
2 initiate foreclosure proceedings that would entail delay,
3 fees, costs and prolonged uncertainty. Even if CBRE could
4 ultimately recover the full amount of its loan after a
5 foreclosure, and even if a default ultimately “would not
6 harm CBRE,” id. at 277, CBRE would not have collected
7 “according to the contractual terms of the original
8 agreements.” Without categorically rejecting the district
9 court’s collateralization approach, we hold that it cannot
10 decide this case. Adequacy of collateral is one of the
11 qualitative factors--but not the only one--that determines
12 whether a misstatement or omission concerning the loan is
13 material.

14 We therefore turn to quantitative measures. To do so,
15 we must at the outset reconcile two recent decisions in our
16 Circuit, each of which analyzed whether statements in a
17 registration statement were material for purposes of a
18 Section 11 claim: ECA & Local 134 IBEW Joint Pension Trust
19 of Chicago v. JP Morgan Chase Co., 553 F.3d 187 (2d Cir.
20 2009), and Litwin v. Blackstone Grp., L.P., 634 F.3d 706 (2d
21 Cir. 2011). In JP Morgan, the panel conducted a
22 quantitative materiality analysis that compared the value of

1 the troubled investment to the value of the defendant's
2 entire investment portfolio, whereas the Blackstone panel,
3 conceding that the troubled investment did not meet the 5%
4 quantitative threshold when considered as a part of the
5 company's entire portfolio, determined that the investment
6 was qualitatively material nevertheless by weighing the
7 impact of the troubled loan on the constituent part of
8 Blackstone's business in which the loan was located.

9 In JP Morgan, plaintiffs alleged that JP Morgan Chase
10 Co. ("JP Morgan") made material misstatements concerning \$2
11 billion in prepay transactions that JP Morgan made to a
12 special purpose entity that, in turn, made loans to Enron
13 Corporation. 553 F.3d at 193. We first looked to the
14 quantitative factors and observed:

15 Although \$2 billion in prepay transactions may sound
16 staggering, the number must be placed in context--
17 reclassifying \$2 billion out of one category of trading
18 assets (derivative receivables) totalling \$76 billion
19 into another category (loan assets) totalling \$212
20 billion does not alter JPMC's total assets of \$715
21 billion. Moreover, the underlying assets in either
22 classification carry some default risk. As the
23 district court said about this same information,
24 "[c]hanging the accounting treatment of approximately
25 0.3% of JPM Chase's total assets from trades to loans
26 would not have been material to investors."

27 Id. at 204 (quoting In re JP Morgan Chase Sec. Litig., 363
28 F. Supp. 2d 595, 631 (S.D.N.Y. 2005)) (internal citation

1 omitted). On appeal, we approved the quantitative approach
2 as “a good starting place for assessing the materiality of
3 the alleged misstatement,” and reasoned that “[a]n
4 accounting classification decision that affects less than
5 one-third of a percent of total assets does not suggest
6 materiality.” Id. We added that a further necessary
7 consideration is the qualitative factors set forth in SAB
8 No. 99. Id.

9 In Blackstone, the plaintiffs alleged that Blackstone
10 Group, L.P. (“Blackstone”) invested: (1) approximately \$331
11 million in FGIC Corp., a monoline financial guarantor, 634
12 F.3d at 711; (2) \$3.1 billion in Freescale Semiconductor,
13 Inc., a semiconductor designer and manufacturer, id.; and
14 (3) an undisclosed amount in residential real estate
15 investments, id. at 712. Plaintiffs alleged that at the
16 time of Blackstone’s \$4.5 billion IPO, FGIC faced massive
17 losses as a result of the housing market collapse, id. at
18 711, and that Freescale had lost an exclusive agreement to
19 manufacture chipsets for its largest customer, id. at 711-
20 12. We conceded that “Blackstone’s investments in FGIC and
21 Freescale f[e]ll below the presumptive 5% threshold of
22 materiality,” but held that “the District Court erred in its

