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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KYUNG CHO, ET AL., Individually and On
Behalf of All Others Similarly Situated,

No. C 09-4208 JSW

Plaintiffs,

v.

**ORDER REGARDING MOTIONS
TO DISMISS**

UCBH HOLDINGS, INC., ET AL.,

Defendants.

Now before the Court are the motions to dismiss the Consolidated Amended Complaint filed by Defendants Thomas Wu (“Wu”) (doc. no. 156); Burton D. Thompson (“Thompson”) (doc. no. 161); Daniel M. Gautsch, Douglas Mitchell and Robert Nagel (doc. no. 163); Ebrahim Shabudin (“Shabudin”) (doc. no. 164); John M. Kerr (“Kerr”) (doc. no. 165); Dennis Wu, Joseph J. Jou, Pin Pin Chau, Li-Lin Ko, Godwin Wong, David Ng, Daniel P. Riley and Richard Li-Chung Wang (the “Director Defendants”) (doc. no. 166); and Craig On (“On”) (doc. no. 167). The matters are now fully briefed and ripe for decision, and the Court finds that these matters are appropriate for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b).

For the reasons set forth below, the Court GRANTS the motions to dismiss with leave to amend.

BACKGROUND

Plaintiffs filed several putative securities class actions which the Court consolidated pursuant to Federal Rule of Civil Procedure 42(a) by Order dated January 27, 2010. The

1 actions against Defendant UCBH Holdings, Inc. (“UCBH” or the “Company”) were
2 automatically stayed upon filing of the Notice of Bankruptcy Filing and Automatic Stay on
3 November 25, 2009. Plaintiffs filed the operative Consolidated Amended Complaint on August
4 10, 2010.

5 Plaintiffs allege that during the class period from January 24, 2008 through September 8,
6 2009, Defendants issued materially false and misleading statements concerning UCBH’s
7 allowance for loan loss and provision for loan loss and falsely representing that the Company’s
8 financial reporting controls were effective. Plaintiffs allege that UCBH’s auditor, KPMG, met
9 with examiners from the Federal Deposit Insurance Corporation (“FDIC”) and California
10 Department of Financial Institutions (“CDFI”) on May 8, 2009, about the deterioration in asset
11 quality and overall financial condition of UCBH’s subsidiary, United Commercial Bank
12 (“UCB” or the “Bank”). (CAC ¶ 9.) On May 13, 2009, KPMG alerted UCBH’s audit
13 committee that illegal acts may have occurred related to overvaluation of impaired and real
14 estate owned loans, prompting the audit committee to initiate an internal investigation. (*Id.*)
15 Plaintiffs further allege that on September 8, 2009, UCBH announced the results of the internal
16 investigation conducted by a subcommittee of UCBH’s audit committee, that UCBH was
17 required to restate its financial statements, and that UCBH had reached a consent agreement
18 with the FDIC and CDFI relating to a cease and desist order concerning the improprieties
19 alleged in these actions. Plaintiffs contend that as a result of these disclosures, UCBH’s stock
20 value fell and ultimately the Bank was closed. (*Id.* ¶ 121.)

21 Plaintiffs allege the following causes of action: (1) violation of Section 10(b) of the
22 1934 Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17
23 C.F.R. § 240.10b-5; (2) violation of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

24 LEGAL STANDARD

25 I. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

26 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a
27 claim upon which relief can be granted. The complaint is construed in the light most favorable
28 to the non-moving party and all material allegations in the complaint are taken to be true.

1 *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The Court may consider the facts
2 alleged in the complaint, documents attached to the complaint, documents relied upon but not
3 attached to the complaint when the authenticity of those documents is not questioned, and other
4 matters of which the Court can take judicial notice. *Zucco Partners LLC v. Digimarc Corp.*,
5 552 F.3d 981, 990 (9th Cir. 2009).

6 Rule 8(a) requires only “a short and plain statement of the claim showing that the
7 pleader is entitled to relief.” Even under the liberal pleading standard of Rule 8(a), “a plaintiff’s
8 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
9 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell*
10 *Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S.
11 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is
12 conceivable but must instead allege “enough facts to state a claim to relief that is plausible on
13 its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content
14 that allows the court to draw the reasonable inference that the defendant is liable for the
15 misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550
16 U.S. at 556). “The plausibility standard is not akin to a probability requirement, but it asks for
17 more than a sheer possibility that a defendant has acted unlawfully. ... When a complaint pleads
18 facts that are merely consistent with a defendant’s liability, it stops short of the line between
19 possibility and plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 556-57)
20 (internal quotation marks omitted).

21 Where a plaintiff alleges fraud, however, Rule 9(b) requires the plaintiff to state with
22 particularity the circumstances constituting fraud. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541,
23 1547-49 (9th Cir. 1994) (en banc) (superseded by the Private Securities Litigation Reform Act
24 (“PSLRA”) on other grounds). In the securities context, the pleading requirements are even
25 more stringent.

26 **II. Private Securities Litigation Reform Act**

27 “At the pleading stage, a complaint stating claims under section 10(b) and Rule 10b-5
28 must satisfy the dual pleading requirements of . . . Rule 9(b) and the PSLRA.” *Zucco Partners*,

1 552 F.3d at 990. The PSLRA requires that “a complaint ‘plead with particularity both falsity
2 and scienter.’” *Id.* (quoting *Gompper v. VISX*, 298 F.3d 893, 895 (9th Cir. 2002), in turn
3 quoting *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001)). Where a plaintiff asserts a
4 Section 20(a) claim based on an underlying violation of section 10(b), the pleading
5 requirements for both violations are the same. *See In re Ramp Networks, Inc. Sec. Lit.*, 201 F.
6 Supp. 2d 1051, 1063 (N.D. Cal. 2002).

7 Under the PSLRA, actions based on allegations of material misstatements or omissions
8 must “specify each statement alleged to have been misleading, the reason or reasons why the
9 statement is misleading, and, if an allegation regarding the statement or omission is made on
10 information and belief, the complaint shall state with particularity all facts on which that belief
11 is formed.” 15 U.S.C. §78u-4(b)(1). In order to adequately plead scienter, the PSLRA requires
12 that the plaintiff “state with particularity facts giving rise to a strong inference that the
13 defendant acted with the required state of mind.” *Zucco Partners*, 552 F.3d at 991 (quoting 15
14 U.S.C. § 78u-4(b)(2)). If the allegations are insufficient to state a claim, a court should grant
15 leave to amend, “unless it is clear that the complaint could not be saved by any amendment.”
16 *Id.* at 989 (quoting *Livid Holdings Ltd. v. Solomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th
17 Cir. 2005)).

