UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. LOCKHEED MARTIN CORPORATION, et al., Defendants.	Civil Action No. 11-cv-05026-JSR CLASS ACTION PLAINTIFF'S POST-HEARING SUBMISSION

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City of Pontiac General Employees' Retirement System ("Plaintiff") respectfully makes this submission in response to the Court's directive at the evidentiary hearing on October 1, 2012 (the "10/1 Hearing") that the parties make written submissions as to how "the Court should evaluate the testimony here." Ex. A at 212:7.[1]

I. INTRODUCTION[2]

When, during oral argument on Defendants' summary judgment motion (the "7/25 SJ Hearing"), the Court scheduled the 10/1 Hearing, it did not do so with Defendants' summary judgment motion in mind. As the Court stated, "The evidentiary hearing won't resolve [the motivations of the CWs] for summary judgment purposes because I can't make credibility determinations for summary judgment purposes. It will resolve it for what at this point appears to the court to be the much more important purpose, the finding who the heck tried to pull a fraud on this court." Ex. B (transcript of 7/25 SJ Hearing) at 15:1-8.[3] The Court raised "the very real possibility that one or more persons may have lied to the court or suborned false statements to the court." *Id.* at 2:7-8.

Throughout these proceedings, Defendants have repeatedly and aggressively pointed the finger of blame at Plaintiff's counsel, leveling very serious accusations against them and their private

[1] Ex. A is the transcript of the 10/1 Hearing. Unless otherwise noted, all lettered exhibits are attached to the Declaration of Samuel H. Rudman dated October 15, 2012. All numbered exhibits are attached to the Declaration of Samuel H. Rudman dated July 19, 2012, submitted in opposition to Defendants' summary judgment motion.

[2] All terms defined in Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, dated July 19, 2012 ("Pl. SJ Opp. Mem."), will have the same meanings herein. Pl. SJ Opp. Mem. addresses the credibility of the CWs and Mr. Keatly in great detail and is therefore incorporated herein by reference.

[3] *See also McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) ("It is a settled rule [on summary judgment] that '[c]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury.'").

investigator, Ken Keatly. They questioned the "bona fides" of the Complaint. Def. SJ Mem. at 1.[4] They stated that the Complaint "relies heavily on allegations that appear to be completely untrue." *Id.* They suggested, in effect, that either Plaintiff's counsel or their investigator made up the allegations attributed to the CWs from thin air. *See generally id.* at 5-11. And they raised the possibility that Plaintiff's counsel may have engaged in a "fraud on the court" or "obstruction of justice." *Id.* at 3.

Now, however – after the depositions of the CWs and Mr. Keatly, summary judgment briefing, and the 10/1 Hearing – a very different picture has emerged. ***All*** the evidence before the Court points to the integrity of Mr. Keatly and his investigation. As discussed in more detail below (as well as in Plaintiff's opposition to Defendants' summary judgment motion), that evidence includes Mr. Keatly's call logs, his interview notes, his interview memoranda, telephone records corroborating the call logs, and Mr. Keatly's testimony before this Court at the 10/1 Hearing (as well as his deposition testimony). All of this evidence, without exception, points to the correctness of the Court's preliminary finding at the 10/1 Hearing that "Mr. Keatly's testimony was credible." *See* Ex. A at 212:23-24. It also establishes that Plaintiff, which closely tracked Mr. Keatly's memoranda in preparing the Complaint, had a good-faith basis for including those allegations based on information from the CWs.

At the same time, it has become clear that each of the CWs, with the exception of Mr. Parsons (CW3), had a financial motivation for denying the substance of the allegations attributed to them. Mr. Parsons, the only CW who neither signed a severance agreement nor received a severance payment that is subject to clawback, validated virtually all of the allegations attributed to him, while

[4] "Def. SJ Mem." refers to Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, dated June 25, 2012.

only occasionally disputing the phrasing. One other CW, Ms. Burns (CW1), also signed an agreement that put her severance payment at risk, but had a clear demeanor of honesty during the 10/1 Hearing, as the Court observed. As discussed below, despite her severance agreement, Ms. Burns largely confirmed the information attributed to her.

The other three CWs, Mr. Asbury (CW5), Mr. Morrison (CW4), and Ms. Hawn (CW2), were all demonstrably untruthful in either their deposition testimony, their affidavits, their testimony during the 10/1 Hearing, or all three, as discussed below.[5] Nonetheless, there is good reason to believe that they were being truthful during their interviews with Mr. Keatly – conducted at a time when Lockheed Martin ("LM") had no inkling of their cooperation, and when the possibility of losing their severance payments was still abstract and remote. Even if they were being untruthful with Mr. Keatly, however, Plaintiff's counsel would have had no reason to question their honesty when the Complaint was filed.

Moreover, to the extent the Court is concerned that portions of the Complaint are based upon hearsay, the case law in this circuit is that plaintiffs may rely on hearsay in pleading a complaint, and that issues of admissibility are inappropriate for consideration on a motion to dismiss. In any event, the most important allegations in the Complaint do ***not*** rely on hearsay.

Because Plaintiff and its counsel acted in good faith, and because the Court may not resolve credibility issues on Defendants' pending summary judgment motion, Plaintiff respectfully submits that the best course at this juncture is for the Court to deny summary judgment and permit the case to proceed to trial.

II. THE CREDIBILITY OF THE WITNESSES

How the Court should treat the testimony at the 10/1 Hearing depends in large part on whom

[5] Mr. Asbury did not submit an affidavit, but Mr. Morrison and Ms. Hawn did.

the Court deems to have been credible, a subject that is treated below.