1 analysis of certain qualitative factors related to
2 materiality." Id. at 719. First, we held that Blackstone
3 could not rely on its corporate structure to argue
4 immateriality on the ground that a loss in one division was
5 offset by a gain in another. Id. Second--and critical for
6 present purposes--we held that the district court "erred in
7 finding that the alleged omissions did not relate to a
8 significant aspect of Blackstone's operations." Id. The
9 Corporate Private Equity group was represented by Blackstone
10 to be its "flagship segment" and had a critical role in the
11 overall enterprise. Id. at 720. "Even where a misstatement
12 or omission may be quantitatively small compared to a
13 registrant's firm-wide financial results"--Blackstone's
14 investment in Freescale was a relatively minor piece of
15 Blackstone's total investments, accounting for 9.4% of the
16 Corporate Private Equity segment's assets under management--
17 "its significance to a particularly important segment of a
18 registrant's business tends to show its materiality." Id.

19 We need to consider these two opinions together in
20 order to decide in this case whether to gauge the
21 materiality of the Triton Loans in terms of CBRE's entire
22 portfolio or its portfolio of mezzanine loans only. It is

1 clear that Blackstone does not purport to limit or affect
2 the holding of JP Morgan: a panel is "bound by the decisions
3 of prior panels until such time as they are overruled either
4 by an en banc panel of our Court or by the Supreme Court."
5 United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir.
6 2004). So we need to identify the crucial factor or fact
7 that renders Blackstone consistent with the holding of JP
8 Morgan. It is this: If a particular product or product-
9 line, or division or segment of a company's business, has
10 independent significance for investors, then even a matter
11 material to less than all of the company's business may be
12 material for purposes of the securities laws.
13 Hypothetically, such a product or segment might be the
14 company's original niche, its iconic or eponymous business,
15 critical to its reputation, or most promising for growth or
16 as an engine of revenue. Thus Blackstone emphasized as a
17 qualitative factor that the Corporate Private Equity group
18 was the firm's "flagship segment": "a reasonable investor
19 would almost certainly want to know information related to
20 that segment that Blackstone reasonably expects will have a
21 material adverse effect on its future revenues."
22 Blackstone, 634 F.3d at 720.

1 CBRE is "a commercial real estate speciality finance
2 company that is primarily focused on originating, acquiring,
3 investing, financing, and managing a diversified portfolio
4 of commercial real estate-related loans and securities."
5 Plaintiffs claim that the entirety of the Triton Loans--
6 \$51.5 million--constituted "25% of CBRE's mezzanine loans
7 which were 60% of CBRE's total capital, 27% of all of CBRE's
8 loans, and 21% of CBRE's entire investment portfolio." Thus
9 Plaintiffs isolate some of CBRE's transactions (mezzanine
10 loans) as a notional division or segment in which the Triton
11 Loans could loom as material in quantitative terms.
12 However, Plaintiffs have not alleged (plausibly or
13 otherwise) that mezzanine loans constitute a component of
14 CBRE's business that is of distinct interest to investors
15 other than as another component of CBRE's book of business.
16 For a company that makes real estate loans, mezzanine loans
17 (which are one tier in the hierarchy of secured interests)
18 are not the subject of investors' fixation. So any alleged
19 impairment of the Triton Loans must be analyzed in relation
20 to CBRE's entire investment portfolio (\$1.1 billion),
21 consistent with the quantitative approach in JP Morgan.

22 In that light, the Triton Loans were not material.

1 Moreover, the Second Amended Complaint fails to allege how
2 much of the Triton Loans was impaired at the time of the
3 IPO. It is alleged that when CBRE foreclosed on the Triton
4 Loans, long after the IPO, it incurred a \$7.8 million
5 impairment charge on the write-down of the Monterey Loan;
6 but it is not alleged that this figure (or some other dollar
7 amount of impairment) was known to CBRE at the time of the
8 IPO.⁵

9 As to the qualitative analysis, Plaintiffs rely on two
10 SAB No. 99 factors to support their contention that the
11 misstatements and omissions were material: (A) CBRE's stock
12 price drop following disclosure of the Triton Loans'