18 ANALYSIS

19 I. SUFFICIENCY OF ALLEGATIONS OF RULE 10(b) VIOLATION

20 Section 10(b) of the Exchange Act provides, in part, that it is unlawful “to use or
21 employ in connection with the purchase or sale of any security registered on a national
22 securities exchange or any security not so registered, any manipulative or deceptive device or
23 contrivance in contravention of such rules and regulations as the [SEC] may prescribe.” 15
24 U.S.C. § 78j(b). Rule 10b-5, promulgated under Section 10(b), makes it unlawful for any
25 person to use interstate commerce: (a) to employ any device, scheme, or artifice to defraud; (b)
26 to make any untrue statement of material fact or to omit to state a material fact necessary in
27 order to make the statements made, in light of the circumstances under which they were made,
28 not misleading; or (c) to engage in any act, practice, or course of business which operates or

1 would operate as a fraud or deceit upon any person, in connection with the purchase or sale of
2 any security. 17 C.F.R. § 240.10b-5.

3 For a claim under Section 10(b) and Rule 10b-5 to be actionable, a plaintiff must allege:
4 (1) a misrepresentation or omission; (2) of material fact; (3) made with scienter; (4) on which
5 the plaintiff justifiably relied; (5) that proximately caused the alleged loss. *See Binder v.*
6 *Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999). A complaint must “specify each statement
7 alleged to have been misleading, the reason or reasons why the statement is misleading, and, if
8 an allegation regarding the statement or omission is made on information and belief, the
9 complaint shall state with particularity all facts on which that belief is formed.” 15 U.S.C.
10 § 78u-4(b)(2). As discussed above, in order to avoid having the action dismissed, a plaintiff
11 must “plead with particularity both falsity and scienter.” *Ronconi v. Larkin*, 253 F.3d 423, 429
12 (9th Cir. 2001). The Ninth Circuit, in *Ronconi*, articulated the rule as follows:

13 Because falsity and scienter in private securities fraud cases are
14 generally strongly inferred from the same set of facts, we have
15 incorporated the dual pleading requirements of 15 U.S.C. §§ 78u-
16 4(b)(1) and (b)(2) into a single inquiry. In considering whether a
17 private securities fraud complaint can survive dismissal under Rule
18 12(b)(6), we must determine whether ‘particular facts in the complaint,
19 taken as a whole, raise a strong inference that defendants intentionally
or [with] ‘deliberate recklessness’ made false or misleading statements
to investors.’ Where pleadings are not sufficiently particularized or
where, taken as a whole, they do not raise a ‘strong inference’ that
misleading statements were knowingly or [with] deliberate
recklessness made to investors, a private securities fraud complaint is
properly dismissed under Rule 12(b)(6).

20 *Id.* (citations and internal quotation marks omitted).

21 In the motions to dismiss, Defendants contend that Plaintiffs fail to satisfy the
22 heightened pleading requirements under the PSLRA. In particular, Defendants argue that, with
23 regard to Plaintiffs’ first claim for relief: (1) Plaintiffs have failed to plead with particularity
24 that Defendants made false or misleading statements; (2) Plaintiffs have failed to plead with
25 particularity facts demonstrating a strong inference of scienter as to any Defendant; and
26 (3) Plaintiffs failed to allege “control person” liability with sufficient particularity.
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c. Craig On

Defendant On was the Chief Financial Officer and Executive Vice President of UCBH and the Bank from October 2008 through the end of the Class Period. (CAC ¶ 33.) On served as the Deputy Chief Financial Officer for UCBH from May 2008 to October 2008, and as Senior Vice President and Corporate Controller from June 2005 to March 2008. (*Id.*)

d. Burton D. Thompson

Defendant Thompson, who joins in the motions filed by Defendant On and the Outside Director Defendants, was UCBH's Senior Vice President and Corporate Controller from August 1, 2008, to the end of the Class Period. (CAC ¶ 39.)

e. Daniel M. Gautsch, Douglas Mitchell and Robert Nagel

Defendant Mitchell was the Company and Bank's Senior Vice President and Director of Corporate Development and Investor Relations from March 3, 2008 through the end of the Class Period. (CAC ¶ 38.)

Defendant Gautsch was the Company and Bank's Executive Vice President and Chief Risk and Compliance Officer from August 23, 2006 through the end of the Class Period. (*Id.* ¶ 37.)

Defendant Nagel was the Company and Bank's Senior Vice President and Chief Audit Executive from July 14, 2008 to the end of the Class Period. (*Id.* ¶ 35.) He also served on the Company and Bank's compensation committee during his tenure. (*Id.*)

f. John M. Kerr

Defendant Kerr served as UCBH's Executive Vice President and Chief Credit Officer from January 1, 2008 to September 11, 2008, when he was appointed Executive Vice President and Director of Portfolio Management and Credit Compliance until January 9, 2009, when he was appointed Executive Vice President and Chief Lending Officer until his resignation on or about June 30, 2009. (CAC ¶ 36.)

g. Director Defendants

Defendants Dennis Wu, Joseph J. Jou, Li-Lin Ko, Godwin Wong, David Ng, and Richard Li-Chung Wang served as directors of UCBH during the entire Class Period, and

1 Defendants Pin Pin Chau and Daniel P. Riley served as directors during part of the Class Period
2 (collectively, “Director Defendants”). (CAC ¶¶ 34, 41-43, 46-49.) Dennis Wu also was
3 employed by UCBH and the Bank as Executive Vice President and CFO from June 2005
4 through March 3, 2008. (*Id.* ¶ 34.)

5 Defendants Jou, Chau, Ko and Ng served on the Audit Committee, whose primary
6 purpose was to assist the Board in fulfilling its responsibilities to oversee the accounting,
7 auditing and financial reporting processes of the Company and the internal and external audit
8 process. (CAC ¶¶ 41-43, 50.) Defendants Jou and Wong served on the Credit Committee
9 which was responsible for approving credit policies and monitoring the overall credit risk
10 profile for the Company and the Bank and the allowance for loan losses. (*Id.* ¶¶ 41, 46, 54.)