A. Mr. Keatly Was Credible

At the end of the 10/1 Hearing, the Court gave its tentative initial impression that Mr. Keatly's testimony on the whole was credible. Ex. A at 212:23-24. As touched upon in the Introduction above, all the available indicators support the integrity of Mr. Keatly's investigation. Those indicators include the following:

1. Mr. Keatly's Contact Log and the Relevant Phone Records

During the 10/1 Hearing, Mr. Keatly testified that he kept a contemporaneous witness contact log in which he recorded certain data, including the date and length of the call, for every witness he called or attempted to call in the course of his LM investigation. *See* Ex. A at 158:21 - 159:5; *see also* Ex. 23 (Keatly contact log for LM investigation). Plaintiff substantiated the accuracy of Mr. Keatly's contact log in its opposition to Defendants' summary judgment motion, when two CWs – Asbury and Hawn – disputed the length of their calls with Mr. Keatly. To resolve the matter once and for all, Plaintiff's counsel secured the relevant telephone records.

At his deposition, Mr. Asbury (CW5) – the President of IS&GS Civil during the Class Period – testified that REDACTED

Ex. 18 (Asbury Tr.) at 15:7-13; 16:3-4; 21:8-9; 51:8-17; 52:9; 52:25 - 53:5; 53:24 - 54:2. In fact, however, Mr. Keatly's witness contact log reflects two calls with Mr. Asbury on September 22, 2011, totaling ***50 minutes*** (Ex. 23 at PONTIAC015484),[6] and the

[6] Mr. Keatly testified that the first call dropped in the middle and Mr. Asbury called him back. Ex. 22 (Keatly Tr.) at 160:1-17; *see also* Ex. A at 161:17 - 162:3.

records of Mr. Asbury's ***own company*** – of which he is President and CEO (Ex. 18 at 10:3-7) – document two calls from Mr. Asbury to Mr. Keatly of ***51 minutes*** (a first call of 15 minutes followed immediately by another call of 36 minutes). Ex. 53. *See also* Ex. 20 (Carrillo Dec.) at PONTIAC015564 (phone records of LRH&A's carrier, reflecting two calls from REDACTED totaling 2,982 seconds, or ***49.6 minutes***).[7] Thus, the relevant telephone records – including records provided by Mr. Asbury's own company – confirm the accuracy of Mr. Keatly's contact log.[8]

Ms. Hawn (CW2) presents an almost identical example. She attested that each of the three times Mr. Keatly contacted her she "refused to answer the caller's questions" (Ex. 11 (Hawn Aff.) ¶18), and that each of the calls was "brief" (*id.* ¶20). Similarly, during her deposition, Ms. Hawn testified that REDACTED ." Ex. 10 (Hawn Tr.) at 160:13-14 (agreeing with Plaintiff's counsel's characterization). She reiterated that testimony at the 10/1 Hearing. *See* Ex. A at 125:8-17; 134:7-11. Yet the TelePacific phone records of Plaintiff's investigator establish that one of the calls to Ms. Hawn, on September 29, 2011, was actually over an hour long – ***64.8 minutes***. Ex. 13 at p. 2. These records corroborate Mr. Keatly's witness contact log, which lists the call as ***65 minutes***. Ex. 23 at PONTIAC015486.

2. Mr. Keatly's Interview Notes and Memoranda

Mr. Keatly also testified that he kept contemporaneous notes of his interviews of the various CWs. Ex. A at 152:20 - 153:1. Plaintiff submitted those notes with its summary judgment opposition as Exs. 25 (Burns), 27 (Hawn), 29 (Parsons), 31 (Morrison), and 33 (Asbury). Mr. Keatly also testified to his practice of preparing memoranda of his witness calls, and attempting

[7] REDACTED is Mr. Asbury's work cell phone number. *See* Ex. 21 (Asbury business card); *see also* Ex. 18 (Asbury Tr.) at 245:6-12.

[8] Plaintiff addresses Mr. Asbury's explanation for the discrepancy between his testimony and the phone records in Section III.C, addressing Mr. Asbury's credibility.

to do so "as timely as I can, often starting the same day and sometimes the next day." Ex. A at 154:3-7. Plaintiff submitted the relevant memoranda from his LM investigation, which contain a level of detail he could not have made up, with its summary judgment opposition as Exs. 24 (Burns), 26 (Hawn), 28 (Parsons), 30 (Morrison), 32 (Asbury), and 34 (Nimmons).

Together, the witness contact log and interview notes establish that Mr. Keatly interviewed Ms. Burns for 67 minutes and took 14 pages of notes; he interviewed Ms. Hawn for 65 minutes and took 13 pages of notes; he interviewed Mr. Parsons for 59 minutes and took 11 pages of notes; he interviewed Mr. Morrison for 55 minutes and took 14 pages of notes; and he interviewed Mr. Asbury for 50 minutes and took 11 pages of notes. *See* Exs. 23, 25, 27, 29, 31, 33.

Moreover, with its summary judgment opposition, Plaintiff's counsel submitted a chart with columns for, *inter alia*, excerpts from Mr. Keatly's interview memoranda and the corresponding excerpts from his handwritten notes. *See* Ex. 37. Ex. 37 shows the consistency between Mr. Keatly's notes and the memoranda he prepared based upon those notes, as well as the consistency between the memoranda and the allegations based on them.

3. Mr. Keatly Included Information that Was Not Helpful to Plaintiff

As noted above, the level of detail in Mr. Keatly's memoranda is self-validating; he could not have made those details up. Moreover, that detail includes not only facts that ***support*** Plaintiff's case, but those that do not. During the 10/1 Hearing, for example, Mr. Keatly had the following exchange with Plaintiff's counsel:

> Q. Is it your practice to try and record as accurately as possible what the witness said, irrespective of whether it helps or hurts your client?
>
> A. Yes, it is.

Ex. A at 171:1-4; *see also id.* at 171:5-23 (giving example). Mr. Keatly's inclusion of information that did not bolster Plaintiff's case further validates his efforts.