⁵ Plaintiffs seek to rely on facts outside the Second Amended Complaint--namely, CBRE's counterclaims in a lawsuit filed against the principals of Triton in the United States District Court for the District of Maryland--to suggest that CBRE suffered \$22.6 million in damages due to Triton's default and that CBRE knew (prior to the IPO) that Triton was experiencing financial difficulties and might not have been able to make timely interest payments. See CBRE Fin. TRS, LLC v. McCormick, No. 08-cv-1964, 2009 WL 4782124, at *10 (D. Md. Dec. 8, 2009) (granting CBRE summary judgment and awarding more than \$22.6 million in damages). Even assuming that either the district court below or this Court could consider those extraneous facts, \$30.4 million (\$7.8 million impairment plus \$22.6 million in damages) out of a total investment portfolio of \$1.1 billion falls well short of SAB No. 99's 5% threshold and is therefore presumed to be quantitatively immaterial. See 64 Fed. Reg. at 45,151; see also JP Morgan, 553 F.3d at 204 (analyzing misreported transaction as a portion of JP Morgan's total assets).

1 impairment, and (B) the impact on a major portion of CBRE's
2 business. See SAB No. 99, 64 Fed. Reg. at 45,152 ("Among
3 the considerations that may well render material a
4 quantitatively small misstatement . . . are-- . . . Whether
5 the misstatement concerns a segment or other portion of the
6 registrant's business that has been identified as playing a
7 significant role in the registrant's operations or
8 profitability . . . [and] the demonstrated volatility of
9 the price of a registrant's securities in response to
10 certain types of disclosures").

11 (A) Stock Drop. The Second Amended Complaint alleges,
12 as cause and effect, that "the price of CBRE common stock
13 declined more than 18%, on extremely heavy [trading]
14 volume," in the two days following CBRE's February 26, 2007
15 press release reporting that the Monterey Loan was non-
16 performing and that the Rodgers Forge Loan was placed on
17 CBRE's watch list. However, that same press release
18 reported lower-than-expected 2006 fourth quarter financial
19 results. CBRE Realty Finance, Inc., Fourth Quarter and Full
20 Year 2006 Results (Form 8-K) (February 26, 2007). (That
21 press release also advised that the Triton Loans were fully
22 collateralized. Id.)

1 The Second Amended Complaint also alleges, as cause and
2 effect, that "the price of CBRE stock declined from \$6.21
3 per share to \$4.25 per share, a decline of 32%[,] and 70%
4 lower than the IPO price of \$14.50, on extremely heaving
5 trading volume," after CBRE's August 6, 2007 press release
6 disclosing that CBRE had taken a \$7.8 million impairment
7 charge due to the write-down of the Monterey Loan and that
8 CBRE had foreclosed in May 2007 on both The Monterey and The
9 Rodgers Forge. However, the disclosures in the August 2007
10 press release included that CBRE "ha[d] halted making new
11 investments in the near-term" and that CBRE was being
12 required to post an additional \$26.7 million in collateral
13 by one of its primary lenders--something that CBRE stated in
14 its Prospectus could have dire consequences: "Posting
15 additional collateral to support our credit facilities will
16 reduce our liquidity and limit our ability to leverage our
17 assets. In the event we do not have sufficient liquidity to
18 meet such requirements [it could] result in a rapid
19 deterioration of our financial condition and possibly
20 necessitate a filing for [bankruptcy protection]." CBRE
21 Realty Finance, Inc., Second Quarter 2007 Results (Form 8-K)
22 (August 7, 2007).

1 These (insufficient) cause-and-effect allegations
2 exemplify the warning in SAB No. 99 (which we adopted in JP
3 Morgan): “[c]onsideration of potential market reaction to
4 disclosure of a misstatement is by itself too blunt an
5 instrument to be depended on in considering whether a fact
6 is material.” 64 Fed. Reg. at 45,152 (internal quotation
7 marks omitted); see JP Morgan, 553 F.3d at 205 (“SAB No. 99
8 limits the usefulness of [market volatility] to instances
9 where management expects ‘that a known misstatement may
10 result in a significant positive or negative market
11 reaction.’” (quoting SAB No. 99, 64 Fed. Reg. at 41,152)).
12 CBRE’s press releases were loaded with news (largely very
13 bad), any item of which could have caused CBRE’s stock price
14 to drop. Moreover, CBRE had already reported the
15 foreclosures when they happened, in May 2007; so, that item
16 in the August 2007 press release was not information new to
17 the market.