11 **2. Allegations of False and Material Misstatements**

12 Plaintiffs contend that the following statements were materially false and misleading by
13 fraudulently underreporting the Company’s allowance for loan loss (“ALL”) and provision for
14 loan loss (“Provision”), which mischaracterized the Company’s reported net loss, and by falsely
15 stating that the Company’s internal financial reporting controls were effective at a time when
16 senior executives allegedly concealed serious financial reporting issues (CAC ¶ 83g.):

17 a. January 24, 2008 Press Release (“1/24/08 PR”) announcing results for
18 fourth quarter and fiscal year ending December 31, 2007: The CAC alleges that the 1/24/08 PR
19 stated that the ALL and Provision was \$14.2 million for FY2007 and \$8.1 million for 4Q2007.
20 (CAC ¶ 59.) Plaintiffs allege that the 1/24/08 PR understated the provision by 42% for FY2007
21 and 72% for 4Q2007, as demonstrated by UCBH’s Form 10-K filed with the SEC on February
22 29, 2008, reporting provisions of \$20.2 million for FY2007 and \$14 million for 4Q2007. (*Id.*
23 ¶ 62.)

24 b. February 29, 2008 10-K (“FY 2007 10-K”): Plaintiffs allege that the
25 \$20.2 million provision reported in the FY 2007 10-K was false on the ground that an FDIC and
26 CDFI examination, commenced on February 27, 2008, recommended that UCBH increase its
27 ALL by \$35 million, resulting in a \$35 million increase in the provision for loan losses and
28 decrease in the company’s net income. (*Id.* ¶ 67.) Plaintiffs allege that the FY 2007 10-K was

1 misleading because it failed to disclose the FDIC's recommendation and falsely stated that the
2 Company's internal control over financial reporting was effective when UCBH allegedly lacked
3 adequate internal controls. (*Id.* ¶ 68-69, 71.) The CAC further alleges that the provision of
4 \$20.2 million for FY 2007 reported in the 2/29/08 10-K is materially false because UCBH
5 reported elsewhere in a Call Report that its provision for loan losses was \$22.2 million for that
6 same period. (*Id.* ¶ 66.) Plaintiffs allege that UCBH never corrected this \$2.2 million
7 difference in its subsequent 10-K or issued a correction in an 8-K to advise investors. (*Id.*)
8 Plaintiffs further allege that the Sarbanes-Oxley ("SOX") certifications signed by Wu and
9 Dennis Wu falsely stated that the 10-K "does not contain any untrue statement of a material
10 fact or omit to state a material fact." (*Id.* ¶ 70.)

11 c. May 9, 2008 10-Q ("1Q 2008 10-Q"): Plaintiffs allege that the 10-Q for
12 the first quarter ended March 31, 2008 and the SOX certifications, signed by Wu and John
13 Downing, falsely stated that the Company's internal controls were effective and that there were
14 no material changes that materially affected internal controls over financial reporting, when
15 Defendants allegedly were aware that UCB had ineffective controls because the FDIC provided
16 a copy of its Report of Examination to UCB management. (*Id.* ¶¶ 72-74.)

17 d. August 11, 2008 10-Q ("2Q 2008 10-Q"): Plaintiffs allege that the 10-Q
18 for the second quarter ended June 30, 2008 and the SOX certifications, signed by Wu and On,
19 falsely stated that the Company's internal controls were effective. (*Id.* ¶¶ 75-78.)

20 e. October 24, 2008 conference call: Plaintiffs allege that during the
21 earnings conference call with investors to discuss third quarter financial results ended
22 September 30, 2008, Wu, On and Mitchell made false statements about the Company's efforts
23 to determine and report UCB's loan losses reserves and provisions. In particular, Plaintiffs
24 allege that On made a false statement orally during the 10/24/08 earnings call by falsely
25 reassuring investors that UCBH's method for determining its Provision and ALL was
26 conservative and timely, when UCBH's deteriorating financial condition was being masked by
27 UCB's management. (Pls' Opp. to Craig On's Motion to Dismiss ("Opp. to On Mot.") at 9
28 (citing CAC ¶ 82 and Ex. A at 44).) Plaintiffs further allege that Defendants deliberately

1 concealed the company's deteriorating financial condition. Plaintiffs allege that Wu and
2 Shabudin were forced out of the Company because of their involvement in the misconduct. (*Id.*
3 ¶¶ 79-83.)

4 f. November 10, 2008 10-Q ("3Q 2008 10-Q"): Plaintiffs allege that the
5 10-Q for the third quarter ended September 30, 2008 and the SOX certifications, signed by Wu
6 and On, falsely stated that the Company's internal controls were effective. (*Id.* ¶¶ 84-87.)

7 g. January 22, 2009 Press Release ("1/22/09 PR"): Plaintiffs allege that the
8 Company issued a press release announcing financial results for the fourth quarter and fiscal
9 year ended December 31, 2008 that underreported the Company's net loss before income taxes
10 and its allowance for loan losses. Plaintiffs also allege that the 1/22/09 PR was false and
11 misleading because from about October 2008 senior management and board members were
12 deliberately concealing the Company's true financial condition. (*Id.* ¶¶ 88-89.)

13 h. March 16, 2009 10-K ("FY 2008 10-K"): Plaintiffs allege that the 10-K
14 for the fiscal year ended December 31, 2008, signed by Wu, On, Jou, Ko, Kwok, Ng, Riley,
15 Wan, Wang, Wong and Dennis Wu, overstated the Company's net income before income taxes.
16 Plaintiffs further allege that the 10-K was false and misleading because it identified only one
17 internal control deficiency and falsely assured investors that it was "actively working" to
18 remediate the deficiency. Plaintiffs also allege that the SOX certifications signed by Wu and
19 On were materially false and misleading. (*Id.* ¶¶ 90-96.)

20 i. April 23, 2009 Press Release ("4/23/09 PR"): Plaintiffs allege that the
21 press release announcing the financial results for the first quarter ended March 31, 2009, falsely
22 reported the provision for loan losses, the allowance for loan losses and the net loss before
23 income taxes. Plaintiffs further allege that the 4/23/09 PR falsely stated the belief that the
24 "allowance was adequate to absorb expected losses inherent in the loan portfolio." (*Id.* ¶¶ 97-
25 99.) Plaintiffs contend that a 5/22/09 Call Report materially contradicts the 4/23/09 PR. (*Opp.*
26 to Director Defs' Mot. at 6.)