4. Mr. Parsons' Testimony Supports Mr. Keatly

Mr. Parsons (CW3) was the only CW at issue here who neither signed a severance agreement with LM REDACTED . Ex. 14 (Parsons Tr.) at 13:15-16 (no severance agreement); *id.* at 13:17-19; 99:10-12 (no severance payment); *see also* Ex. A at 69:1-2 (no severance agreement). Thus, he was the only CW with no personal financial incentive to recant or take back any of the statements he made about LM.

Although Mr. Parsons sometimes disagreed with the phrasing of the Complaint, he largely agreed with the substance of the allegations attributed to him. *See* Section II.B, below; *see also* Pl. SJ Opp. Mem. at 17-20. Because those allegations were based upon the memorandum Mr. Keatly prepared of his interview of Mr. Parsons, Mr. Parsons' agreement with the substance of the those allegations validates not only the Complaint, but Mr. Keatly's interview memorandum, as well.

5. Mr. Keatly's Demeanor

Although demeanor is an intangible, subjective factor, Plaintiff submits that Mr. Keatly came across during his examination at the 10/1 Hearing as an honest and diligent professional[9] who made

[9] Mr. Parsons – a former director of the Kennedy Space Center (Ex. A. at 68:6-7) – testified as follows about Mr. Keatly:

> Q. Did you speak with Mr. Keatly?
> A. Yes, sir.
> Q. Did you speak with him for almost an hour?
> A. Yes, sir.
> Q. Was he professional?
> A. Yes, sir.
> Q. Was he courteous?
> A. Yes, sir.
> Q. Did he force you to provide any information?
> A. No, sir.
> Q. Did he pressure you in any way to provide information?
> A. No, sir.
> Q. . . . Did you believe Mr. Keatly was a professional person?
> A. ***Absolutely***.

Footnote continued

every effort to accurately record what the witnesses told him.[10]

B. Mr. Parsons Was Credible

Among its "tentative initial impressions," the Court appears to have found Mr. Parsons credible, and noted that his testimony was "largely uncontested." Ex. A at 212:21. As fully discussed in Plaintiff's opposition to Defendants' summary judgment motion (*see* Pl. SJ Opp. Mem. at 17-21), as well as in Section II.A.4 above, Mr. Parsons was the only CW with no personal financial incentive to recant or deny any of the statements he made about LM. And although he sometimes disagreed with the wording of the Complaint, he largely agreed with the substance of the allegations attributed to him. For example, he had the following exchanges with the Court:

> THE COURT: ***Did you discuss in any respect the projections for 2009*** [with the investigator]?
>
> THE WITNESS: ***Yes, sir, I did***. We were told, there was a lot of discussions back then about the financials and so I'm sure that there was some discussions about whether we were going to make our marks or not.
>
> THE COURT: So did you tell the investigator that the projections were overstated?
>
> THE WITNESS: No, sir. It's just not a term I would have used. I'm not a financial person. I'm more a manager.
>
> THE COURT: What terms would you recall using?
>
> THE COURT: ***I would have said we were struggling to meet our financial goals***.

Ex. A at 59:19 - 60:6.

Similarly:

> THE COURT: Let's go to page 13, paragraph 45, the second and third sentence. Actually the whole paragraph. The first sentence. "According to CW3 and CW5, Lockheed Martin held weekly Tuesday telephone conference calls referred to as red

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Ex. A at 68:8-22. All emphasis in quoted material is added unless otherwise noted.

[10] In this context, it is worth noting that Mr. Keatly voluntarily appeared and stood ready to answer the Court's questions at the 7/25 SJ Hearing. *See* Ex. B at 26:10-25. None of the CWs were present at that hearing.

program review meetings during which each IS&GS program classified as red was discussed." Let's stop there. ***Did you say anything along those lines to the investigator?***

THE WITNESS: ***Probably so, sir, yes, sir.***

THE COURT: ***Is what is in that sentence accurate to the best of your knowledge?***

THE WITNESS: ***To the best of my knowledge, yes, sir***.

THE COURT: The second sentence, "CW3 stated that defendant Gooden and IS&GS program managers regularly participated on these weekly red program calls." ***Is that what you told the investigator?***

THE WITNESS: ***Yes, sir***.

THE COURT: To the best of your knowledge that's accurate?

THE WITNESS: ***Yes, sir***.

THE COURT: And the third sentence, "According to CW3, it was clear from the calls that major civil segment IS&GS programs were troubled in April and May 2009." ***Did you say that?***

THE WITNESS: I can't recall saying exactly that. ***I know that we had some programs that were classified red programs***.

THE COURT: And that's what you would have meant by troubled?

THE WITNESS: ***Yes, sir.*** I wouldn't use the word "troubled." . . .

THE COURT: Well, independent of that, ***were there major civil segment IS&GS programs that in your view were troubled in April and May of 2009***?

THE WITNESS: ***There were a few programs that we were concerned about, yes, sir***.

THE COURT: And then the final sentence, "While CW3 stated that there were at least five major civil programs in IS&GS in the months leading up to 2009, ***CW3 was not aware of any IS&GS programs that unexpectedly entered red status in June or July 2009." Did you say that to the investigator***?

THE WITNESS: ***Yes, sir. That sounds like something I would have said***.

Ex. A at 63:4 - 64:22.

Mr. Parsons testified that he would not have used the word "lowball," ascribed to him in ¶39, which states: "CW3 stated that many of the problems with IS&GS's financial performance in 2Q09 (including margins and earnings) were due to Defendant Gooden's practice of submitting lowball

bids to win contracts." *See* Ex. A at 65:11-12 ("THE WITNESS: That's just not something that would be in my terminology . . . ."). But that was only a difference in phrasing. Mr. Parsons testified about a program called "price to win": "so you have to find a price that we think would win the contract, and so what in most cases you started out doing was you try to put everything you think of into the proposal, ***then you start trying to pull things out to get it to a place where it was a price to win***." *Id*. at 61:16-21. Mr. Parsons also testified that "the talk amongst other people was that usually if you brought a proposal bid to the management group, that it would be moved downwards." *Id.* at 61:6-8. Significantly, Mr. Parsons also stated that he witnessed this practice in at least one meeting with Ms. Gooden and her staff:

> THE COURT: Now, you yourself were not present at the meetings where this defendant Gooden or her staff, where this revision downward occurred, were you?
>
> THE WITNESS: ***I've been in on meetings where the staff is given direction to go scrub the numbers***.
>
> THE COURT: Okay. ***By Ms. Gooden***?
>
> THE WITNESS: Well, ***Ms. Gooden and her management staff***. She wouldn't be the only one in the meeting.