18 As in JP Morgan, Plaintiffs have not pled facts “that
19 would permit the inference that [CBRE] expected that the
20 alleged [omissions concerning the Triton Loans would] result
21 in a significant market reaction.” JP Morgan, 553 F.3d at
22 205. Thus, the market’s reaction to CBRE’s press releases

1 does not "point towards qualitative materiality under SAB
2 No. 99." Id.

3 (B) Business Impact. Plaintiffs' contention that the
4 impairment of the Triton Loans impacted a major segment of
5 CBRE's business fails for the same reasons we hold that the
6 loans were not quantitatively material, i.e., the loans did
7 not compose a significant portion of CBRE's loan portfolio.
8 Moreover, the fact that the Triton Loans were fully
9 collateralized, as identified by CBRE in its May 7, 2007
10 Form 8-K, militates in favor of finding that a major segment
11 of CBRE's business ultimately was not threatened by the
12 impairment of the loans.

14 IV.

15 Section 15 imposes joint and several liability on
16 "[e]very person who, by or through stock ownership, agency,
17 or otherwise . . . controls any person liable under" § 11.
18 15 U.S.C. § 77o(a). "To establish § 15 liability, a
19 plaintiff must show a 'primary violation' of § 11 and
20 control of the primary violator by defendants." In re
21 Lehman Bros., 2011 WL 1778726, at *14 (quoting JP Morgan,
22 553 F.3d at 206-07). Because Plaintiffs failed to plead a

1 § 11 claim, their § 15 claim necessarily fails. See, e.g.,
2 SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1472-73 (2d
3 Cir. 1996).

4
5 **V.**

6 We review denial of leave to amend under an “abuse of
7 discretion” standard. See, e.g., McCarthy v. Dun &
8 Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007). When
9 the denial of leave to amend is based on a legal
10 interpretation, such as a determination that amendment would
11 be futile, a reviewing court conducts a de novo review.
12 See, e.g., Littlejohn v. Artuz, 271 F.3d 360, 362 (2d Cir.
13 2001) (“[I]f the denial of leave to amend is based upon a
14 legal interpretation . . . we review the decision de
15 novo.”); see also Gorman v. Consol. Edison Corp., 488 F.3d
16 586, 592 (2d Cir. 2007) (reviewing de novo a district
17 court’s denial of leave to amend on grounds of futility).

18 The district court ruled that “amending the complaint
19 would be futile because the proposed third amended complaint
20 fails to cure the pleading deficiency concerning materiality
21 that plagued the three previous iterations,” i.e., failure
22 to “allege a collateral shortfall at the time the

1 Registration Statement and prospectus issued." Hutchison
2 II, 2010 WL 1257495, at *3. Because we affirm the district
3 court's dismissal of Plaintiffs' Second Amended Complaint on
4 alternative grounds, we cannot affirm the denial of
5 Plaintiffs' motion to amend on the futility ground cited by
6 the district court.⁵

7 We affirm nevertheless. As discussed above, even
8 assuming Plaintiffs supplement their allegations with facts
9 drawn from CBRE's lawsuit in Maryland--i.e., that CBRE
10 suffered \$22.6 million in damages--Plaintiffs' allegations
11 fail to satisfy any of SAB No. 99's quantitative or
12 qualitative materiality factors. Amending the Second
13 Amended Complaint would be futile.

14 15 **CONCLUSION**

16 The judgment of the district court is affirmed.

⁵ Plaintiffs did not raise any challenges to the district court's denial of their motion for reconsideration; therefore, Plaintiffs have waived any such argument. See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").