27 j. May 20, 2009 8-K ("5/20/09 8-K"): Plaintiffs allege that the 5/20/09 8-K
28 disclosing that the financial statements for FY 2008 and the earnings release for the first quarter

1 of 2009 had to be restated failed to disclose that the restatement and investigation had been
 2 prompted by UCBH's auditor upon uncovering potential violations of law by UCBH officials.
 3 (CAC ¶¶ 100-101.)

4 k. June 3, 2009 8-K/A ("6/3/09 8-K/A"): Plaintiffs allege that the 6/3/09
 5 8-K/A amending the 5/20/09 8-K falsely stated that the Company would not be able to
 6 determine the impact of the restatement until it was completed, when the Company had
 7 determined the impact for certain restatement adjustments. (*Id.* ¶¶ 102-03.)

8 l. August 6, 2009 Press Release ("8/6/09 PR"): Plaintiffs allege that the
 9 press release announcing preliminary results for the second quarter ended June 30, 2009
 10 knowingly understated UCBH's provision for loan losses and allowance for loan losses, as
 11 demonstrated by the Company's filings with the Federal Financial Institutions Examinations
 12 Counsel and with the Board of Governors of the Federal Reserve System which listed the
 13 provision for loan losses as \$676,909,000 million, rather than the \$300 to \$330 million
 14 announced in the 8/6/09 PR. (*Id.* ¶¶ 104-06.) Plaintiffs contend that the 8/6/09 PR materially
 15 contradicts a Call Report issued the same day. (Opp. to Director Defs' Mot. at 6.)

16 3. Statute of Limitations

17 Wu contends that allegations based upon alleged misstatements made in the 1/24/08 PR
 18 is barred by the one-year statute of limitations. ((Motion of Thomas S. Wu to Dismiss CAC
 19 ("Wu Mot.") at 9 n.8 (citing 15 U.S.C. § 18(c).) The statute of limitations for a Section 10(b)
 20 claim is two years from discovery of the fraud with a repose period of five years. *Merck & Co,*
 21 *Inc. v. Reynolds*, 130 S.Ct. 1784, 1790 (2010) (citing 28 U.S.C. § 1658(b)). Plaintiffs' claims
 22 therefore are not time-barred.

23 4. Rule 10(b) Liability for Making False Statements

24 Plaintiffs argue that the group pleading doctrine allows for a presumption that false and
 25 misleading statements in the PRs and SEC filings were made by the collective action of the
 26 senior officers and directors at UCBH.

27 The Ninth Circuit has not ruled on the issue whether the group pleading doctrine
 28 survived the PSLRA, and has not adopted a theory of collective scienter. *Glazer Capital*

1 *Management, LP v. Magistri*, 549 F.3d 736, 744 (9th Cir. 2008). In *Glazer*, the Ninth Circuit
2 recognized the split of authority among other circuits as to whether a collective scienter theory
3 of liability would satisfy the pleading requirements of the PSLRA. *Id.* at 743-44. The Court
4 declined to rule on the validity of the group pleading doctrine under the PSLRA and limited its
5 holding to the specific circumstances of *Glazer* to require particularized allegations as to each
6 defendant: “we hold that the PSLRA requires Glazer to plead scienter with respect to those
7 individuals who actually made the false statements in the merger agreement. Therefore, to
8 succeed on its claim, Glazer must ‘plead, in great detail, facts that constitute strong
9 circumstantial evidence of deliberately reckless or conscious misconduct’ on the part of
10 Magistri.” *Id.* at 745 (quoting *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 979 (9th
11 Cir.1999)). Following *Glazer*’s ruling requiring specific factual allegations for pleading
12 scienter, the Court declines to apply a group pleading theory to attribute the allegedly false
13 statements to Defendants based on allegations that they are senior officers and directors.

14 In *Howard v. Everex Sys., Inc.* 228 F.3d 1057, 1061-63 (9th Cir. 2000), the Ninth Circuit
15 held that corporate officers who signed SEC filings on behalf of the corporation were liable
16 under Section 10(b) as primary violators for making a false statement. *Howard* further
17 recognized that “substantial participation or intricate involvement in the preparation of
18 fraudulent statements is grounds for primary liability even though that participation might not
19 lead to the actor’s actual making of the statements.” 228 F.3d at 1061 n.5 (citation omitted).

20 The CAC alleges that Wu signed the UCBH 10-Ks and 10-Qs, so that those statements
21 are attributed properly to him. See *In re LDK Solar Sec. Litig.*, 2008 WL 4369987 *8 (N.D.
22 Cal. Sept. 24, 2008) (citing *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1061 (9th Cir.
23 2000)). Similarly, On is liable for the false statements in the SEC filings which he is alleged to
24 have signed. The allegations of the CAC fail to demonstrate, however, that On substantially
25 participated in or was intricately involved in preparing other SEC filings such as the FY2007
26 10-K and 1Q2008 10-Q.

27 Based on Plaintiffs’ allegations that each of the Director Defendants signed the 2007
28 10K (except Mr. Riley) and the 2008 10K (except Ms. Chau) (CAC ¶¶ 69, 90; Opp. to Director

1 Defs' Mot. at 1 n.1), the alleged misstatements are attributable to the Director Defendants. *In re*
2 *Maxim Integrated Products, Inc., Deriv. Lit.*, 574 F.Supp.2d 1046, 1063 (N.D. Cal. 2008) (“A
3 director who signs a financial disclosure may be held liable for any misrepresentations in the
4 disclosure”) (citing *Howard*, 228 F.3d at 1061 n. 5).

5 Plaintiffs contend that the allegedly false statements are attributable to Thompson who
6 was involved in the day-to-day operations of the Company and drafted, produced, reviewed
7 and/or disseminated the false and misleading statements at issue. (*See* Opp. to Thompson Mot.
8 at 3 (citing CAC ¶ 56).) The allegations referring to Thompson’s position as the Corporate
9 Controller, without allegations to show his substantial participation or intricate involvement in
10 preparing the allegedly false statements, are insufficient to attribute those misstatements to
11 Thompson. Similarly, the allegations referring to Kerr and Shabudin as senior executives do
12 not demonstrate substantial participation or intricate involvement in preparing the false
13 statements. (*See* Opp. to Kerr Mot. at 2-3; Opp. to Shabudin Mot. at 9-12.)