Ex. A at 62:1-8; *see also id.* at 67:20-24.

Thus, the one witness with absolutely no incentive to lie validated the allegations of the Complaint with only minor deviations.[11]

C. Mr. Asbury Was Not Credible

The Court tentatively concluded at the 10/1 Hearing that Mr. Asbury was not credible. *See* Ex. A at 213:3-19. Indeed, there can be little doubt that Mr. Asbury had an incentive to lie, and that

[11] *See also* Pl. SJ Opp. Mem. at 18-20 (demonstrating, via his deposition testimony, Mr. Parsons' agreements with the Complaint). As noted in both Plaintiff's opposition to the summary judgment motion and at the 10/1 Hearing, Plaintiff has withdrawn the attribution to Mr. Parsons in the second sentence of ¶36. *See* Pl. SJ Opp. Mem. at 20; Ex. A at 69:13-24.

he did lie, both during his deposition and at the 10/1 Hearing. Mr. Asbury has admitted, for example, that he signed a severance agreement with LM, that he received approximately $600,000 in severance payments from LM, and that a breach of his severance agreement could result in him losing that severance:

> Q. And you understood that in fact if you breached the severance agreement you could lose that vest program benefit for [$]600,000 and all severance payments, correct?
>
> A. The vest payments are the severance payments but yes, generally correct.

Ex. A at 28:18-22.[12] Thus, whether or not he had any other motive to deny the information attributed to him in the Complaint, such as embarrassment (a possibility raised by the Court (*see* Ex. A at 213:13)), he had a financial incentive to deny the information he told Mr. Keatly.

During his deposition, for example, Mr. Asbury testified that, REDACTED

. *See* Ex. 18 (Asbury Dep. Tr.) at 52:25 - 53:5 ("REDACTED

."); *see also* Ex. A at 20:2-9 (acknowledging his deposition testimony). During the 10/1 Hearing, however, Mr. Asbury admitted there were certain substantive matters he discussed with Mr. Keatly during their 50-minute conversation, including the "goals and estimates" of IS&GS Civil, and the conduct of certain program reviews. *See, e.g.*, Ex. A at 19:13-15; 22:12-16. He also conceded the possibility that they discussed other substantive matters. *See id.*

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[12] As demonstrated in Plaintiff's summary judgment opposition, Mr. Asbury's severance agreement REDACTED

REDACTED

See, e.g., Ex. 19 (Asbury Sev. Agr.) at 4-5. While Mr. Asbury may not have had these provisions on his mind when he spoke with Mr. Keatly, he likely became acutely aware of them once Defendants had learned his identity.

at 34:15-18.

When confronted at the 10/1 Hearing about this discrepancy – between his sworn representation that he told Mr. Keatly nothing of substance and the reality that they discussed specific topics – Mr. Asbury explained that he had had "three months to consider the conversation [with Mr. Keatly] or to reflect upon this, and I believe, I believe that what I'm telling you today is a more accurate reflection of my memory." Ex. A at 20:15-18. Mr. Asbury's suggestion that his ***later*** memory was better than his ***earlier*** memory, and that he ***failed*** to give proper consideration to his conversation with Mr. Keatly before his deposition, simply defies belief – particularly given his admission, upon questioning by the Court, that he met with his lawyer before his deposition for two to three hours (*id.* at 20:20 - 21:8), and that he understood, in the Court's words, "that the purpose of [the] deposition was to discuss whether or not you had provided the information attributed to CW5 to plaintiff's investigator." *Id.* at 21:16-18.[13]

At the 10/1 Hearing, Mr. Asbury also denied outright that he believed in February 2009 that the full-year projections for IS&GS could not be achieved. Ex. A at 43:15-18. In support of that denial, defense counsel entered as Exhibit No. 1 the 2009 Tactical Plan for IS&GS Civil, presented by defendant Gooden and others on February 16, 2009 (the "2/16/09 Presentation"). Ex. A at 46:5-14. Defense counsel entered this exhibit, as the Court explained, as "evidence that makes it, defense counsel would argue, very unlikely that the witness would have said to the investigator what the investigator reported that is reflected in the complaint because of things he had signed off on in

[13] At the 10/1 Hearing, Mr. Asbury also tried to explain away his deposition testimony that the call with Mr. Keatly lasted only five minutes, when it in fact lasted 50 minutes, in essence arguing that he got confused. *See* Ex. A at 30:10-15; 33:11 - 34:4. Whether or not the Court accepts this explanation for confusing a 50-minute call for a five-minute call, he has provided no plausible explanation for his deposition testimony that he said nothing of substance to Mr. Keatly during that fifty minute call, as discussed above.

effect at an earlier date." *Id.* at 49:3-9.

In fact, however, evidence has revealed that REDACTED

. According to a February 15, 2009 email from Jeffrey D. MacLauchlan, the CFO of IS&GS (*see* Ex. C (Gooden Tr.) at 21:21-25), to Linda Gooden, sent at 6:22 the evening before Mr. Asbury presented his 2009 Tactical Plan to Ms. Gooden and others at 11:20 the next morning:

REDACTED

Ex. D; *see also* Ex. E (agenda for the 2/16/09 Presentation). REDACTED

. *See* Ex. D; *see also* Ex. C at 108:18-21. Thus, the 2009 Tactical Plan is hardly dispositive evidence that Mr. Asbury would not have told Ms. Gooden in February 2009 that IS&GS Civil could not make its numbers. *See* Ex. 32 (Keatly Memorandum) at 6 ("Asbury said that he and the other division leaders told Gooden in February 2009 that 'we cannot make the year' goals for IS&GS.").

Indeed, at her deposition, REDACTED

. Specifically, she testified: REDACTED

(*see* Ex. C at 160:7-15); REDACTED

REDACTED (*id.* at 134:7 - 136:15);[14] REDACTED (*id.* at 148:7-12); REDACTED (*id.* at 156:13-22; 168:7-18]; REDACTED (*id.* at 185:16-21). By contrast, only three days later, in the April 21, 2009 analyst conference call, Mr. Tanner represented that he expected IS&GS operating margins to go ***up*** from the 8.8% level reported in the first quarter of 2009. *See* ¶73 ("we still expect to see in the second and fourth ***significant increases in margin***, as we reflect the award fees that will be received in those two quarters").[15] Thus, it is entirely plausible that Mr. Asbury informed Ms. Gooden on February 16, 2009, that the 2009 Tactical Plan for IS&GS Civil was unachievable.

D. Ms. Hawn Was Not Credible

At the 10/1 Hearing, the Court tentatively concluded that Ms. Hawn, like Mr. Asbury, was not credible. *See* Ex. A at 213:3-4; 213:16-19. For the same reasons that conclusion was correct as to Mr. Asbury, it is also correct as to Ms. Hawn.

First, Ms. Hawn signed a severance agreement with all the same provisions as Mr. Asbury's: REDACTED

See Ex. 12 at 3-5; *see also* Ex. A at 147:20 - 148:18. REDACTED

[14] Ms. Gooden also testified that REDACTED . *See* Ex. C at 135:16 - 136:8.

[15] On July 21, 2009, LM reported margins of 8.2% for IS&GS for the second quarter. ¶84.

REDACTED (*see* Ex. 12 at 7), REDACTED .[16]

Second, in the affidavit she submitted in this case, Ms. Hawn stated that "Each of the three times [Mr. Keatly] has contacted me, I refused to answer the caller's questions . . . ." Ex. 11 ¶18. Similarly, during the 10/1 Hearing, she stated that "I didn't do any talking." Ex. A at 129:23-24. Yet Mr. Keatly has produced 13 pages of handwritten notes documenting his call with Ms. Hawn (*see* Ex. 27), and an eight-page, single-spaced memorandum about the call. *See* Ex. 26. Her representation that she refused to answer his questions is therefore not credible, especially in light of the phone records (discussed below) showing that she spoke with Mr. Keatly for more than an hour.

Third, Ms. Hawn (like Mr. Asbury) grossly mischaracterized the length of her calls with Mr. Keatly. In her affidavit, she described each of the calls as "brief" (*see* Ex. 11 ¶20), and at her deposition testified REDACTED Ex. 10 at 160:13-14 (agreeing with Plaintiff's counsel's characterization). Even as recently as her testimony before the Court, Ms. Hawn described her conversation with Mr. Keatly as "a short phone call" that could not have been more than "[t]hree, four minutes." Ex. A at 125:11-17. The TelePacific phone records of Plaintiff's investigator, however, establish that one of the calls to Ms. Hawn, on September 29, 2011, was actually over an hour long – ***64.8 minutes***. Ex. 13 at 2.

Finally, Ms. Hawn confirmed one allegation attributed to her in the Complaint – that there were inexperienced people at the Department of State (*see* ¶55) – but she denied telling Mr. Keatly that – even though she is the only source for that allegation in the Complaint. In this regard, Ms. Hawn had the following exchange with the Court:

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[16] REDACTED . Ex. F at 127:11-18.

> THE COURT: . . . . Do you understand that you did not say that to the investigator but that is nonetheless [a] true allegation[] to the best of your knowledge?
>
> THE WITNESS: Yes.

Ex. A at 131:25 - 132:3.

It is clear, therefore, that Ms. Hawn is not a credible witness.[17]

E. Mr. Morrison Was Not Credible

At the end of the 10/1 Hearing, the Court disclosed its tentative impression that Mr. Morrison was not credible. Ex. A at 212:15-200 (Morrison). Plaintiff submits that Mr. Morrison's testimony and the evidence support that conclusion.

First, during his testimony at the 10/1 Hearing, Mr. Morrison acknowledged signing a severance agreement, that he received approximately $7,000 in severance, that the agreement required his cooperation in any litigation against LM, and that any breach of that agreement would permit LM to get the $7,000 back. Ex. A at 106:18-24; 107:6-10; 108:14-20. He also stated a concern that his involvement in the case could "affect [his] ability to work" as a consultant, and make it difficult to get a job recommendation from LM. *Id.* at 92:1-6. Like Mr. Asbury and Ms. Hawn, therefore, he had a financial incentive to deny the statements he made to Mr. Keatly.

Second, Mr. Morrison testified that Mr. Keatly presented himself as a representative of LM. *See* Ex. A at 81:11-22. Because Mr. Morrison is the only CW to have made such a claim, it seems unlikely to be true (whether because of a misunderstanding or otherwise). *See, e.g.*, Ex. A at 112:25 - 113:2 ("THE WITNESS [Burns]: [Keatly] told me he was investigating on behalf of some shareholders bringing a case against Lockheed Martin.").

[17] At the 10/1 Hearing, the Court stated that it was "troubled" by one of the allegations attributed to Ms. Hawn – the statement that "Defendants Stevens and Tanner received information about IS&GS directly from Defendant Gooden and Gooden's finance manager, Jeff MacL[au]lan." ¶36. That allegation is discussed below in Section III.B.