14 With respect to Gautsch and Nagel, Plaintiffs’ allegations that they were “senior
15 executives” are insufficient to demonstrate that either Gautsch or Nagel substantially
16 participated in or were intricately involved in making the allegedly false SEC filings or press
17 announcements. (Opp. to Gautsch, Mitchell and Nagel Mot. at 4.) Although the CAC does not
18 contain particular allegations to demonstrate that Mitchell substantially participated in
19 preparing the allegedly false statements, Plaintiffs are granted leave to amend the complaint to
20 include factual allegations that would support substantial participation or intricate involvement,
21 such as the FY 2008 10-K identifying Mitchell, press releases naming Mitchell as the contact
22 person, and his address to analysts and investors during conference calls. (*Id.* at 2-3.)

23 **5. Materiality**

24 Several Defendants contend that vague assertions about the company would not be
25 relied upon by reasonable investors and cannot support materiality. (*See* Wu Mot. at 12.) The
26 Ninth Circuit has held that “although overstatement of revenues in violation of GAAP may
27 support a plaintiff’s claim of fraud, the plaintiff must show with particularity how the
28 adjustments affected the company’s financial statements and whether they were material in light

1 of the company's overall financial position." *In re Daou Systems, Inc.*, 411 F.3d 1006, 1018
2 (9th Cir. 2005). The CAC alleges more than mere puffery by identifying specific misleading
3 statements either overstating UCBH's net income before taxes, allowance for loan loss and
4 provision for loan loss or understating losses, as demonstrated by the corrected amounts
5 reported in subsequent filings. The CAC alleges, for example, that the 1/22/09 PR falsely
6 reported the net loss before taxes for FY 2008 as \$94,250,000, which was corrected to
7 \$134,250,000 in the 2008 10-K, a \$40 million understatement of net loss. (CAC ¶ 89(d).)
8 Plaintiffs' allegations that UCBH admitted that its FY 2008 10-K and earnings release for 1Q
9 2009 "should not be relied upon and must be restated" support an inference that the financial
10 reports were materially inaccurate. (CAC ¶¶ 89, 100-01.) *In re Daou Systems*, 411 F.3d at
11 1020 (concluding that the plaintiffs provided enough information for "a court to discern
12 whether the alleged GAAP violations were minor or technical in nature, or whether they
13 constituted widespread and significant inflation of revenue.") (citation omitted). *See In re*
14 *Sipex Corp. Securities Litigation*, 2005 WL 3096178 *1 (N.D. Cal. Nov. 17, 2005).

15 Wu further challenges Plaintiffs' allegations that he falsely stated that UCBH's internal
16 controls were "effective" without alleging facts to demonstrate that the internal controls were
17 lacking or ineffective. (Wu Mot. at 14.) Plaintiffs allege that UCBH suffered internal control
18 weaknesses that prevented accurate monitoring and reporting on the loan portfolio. (CAC ¶¶
19 71, 83.) Plaintiffs further allege financial indicators were overstated due to Defendants'
20 intentional conduct in concealing impairment losses on nonperforming loans and other real
21 estate assets. (*See* CAC ¶ 83(b).) Plaintiffs allege that starting in at least October 2008, "UCB
22 senior executives" deliberately concealed serious financial reporting issues, including (i)
23 modification of loan terms to delay negative consequences; (ii) intentional delays in recognizing
24 risk rating downgrades or specific reserves; (iii) intentional withholding of relevant information
25 from KPMG or the Bank's Finance Department; and (iv) inappropriate alteration of documents
26 by bank employees to improve the perception of credit quality. (CAC ¶ 13.) The Court
27 determines that the allegations of the CAC are sufficient to support materiality.
28

B. SCIENTER

1 “[T]o adequately plead scienter, the complaint must [] ‘state with particularity facts
2 giving rise to a strong inference that the defendant acted with the required state of mind.’”
3 *Zucco Partners LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). The Court must
4 determine “whether *all* of the facts alleged, taken collectively, give rise to a strong inference of
5 scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.”
6 *Tellabs, Inc. v. Makor Issues & Rights, Inc.*, 551 U.S. 308, 322-23 (2007). “[T]he inference of
7 scienter must be more than merely ‘reasonable’ or ‘permissible’ - it must be cogent and
8 compelling, thus strong in light of other explanations.” *Id.* at 324. “To determine whether the
9 plaintiff has alleged facts that give rise to the requisite ‘strong inference’ of scienter, a court
10 must consider plausible nonculpable explanations for the defendant's conduct, as well as
11 inferences favoring the plaintiff.” *Id.* at 323-24. A complaint will survive a Rule 12(b)(6)
12 motion to dismiss “only if a reasonable person would deem the inference of scienter cogent and
13 at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.* at
14 324.
15

16 “To adequately demonstrate that the defendant acted with the required state of mind, a
17 complaint must allege that the defendants made false or misleading statements either
18 intentionally or with deliberate recklessness.” *Zucco Partners*, 552 F.3d at 991. In *Zucco*
19 *Partners*, the Ninth Circuit instructed that “following *Tellabs*, we will conduct a dual inquiry:
20 first, we will determine whether any of the plaintiff's allegations, standing alone, are sufficient
21 to create a strong inference of scienter; second, if no individual allegations are sufficient, we
22 will conduct a ‘holistic’ review of the same allegations to determine whether the insufficient
23 allegations combine to create a strong inference of intentional conduct or deliberate
24 recklessness.” *Id.* at 992.

1. Allegations Do Not Support Strong Inference of Scienter

25 The Court determines that Plaintiffs’ allegations, viewed individually or holistically, do
26 not allege sufficient particularized facts to support a strong inference of scienter under Section
27 10(b). Plaintiffs’ Section 10(b) claim is therefore dismissed with leave to amend.
28

1 actually look at all loans we review 100% of our portfolio . . . to make sure that we are on
2 top of every single problem,” (CAC ¶ 143c), but these allegations do not establish that Wu, On
3 or other Defendants were involved in underreporting the ALL and Provision or that Wu falsely
4 stated that these senior management reviews were conducted or how they were inadequate.