Third, at the 10/1 Hearing, Mr. Morrison expressed extreme anger at "having to be a part of the [litigation] process." *See, e.g. id.*, at 99:5-6 ("I remember stating quite a few obscenities to [defense counsel]"); *id.* at 99:10 (referring to his "fury"). He stated that he signed his affidavit in this action with the hope of avoiding the need to testify (*see id.* at 93:18-22, 94:5-9), and was shown a May 8, 2012 memorandum by defense counsel, submitted here as Ex. G, summarizing counsel's meeting with Mr. Morrison. The memorandum states, in part:

REDACTED

Ex. G at LMC00928250. When asked at the 10/1 Hearing whether he had made the statement highlighted above, he responded: "My recollection is that I do not recall. I was eating a chicken sandwich and having sweet tea, if I remember correctly, and was more focused on my chicken sandwich." Ex. A at 98:14-17.[18]

Thus, there are good reasons to question whether Mr. Morrison was testifying truthfully, or whether he was testifying solely with his own best interests in mind.

F. Ms. Burns Was Credible

Although Ms. Burns signed a severance agreement with LM, a violation of which would put her severance payments at risk (*see* Ex. A at 120:1-20), Ms. Burns gave the impression of being a

[18] Moreover, at his deposition, Mr. Morrison REDACTED *See* Ex. 15 at 18:21; 33:10; 60:13; 65:3; 71:9; 72:25; 74:20; 77:17; 81:14; 81:24; 83:8; 94:23; 109:10; 139:14; 141:19; 147:4; 147:22; 148:11; 148:16; 148:20; 150:4; 150:12; 150:20; 151:15; 153:13; 153:24; 159:11; 162:17; 167:24; 168:19; 169:25; 177:13-14; 179:22. REDACTED

See, e.g., Ex. 15 at 62:17 - 63:8; 72:11 - 73:9.

credible witness, as the Court observed. *See id.* at 122:19-21; 212:14-15. Plaintiff does not contest that preliminary finding, but simply notes that, in large part, she confirmed the allegations attributed to her in the Complaint. For example, with respect to ¶44, she confirmed that the ratings for projects were based on objective criteria and that the project-rating status was established by LM's main headquarters. *See* Ex. A at 114:14-18. Although she described the allegation that "every IS&GS project was evaluated on a monthly basis" as "not completely accurate" (*id.* at 114:18) because "formal evaluations were an annual evaluation" (*id.* at 114:25), she acknowledged that it was "typical for programs to be reviewed internally on a monthly basis." *Id.* at 118:17-19. She also stated that, although she had no personal knowledge that Ms. Gooden "reported the status of IS&GS projects to Lockheed Martin's other senior executives," she believed that to be the case based upon conversations she had had.[19] *Id.* at 115:4 - 116:1. With respect to ¶48, she acknowledged saying that there were "challenges" with the Sentinel Program, but disputed the nature of the challenges. Ex. A at 116:2 - 117:2. Finally, with respect to ¶49, she acknowledged that she "may have said something like" what was alleged – that "the TSA was not satisfied with the work performed by Lockheed Martin." Ex. A at 117:3-9.

III. PLAINTIFF HAD A GOOD-FAITH BASIS FOR ITS ALLEGATIONS IN THE COMPLAINT

A. Because Mr. Keatly Was Credible, Plaintiff Had a Good-Faith Basis for Its Allegations

As discussed above, all the relevant indicia support Mr. Keatly's credibility and the integrity of his investigation. Furthermore, as Plaintiff demonstrated in its summary judgment opposition, the allegations of the Complaint closely track the language from Mr. Keatly's memoranda, which in turn

[19] Moreover, Ms. Burns appeared to treat the allegation in question as a matter of common sense. *See* Ex. A. at 115:14-16 ("I am of the belief that Ms. Gooden certainly speaks about programs with other executives at Lockheed Martin.").

track Mr. Keatly's notes. *See* Pl. SJ Opp. at 21; Ex. 37 (chart entitled "Consistency Across Investigatory Notes, Investigatory Memoranda and Allegations of the Complaint"). Because Plaintiff had no reason to question the credibility of the witnesses when it filed the Complaint, the Court may conclude that Plaintiff had a good-faith basis for attributing to the various CWs the allegations that were attributed to them.[20]

B. There Was a Reasonable Inference that Defendant Gooden, the Head of IS&GS, Gave Information About IS&GS to Her Immediate Boss, Defendant Stevens, and that MacLauchlan, the CFO of IS&GS, Gave Information About IS&GS to Defendant Tanner, the CFO of the Company

During the 10/1 Hearing, the Court indicated that it was "troubled" (Ex. A at 208:18) by one allegation in the Complaint – the statement in ¶36 that, "According to CW2, Defendants Stevens and Tanner received information about IS&GS directly from Defendant Gooden and Gooden's finance manager, Jeff MacL[au]chlan." The statement from Mr. Keatly's memorandum on which that allegation was based states: "She surmised that Bob Stevens primarily got his information from Linda Gooden and that Bruce Tanner got his information from Linda Gooden's 'Finance manager' whom Hawn was willing to confirm was Jeff MacLuachlan [sic]." Ex. 26 at 4 (emphasis omitted).

Plaintiff acknowledges, and regrets, that the quoted allegation from ¶36 omitted the word "surmised," which Mr. Keatly used in his memorandum. By way of explanation only – and not by way of excuse – it seemed to be a reasonable inference that Ms. Gooden, the head of IS&GS and one of the top six executives in the Company (*see* Ex. C (Gooden Tr.) at 20:21-24), reported information about IS&GS directly to her immediate boss, CEO Stevens, and that MacLauchlan, the CFO for

[20] As the Court stated at the 10/1 Hearing: "I don't think there's an obligation on plaintiff's counsel as part of the pleading to ascertain whether a confidential witness is telling the truth, unless it is so inherently implausible that they don't have a good-faith basis for putting it in the complaint." Ex. A at 214:10-14.