5 Plaintiffs further suggest that On and Thompson were motivated to conceal UCBH’s
6 true financial condition in order to obtain TARP funds, but fail to allege particular facts to show
7 that On, Thompson, or other individual Defendant had information about the Bank’s financial
8 condition that was withheld or falsely reported. Plaintiffs’ contention that “[t]he only plausible
9 inference is that On [and Thompson] knowingly made false statements” is not supported by
10 particularized allegations. (See Opp. to On Mot. at 13; Opp. to Thompson Mot. at 9.) See
11 *Tellabs*, 551 U.S. at 326 n.6 (citing *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588,
12 602-603 (7th Cir. 2006)) (leaving undisturbed the ruling of the Seventh Circuit that the group
13 pleading doctrine does not meet the heightened pleading requirements of the PSLRA).
14 Plaintiffs must set out each particular allegation they maintain against each separate Defendant.
15 See, e.g., *In re NextCard, Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 16156 at *11-12 (N.D. Cal.
16 2006) (adopting the reasoning of the Fifth Circuit decision in *Southland Securities Corp. v.*
17 *INSpire Insurance Solutions, Inc.*, 365 F.3d 353, 365 (5th Cir. 2004), and holding that “it
18 appears to be totally inconsistent with the particularity requirements of the PSLRA to hold
19 corporate officers ‘responsible’ for unattributed corporate statements solely on the basis of their
20 titles, even if their general level of day-to-day involvement in the corporation’s affairs is
21 pleaded.”)

22 With respect to Kerr, Mitchell, Gautsch and Nagel, the CAC does not allege facts
23 beyond their job titles about the scope of each Defendant’s job responsibilities to support a
24 strong inference of scienter. Without specific allegations that Defendants possessed the
25 requisite mental state, high-level job titles are not sufficient to give rise to a strong inference of
26 scienter. *In re Downey Securities Litigation*, 2009 WL 2767670 *12 (C.D. Cal. August 21,
27 2009).

28

b. MLR Findings

1
2 Plaintiffs rely on allegations that the Material Loss Review prepared by the FDIC
3 concluded that “UCB senior executives” engaged in deliberate misconduct to conceal the
4 Bank’s “deteriorating financial conditions by deliberately delaying risk rating downgrades and
5 minimizing the bank’s overall loan loss allowance” support an inference that senior executives
6 such as Wu, On, Thompson, Kerr, and Shabudin knew of the deliberate misconduct. (*See* Opp.
7 to Shabudin Mot. at 13; CAC ¶ 83g and Ex. A at 7.) Plaintiffs argue that the misconduct was
8 “precisely the kinds of misconduct that could not be accomplished without [the Defendant’s]
9 actual participation or complicity,” (Opp. to Kerr’s Mot. at 4) but the allegations do not support
10 a strong inference of scienter as to any one Defendant. In particular, Wu contends that the CAC
11 fails to allege that the internal investigation resulted in any conclusions about him, and that the
12 MLR at best supports an allegation of mismanagement, but not fraud. (Wu Mot. at 6-7.) As
13 another district court has noted, “[t]he federal securities laws do not create liability for poor
14 business judgment or failed operations.” *In re Countrywide Financial Corp. Sec. Litig.*, 588 F.
15 Supp. 2d 1132, 1144 (C.D. Cal. 2008).

16 Neither the CAC nor MLR names any particular individual as responsible for the alleged
17 misconduct, referring collectively to “UCB senior executives,” “UCB Officials,” and “UCB
18 Management” as being involved in the intentional misconduct to conceal the “deteriorating
19 financial conditions.” (*See* Thompson Opp. at 2 (citing CAC ¶¶ 13, 83g).) Plaintiffs would
20 have the Court infer that any Defendant who was a senior executive was engaged in the
21 misconduct or knew of the false statements, but the general allegations about senior
22 management are insufficient to support an inference of scienter as to any individual Defendant.

c. FDIC and CDFI’s Examination

23
24 Plaintiffs next argue the joint report of examination (“ROE”) by the FDIC and CDFI
25 dated April 6, 2009, as referenced in the cease and desist order issued by those agencies on
26 September 3, 2009, demonstrates Shabudin’s access to the Company’s true financial condition.
27 (Opp. to Shabudin Mot. at 13; CAC ¶ 71.) The CAC alleges that FDIC and CDFI examiners
28 met with the KPMG auditors on May 8, 2009, concerning the April 2009 examination, and that

1 five days later, on May 13, 2009, KPMG alerted UCBH's audit committee to the potential
2 illegal acts, leading to an internal investigation. (CAC ¶ 9.) These allegations at best support
3 an inference that members of the audit committee became aware of the misconduct in May
4 2009, but do not demonstrate knowledge before May 2009 of any misconduct. Further, the
5 CAC alleges that Defendant Nagel was the Chief Audit Executive and that Defendants Jou,
6 Chau, and Ko served on the Audit Committees, but lacks any allegations to support an inference
7 that KPMG alerted any other Defendants of the findings of the ROE in May 2009.

8 The CAC also alleges that an FDIC and CDFI examination commenced on February 27,
9 2008, recommended that the Company increase its allowance for loan losses by \$35 million and
10 that the Company did not accept the FDIC's recommendation. (CAC ¶ 67.) This allegation
11 fails to specify which Defendants became aware of this recommendation, or when they became
12 aware, and does not demonstrate that the Company's decision to reject the FDIC
13 recommendation was erroneous or improper. Nor do Plaintiffs allege whether the FDIC
14 examiners recommended that the ALL be increased retrospectively for fiscal year 2007, rather
15 than fiscal years 2008 and 2009. (See CAC Ex. A at 13 and table 5 ("examiners recommended
16 increases to the ALLL in 2008 and 2009").) Further, the CAC alleges that Defendants' failure
17 to disclose the FDIC recommendation in the fiscal 2007 10-K was material and misleading, but
18 without allegations specifying when the FDIC released its recommendation to UCBH, it is
19 unreasonable to infer that at the time UCBH filed its 10-K on February 29, 2008, Defendants
20 were aware of the FDIC's findings based on an examination which had commenced on
21 February 27, 2008. (CAC ¶¶ 66-68.)

22 **d. Core Operations Inference**

23 Plaintiffs further suggest that the Court should infer Defendants' substantial
24 participation or "intricate involvement in the preparation of UCBH's admittedly false periodic
25 reports filed with the SEC and Company press releases issued during the Class Period," "given
26 the Company's [Allowance for Loan Loss], Provision, loan portfolio, internal controls, and
27 monitoring thereof, were at the core of the Company's operations during the Class Period."
28 (See Opp. to Thompson Mot. at 3.) Plaintiffs urge the Court to apply the core operations

1 inference to satisfy the pleading standard to support the scienter requirement as to Wu,
2 Shabudin, On, Kerr, Thompson, Gautsch, Mitchell and Nagel.

3 Under the core operations doctrine, “[a]llegations regarding management’s role in a
4 corporate structure and the importance of the corporate information about which management
5 made false or misleading statements may [] create a strong inference of scienter when made in
6 conjunction with detailed and specific allegations about management’s exposure to factual
7 information within the company.” *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th
8 Cir. 2008). In *South Ferry*, the Ninth Circuit recognized three circumstances under which
9 allegations regarding management’s role in a company may be relevant and help to satisfy the
10 PSLRA scienter requirement: “First, the allegations may be used in any form along with other
11 allegations that, when read together, raise an inference of scienter that is ‘cogent and
12 compelling, thus strong in light of other explanations.’” 542 F.3d at 785 (quoting *Tellabs*, 551
13 U.S. at 324). “Second, such allegations may independently satisfy the PSLRA where they are
14 particular and suggest that defendants had actual access to the disputed information.” *Id.* at 786
15 (citing *In re Daou Systems*, 411 F.3d at 1022-23 and *Nursing Home Pension Fund, Local 144 v.*
16 *Oracle Corp.*, 380 F.3d 1226, 1231 (9th Cir. 2004)). “Finally, such allegations may
17 conceivably satisfy the PSLRA standard in a more bare form, without accompanying
18 particularized allegations, in rare circumstances where the nature of the relevant fact is of such
19 prominence that it would be ‘absurd’ to suggest that management was without knowledge of the
20 matter.” *Id.* (quoting *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982, 988 (9th Cir.
21 2008)).

22 In the first approach, the Court takes a holistic view of the allegations when evaluating
23 all the circumstances together. Under this holistic approach, “[t]he allegations, read as a whole,
24 must raise an inference of scienter that is ‘cogent and compelling, thus strong in light of other
25 explanations,’ to satisfy the PSLRA standard.” *South Ferry*, 542 F.3d at 784 (quoting *Tellabs*,
26 551 U.S. at 324). “Allegations that rely on the core-operations inference are among the
27 allegations that may be considered in the complete PSLRA analysis.” *Id.*
28

1 Where there are no particularized allegations of scienter, under rare circumstances,
2 generalized factual allegations may satisfy the PSLRA pleading standard if they are sufficiently
3 prominent that it would be absurd or “patently incredible” to suggest that the company’s
4 officers or managers were unaware of them. *Berson*, 527 F.3d at 989; *No. 84*
5 *Employer-Teamster Joint Council Pension Trust Fund v. America West*, 320 F.3d 920, 943 n.21
6 (9th Cir. 2003). In *Berson*, the plaintiffs alleged facts which contradicted the defendants’
7 statements about the company’s revenue stream. The company had received four stop-work
8 orders that had a “devastating effect” on the company’s revenue. *Berson*, 527 F.3d at 987. The
9 court permitted an inference of scienter from the defendants’ involvement in the company’s
10 core operations because these facts were of such prominence “that it would be ‘absurd to
11 suggest’ that top management was unaware of them.” *Id.* at 989. *See also Glazer Capital*
12 *Management, LP v. Magistri*, 549 F.3d 736, 744 (9th Cir. 2008) (“there could be circumstances
13 in which a company’s public statements were so important and so dramatically false that they
14 would create a strong inference that at least some corporate officials knew of the falsity upon
15 publication.”)

16 In *Zucco Partners*, the Ninth Circuit held that allegations that senior management
17 closely reviewed quarterly accounting numbers and that top executives analyzed inventory
18 numbers closely “do not support the inference that management was in a position to know that
19 such data was being manipulated.” 552 F.3d at 1000-01. Similarly, the CMC contains no
20 allegations to suggest that any Defendant manipulated the Bank’s financial information or knew
21 of the falsity of the information. *Id.* at 1001.

22 Plaintiffs contend that knowledge of the Company’s true ALL, Provision, loan portfolio,
23 and internal controls and monitoring is imputed to Wu, Shabudin, On, Kerr, Thompson,
24 Gautsch, Mitchell and Nagel as core to the Company’s entire business. (*See Opp. to Shabudin*
25 *Mot.* at 13-14.) Defendants contend that the core operations inference does not apply because
26 the determination of the company’s loan loss reserve and oversight of internal controls and
27 monitoring are not “core” business operations. (*See Shabudin Reply* at 7; *Wu Reply* at 6.)
28 Defendants further argue that there are no allegations beyond his job title and presumed

1 responsibilities to support an inference that Shabudin had knowledge of these operations. (*See*
2 Shabudin Reply at 7-8.) Where the core operations inference is the only basis for scienter,
3 without specific allegations to demonstrate any particular Defendant's actual exposure to
4 information, the CAC lacks particularized facts required under the PSLRA. *South Ferry*, 542
5 F.3d at 784.

6 To support their argument that the core operations inference should support scienter
7 because ALL and Provision are "at the very heart of UCBH's business," Plaintiffs rely on the
8 holdings by the district court in *In re Countrywide Financial Corp. Sec. Litig.*, 588 F. Supp. 2d
9 1132, 1194 (C.D. Cal. 2008) and *In re Countrywide Financial Corp. Deriv. Litig.*, 554 F. Supp.
10 2d 1044, 1066 (C.D. Cal. 2008). (*See* Opp. to Thompson Mot. at 6-9.) The plaintiffs in
11 *Countrywide Sec. Litig.* challenged statements made about loan underwriting standards and
12 overstatements about the quality of the loans. In *Countrywide Sec. Litig.*, the district court held
13 that the core operations inference applied not only to those executives familiar with the
14 operations but to those familiar with financials because "the alleged underwriting quality and
15 credit risk management issues were so fundamental to Countrywide, and on such a broad scale,
16 should have been so apparent that 'it would be difficult to conclude that those Defendants at the
17 top levels of Countrywide management did not know what was going on.'" 588 F. Supp. 2d at
18 1194 (quoting *Countrywide Deriv. Litig.*, 554 F. Supp. 2d at 1066).

19 In *Countrywide Sec. Litig.*, the court determined that the plaintiffs had sufficiently
20 alleged that the statements about loan underwriting standards were at the core of Countrywide's
21 operations. 588 F. Supp. 2d at 1144 ("Core mortgage-related operations accounted for the vast
22 majority of Countrywide's earnings during the class period - 93% of fiscal year ("FY") 2006
23 pretax earnings.") Here, by contrast, Plaintiffs have not sufficiently alleged that the ALL and
24 Provision calculations were part of the Bank's core operations.