IS&GS (*see id.* at 21:18-25), reported information about IS&GS directly to LM CFO Tanner. Indeed, in opposition to Defendants' summary judgment motion, Plaintiff submitted a March 23, 2009 email exchange between Ms. Gooden and Mr. Stevens specifically about "IS&GS Margins." *See* Ex. 46. Among other things, Ms. Gooden informed Mr. Stevens (and indicated that she had previously told Mr. Tanner): REDACTED

Id. at LMC00003774-75. Moreover, Ms. Gooden testified REDACTED (Ex. C at 20:17-19), REDACTED Ex. H at 18:17-18.

Now that Mr. Stevens and Mr. Tanner have testified, the substance of the allegation has been confirmed once and for all. Mr. Stevens acknowledged that REDACTED *See* Ex. I at 24:8-10 REDACTED ; *see also id.* at 24:15-22 REDACTED And Mr. Tanner testified that REDACTED . *See* Ex. J at 27:9 - 28:5; *see also* Ex. H (MacLauchlan Tr.) at 98:10-12 REDACTED .

Thus, without excusing the omission of the word "surmised," Plaintiff believed it was making a reasonable inference at the time it filed the Complaint, and the evidence developed during discovery has established the truth of the allegation.[21]

[21] As an aside, in their summary judgment motion (which is still pending), Defendants completely mischaracterize Plaintiff's allegations about CW2 in ¶36 of the Complaint. In ¶36, Plaintiff merely alleges CW2's statement that "Gooden ***was told*** at the beginning of 2009 that the projections for 2009 for IS&GS were overstated" – ***not*** that CW2 personally informed Ms. Gooden of that fact. Similarly, Plaintiff alleges CW2's statement that Stevens and Tanner received "***information*** about IS&GS" directly from Gooden and MacLauchlan – ***not*** that Gooden reported to Stevens and Tanner that the IS&GS goals could not be achieved. Yet Defendants state in their summary judgment

Footnote continued

C. Credibility Determinations Are Not Permitted on a Motion to Dismiss

The fact of credibility problems on the part of several of the CWs, which were not apparent when the Complaint was filed, neither undermines the Complaint nor justifies reconsideration of the Court's decision on the motion to dismiss. That is so for two reasons.

First, credibility determinations, which are for the trier of fact, are not appropriate on a motion to dismiss. *See, e.g.*, *Lewy v. SkyPeople Fruit Juice, Inc.*, 2012 WL 3957916, at *13 (S.D.N.Y. Sept. 10, 2012) ("A motion to dismiss is not the proper vehicle to test the credibility of witnesses or the manner in which the plaintiffs will attempt to prove their allegations."); *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453, 478 n.146 (S.D.N.Y. 2010) ("[n]or is the motion to dismiss stage the proper juncture to assail the credibility of Denning's sworn statement"); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 2004 WL 1810661, at *2 n.5 (S.D.N.Y. Aug. 12, 2004) ("Challenges to the credibility of the source of some of the allegations in the SAC are not appropriate at the motion to dismiss stage.").

Second, the fact that certain witnesses appear to have lied does not mean they were lying to Mr. Keatly. As discussed above, each of the CWs (with the exception of Mr. Parsons) had a financial disincentive to speak with Mr. Keatly as a result of their severance agreements, and yet spoke with him anyway. A trier of fact could reasonably conclude that they spoke with him, even though it was against their financial interests to do so, precisely because they wanted to tell the truth – especially at a time when the possibility of LM discovering their involvement was still remote.

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motion: "CW-2 is alleged to have ***directly told Ms. Gooden*** that the 2009 financial projections for IS&GS business unit 'couldn't be achieved,' while also stating that ***Ms. Gooden 'directly' reported such information*** to Messrs. Stevens and Tanner." Def. Mem. at 2. These statements utterly mischaracterize ¶36 of the Complaint.

D. Plaintiffs May Rely on Hearsay in Pleading a Complaint

At the 10/1 Hearing, the Court raised a question about whether hearsay can support an allegation in a complaint "even for pleading purposes." Ex. A at 213:1-2. Although some courts in this circuit have held that hearsay allegations cannot defeat a Rule 12(b)(6) motion,[22] numerous others have concluded that a motion to dismiss is not the time to assess the admissibility of evidence,[23] and that hearsay may support a complaint. *See*, *e.g.*, *Lewy*, 2012 WL 3957916, at *13 (on a motion to dismiss in a Section 10(b) action, "'we do not assess the admissibility or weight that should be afforded to evidence'") (citation omitted); *Montoya v. Mamma.Com Inc.*, 2006 WL 770573, at * 4 (S.D.N.Y. Mar. 28, 2006) (on a motion to dismiss in a Section 10(b) action, rejecting defendants' argument that the statements recounted in the complaint were based on "multiple levels of hearsay" and too vague to support plaintiffs' core claim, and concluding that there was "adequate support for plaintiffs' allegations," and that "the press reports and confidential sources cited in the complaint are sufficiently specific to support plaintiffs' claim that Kott exerted control over Mamma.Com"); *Palermo v. Korff*, 2011 WL 446209, at *5 (S.D.N.Y. Feb. 7, 2011) (rejecting argument that "a court may not consider hearsay in disposing of" a motion to dismiss: "'whether the statements . . . might constitute inadmissible hearsay when relied upon for the truth of the matters asserted is simply irrelevant'") (quoting *DLJ Mortgage Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 235 (E.D.N.Y. 2010)).

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[22] *See In re Pall Corp.*, 2009 WL 3111777, at *6 (S.D.N.Y. Sept. 21, 2009); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 139 n.17 (D. Conn. 2007).

[23] Indeed, it is well established that a plaintiff has no obligation to plead evidence. *See In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) (even under Rule 9(b) and the PSLRA, "we do not require the pleading of detailed evidentiary matter in securities litigation"); *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 179 (S.D.N.Y. 2010) ("A plaintiff is not required to plead evidence.") (citation omitted).