25 Furthermore, the allegations of GAAP violations or accounting inaccuracies, without
26 more, do not establish scienter. (*See* Wu Mot. at 7; Thompson Reply at 9.) In *Countrywide*
27 *Sec. Litig.*, the court noted that "[f]inancial accounting is not a science. It addresses many
28 questions as to which the answers are uncertain and is a process that involves continuous

1 judgments and estimates.” 588 F. Supp. 2d at 1175 (quoting *Shalala v. Guernsey Memorial*
2 *Hosp.*, 514 U.S. 87, 100 (1995)). With respect to the accounting allegations supporting the
3 claims under Section 11 of the Securities Act of 1933, the court in *Countrywide Sec. Litig.* held
4 that most of the accounting-related statements were not actionable but recognized certain
5 allegations concerning financial statements related to mortgage quality as actionable. 588 F.
6 Supp. 2d at 1175 n.54 and 1178. In *Countrywide Sec. Litig.*, the court referred to *Countrywide*
7 *Deriv. Litig.* and noted that the allegations supporting the Section 10(b) claim there were subject
8 to the heightened PSLRA standard. “Under those standards, the Court found the
9 accounting-related statements in the *Derivative Litigation* were based on too many subjective
10 evaluations and judgment calls to bolster a ‘strong inference of scienter’ on the facts there
11 alleged.” 588 F.Supp. 2d at 1175 n.54. Similarly, Plaintiffs’ allegations concerning inaccurate
12 accounting of the ALL and Provision appear to require some exercise of accounting judgment
13 rather than basic accounting calculations and do not support a strong inference of scienter as
14 required under the PSLRA. *See Fait v. Regions Fin. Corp.*, 712 F. Supp. 2d 117, 124 (S.D.N.Y.
15 2010) (loan loss reserves reflect management’s opinion as to the likelihood of future loan losses
16 and their magnitude); *In re Taleo Corp. Sec. Litig.*, 2010 WL 597987 at 9-11 (N.D. Cal. Feb.
17 17, 2010).

18 **e. Resignation**

19 The CAC identifies Defendants Wu and Shabudin as the senior executives who were
20 identified in the MLR as being “forced out of the Company because of their involvement in the
21 misconduct.” (CAC ¶ 83g.)

22 Wu cites *Zucco Partners* for the proposition that an officer’s resignation does not
23 support an inference of scienter where Plaintiffs have not alleged “sufficient information to
24 differentiate between a suspicious change in personnel and a benign one.” (Wu Mot. at 6
25 (quoting *Zucco Partners*, 552 F.3d at 1002).) With respect to allegations that Shabudin and Wu
26 resigned, Plaintiffs concede that employee departures, standing alone, do not support a strong
27 inference of scienter, but argue that the combination of Shabudin and Wu’s resignations with
28 allegations that “senior executive officers” were involved in the deliberate misconduct raise a

1 strong inference of scienter. (Opp. to Shabudin Mot. at 13.) Without more specific allegations
2 of which senior executives or “certain Bank Officers” were aware of the alleged misconduct in
3 covering up the bank’s financial deterioration, or “details about the defendants’ access to
4 information within the company,” the CAC fails to support a strong inference of scienter. *South*
5 *Ferry*, 542 F.3d at 785.

6 **f. Contradictory Statements**

7 Plaintiffs contend that Defendants’ competing inference of nonculpability is implausible
8 in the context of allegations that the Company reported its Provision for loan losses in the FY
9 2007 10-K as \$20.2 million which was \$2 million less than the \$22.2 million Provision reported
10 in the Call Report for the same period. (See Opp. to On Mot. at 2; Opp. to Shabudin Mot. at 14;
11 CAC ¶¶ 66, 99, 105-06.) Plaintiffs dispute On’s contention that the FY2007 10-K reports a
12 lower Provision than the Call Report because it reflects unfunded commitments which
13 decreased by about \$2 million. (See On Mot. at 10-11; Opp. to On Mot. at 2-3.) Even in the
14 light most favorable to Plaintiffs, the allegations of inconsistent reporting in the Provision for
15 loan losses do not give rise to a strong inference of scienter. *In re GlenFed.*, 42 F.3d at 1549
16 (“In order to allege the circumstances constituting fraud, plaintiff must set forth facts explaining
17 why the difference between the earlier and the later statements is not merely the difference
18 between two permissible judgments, but rather the result of a falsehood.”).

19 **g. SEC Filings and SOX Certifications**

20 Plaintiffs contend that Wu signed each of the allegedly false SOX certifications and that
21 On signed the false SOX certifications of the 10Qs for 2Q2008 and 3Q2008 and the 2008 10K.
22 (CAC ¶¶ 70, 73, 77, 86, 94.) Allegations that On and Wu signed the SOX certifications, or that
23 the Director Defendants reviewed the financial statements in the SEC filings and PRs, do not
24 support a strong inference that each of those signatories were aware that the information
25 contained in those statements were false, particularly in light of the allegations that the internal
26 investigation reported that information was withheld from or misrepresented to the Bank’s
27 Finance Department.
28

1 amend. Particularly with respect to the Section 20(a) claim against Director Defendants,
2 Plaintiffs must allege specific allegations to establish control person liability by outside
3 directors. *See Howard*, 228 F.3d at 1067 n.13.

4 CONCLUSION

5 For the reasons set forth above, Defendants' motion to dismiss is GRANTED WITH
6 LEAVE TO AMEND. Plaintiffs shall file an amended consolidated complaint by June 24,
7 2011. If the parties determine that any extension of time to file amended pleadings or otherwise
8 respond to the amended complaint is necessary, the parties shall file a stipulation establishing
9 good cause for the extension of time.

10 In future, Defendants may not cross-reference arguments made in other Defendants'
11 briefs. Any Defendant who seeks to rely on arguments made by another Defendant shall file a
12 consolidated brief; Defendants who file a consolidated brief may seek leave of the Court to
13 exceed the page limits set forth in the Court's civil standing orders.

14 The Court admonishes counsel to comply with Civil Local Rule 3-4(c)(2) concerning
15 font requirements for written text, including footnotes. The Court will not consider arguments
16 raised in footnotes that do not conform to the Court's font requirements.

17 The case management conference is hereby set for August 26, 2011, at 1:30 p.m. The
18 parties must file a joint case management conference statement by August 19, 2011.

19 **IT IS SO ORDERED.**

20
21 Dated: May 17, 2011

22 
23 _____
24 JEFFREY S. WHITE
25 UNITED STATES DISTRICT JUDGE
26
27
28