It is well established, for example, that plaintiffs may rely on newspaper articles and other hearsay reports in pleading a complaint. For example, in *In re Air Disaster at Lockerbie, Scotland*, 144 F.R.D. 613 (E.D.N.Y. 1992), the court observed that "[p]arties and their attorneys . . . are entitled to base their complaints and their requests for discovery on statements of witnesses, reports of their investigators and ***hearsay*** reports and statements of others until such time, if ever, as they are satisfied that the statements and other evidence are not competent or are otherwise untrustworthy." *Id.* at 617 (denying defendant's motion for sanctions). Similarly, in *In re GPC Biotech AG Sec. Litig.*, 597 F. Supp. 2d 412, 423 (S.D.N.Y. 2009), the court accepted plaintiff's allegations that the defendant-biotech-company's statements regarding a purported agreement with the FDA were false based on "the observations of industry reporters," who had observed a hearing in which the FDA stated that no such agreement had been reached, and a news article that stated that the biotech company's proposal was not "signed off on by the [FDA]." *Id.* at 423. The court credited these allegations, explaining that "[w]hile these articles would seem to be hearsay, they do suggest a good faith basis for plaintiff's factual assertions." *Id.* at 423 n. 3.[24]

These cases, which permit reliance on hearsay, are consistent with the general proposition that, on a motion to dismiss, courts must accept the allegations of the complaint as true. *See*, *e.g.*, *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, --- F. Supp. 2d ---, 2012 WL 2866425, at *4 (S.D.N.Y. July 13, 2012) ("On a motion to dismiss, the Court accepts ***all*** of a plaintiff's factual allegations as true, and draws all reasonable inferences in the plaintiff's favor."). They are also consistent with the proposition that "the inquiry . . . is whether *all* of the facts alleged,

[24] However, courts will consider newspaper articles and other public reports only if those sources meet the ordinary specificity requirements indicating reliability. *See In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 690 (S.D.N.Y. 2008) (noting that "newspaper articles should be credited only to the extent that other factual allegations would be – if they are sufficiently particular and detailed to indicate their reliability") (internal citations omitted).

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.*, 551 U.S. 308, 322-23 (2007) (emphasis on "all" in original).[25]

Finally, it bears underscoring that the single most important scienter allegation in the Complaint is ***not*** based upon hearsay, but upon the admission of the president of IS&GS Civil, Mr. Asbury: "In February 2009, it was clear to CW5 and other IS&GS division leaders that the full year 2009 projections for IS&GS could not be achieved and CW5 and other division leaders told this to Defendant Gooden at that time." ¶36. Although Mr. Asbury now disputes the truth of that allegation, that dispute is not a basis for dismissing the Complaint, as discussed above.

IV. EVEN IF THE COURT WERE TO DISCOUNT ALL THE CWS, THE COMPLAINT WOULD STILL SURVIVE

Even if the Court ignored the CW allegations, the Complaint would survive for four reasons. First, the timing of events supports scienter: it is not plausible that defendants Stevens and Tanner would deny the existence of performance problems as late as May 28, 2009, yet admit serious problems, resulting in reduced guidance for the year, less than two months later, without being aware of them.[26] Second, as the Court has observed, the "specificity" of the statements Tanner and Stevens were making is "strong circumstantial evidence that [they] were receiving some form of specific information on IS&GS." 2012 WL 2866425, at *11. Third, as the Court also noted, the core operations doctrine supports scienter. *Id.* Finally, the allegations that LM inappropriately forecast

[25] Even on a motion for summary judgment, a party may not object that the material cited to support or dispute a fact is hearsay unless that material "***cannot*** be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

[26] *See, e.g., In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 763 F. Supp. 2d 423, 517 (S.D.N.Y. 2011) (allegations of "temporal proximity" can augment scienter allegations). *See also Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 268 (3d Cir. 2009); *Ezra Charitable Trust v. Tyco Int'l, LTD*, 466 F.3d 1, 9 (1st Cir. 2006).

revenues from contracts that were under protest does not rely on any CW allegations. ¶¶58-63.[27]

V. CONCLUSION

As demonstrated above, Mr. Keatly conducted his investigation professionally and with integrity, and proved himself to be a credible witness at the 10/1 Hearing. By contrast, the CWs who have disputed the allegations based upon his investigation – Mr. Asbury, Mr. Morrison, and Ms. Hawn – did not establish themselves to be credible. Because Plaintiff closely based its allegations on Mr. Keatly's memoranda, and had no reason to question the honesty of the CWs at that time, Plaintiff respectfully submits that it had a good-faith basis for those allegations. Thus, there is no basis for revisiting the Court's decision on the motion to dismiss.[28]

Because the Court cannot, as it recognized at the 7/25 SJ Hearing, make credibility determinations on a summary judgment motion, Plaintiff respectfully submits that the Court should deny the pending summary judgment motion and permit the case to proceed to trial.

DATED: October 15, 2012

Respectfully submitted,

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/s/ Samuel H. Rudman
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[27] According to the 2nd Quarter 2009 Performance Review for IS&GS, REDACTED

See Ex. K.

[28] If the Court is nonetheless inclined to reconsider its decision on the motion to dismiss, Plaintiff respectfully requests an opportunity to amend the Complaint. If Defendants are permitted to challenge the Complaint based on discovery, fairness requires that Plaintiff be afforded an opportunity to amend the Complaint based on discovery, as well.

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CERTIFICATE OF SERVICE

I, Samuel H. Rudman, hereby certify that, on October 15, 2012, I caused a true and correct copy of the attached:

PLAINTIFF'S POST-HEARING SUBMISSION

to be served: (i) electronically on all counsel registered for electronic service for this case; and (ii) by first-class mail to any additional counsel.

/s/ Samuel H. Rudman
Samuel H. Rudman