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14 UNITED STATES DISTRICT COURT  
15 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

16 LOU BAKER, individually and on  
behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 SEAWORLD ENTERTAINMENT,  
20 INC., et al.,

21 Defendants.

Case No. 3:14-cv-02129-MMA-AGS

**DEFENDANTS' MEMORANDUM OF  
CONTENTIONS OF FACT AND LAW**

Action Filed: September 9, 2014  
Trial Date: February 18, 2020

Hearing: N/A  
Room: 3D  
Judge: Hon. Michael M. Anello

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**GLOSSARY OF DEFINED TERMS**

The following terms are used herein:

- 1Q13: SeaWorld’s First Fiscal Quarter of 2013, ended March 31, 2013.
- 2Q13: SeaWorld’s Second Fiscal Quarter of 2013, ended June 30, 2013.
- 3Q13: SeaWorld’s Third Fiscal Quarter of 2013, ended September 30, 2013.
- 4Q13: SeaWorld’s Fourth Fiscal Quarter of 2013, ended December 31, 2013.
- 1Q14: SeaWorld’s First Fiscal Quarter of 2014, ended March 31, 2014.
- 2Q14: SeaWorld’s Second Fiscal Quarter of 2014, ended June 30, 2014.
- Blackstone: The Blackstone Group L.P.
- Class Period: August 29, 2013 through August 12, 2014, inclusive.
- Company: SeaWorld.
- Defendants: SeaWorld, James Atchison, James M. Heaney, Marc Swanson, and Blackstone.
- Individual Defendants: James Atchison, James M. Heaney, and Marc Swanson.
- SAC: The Second Amended Consolidated Class Action Complaint filed in this action on May 31, 2016 (ECF No. 123).
- SeaWorld: SeaWorld Entertainment, Inc.
- SEC: United States Securities and Exchange Commission.
- SJ Ruling: *Baker v. SeaWorld Entm’t, Inc.*, 2019 WL 6118448 (S.D. Cal. Nov. 18, 2019).

1 Defendants respectfully submit this Memorandum of Contentions of Fact and Law  
2 in accordance with Local Rule 16.1(f)(2) and the Court’s October 21, 2019 pretrial  
3 scheduling order (ECF 466).<sup>1</sup>

#### 4 **I. OVERVIEW**

5 1. This is a class action suit that asserts securities fraud claims under the  
6 private right of action implied under Section 10(b) of the Securities Exchange Act of  
7 1934 (“Exchange Act”), 15 U.S.C. § 78j and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5,  
8 promulgated thereunder (“Rule 10b-5”). Plaintiffs also allege that Defendants  
9 Blackstone, Atchison, Swanson, and Heaney are “control persons” of SeaWorld and are  
10 secondarily liable under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t (“Section  
11 20(a)”) for the alleged violations of Rule 10b-5. The Class Period in this action runs  
12 from August 29, 2013, when the first alleged misstatement was published, to August 13,  
13 2014, when the Company issued an earnings release that Plaintiffs claim constituted a  
14 corrective disclosure.

15 2. SeaWorld is a theme park and entertainment company. During the Class  
16 Period, the Company owned and operated eleven theme parks in the United States:  
17 SeaWorld Orlando, SeaWorld San Diego, SeaWorld San Antonio, Aquatica Orlando,  
18 Aquatica San Diego, Discovery Cove, Busch Gardens Tampa, Busch Gardens  
19 Williamsburg, Adventure Island, Water Country USA and Sesame Place. SeaWorld has  
20 long been targeted by the animal rights community and the subject of negative publicity,  
21 especially in connection with films such as *Free Willy* and the Academy Award-winning  
22

---

23 <sup>1</sup> Defendants reserve all rights to supplement and amend these disclosures as set forth  
24 below in Defendants’ Amended Rule 26(a)(3) Pre-Trial Disclosures. See ECF No. 479.  
25 Furthermore, Defendants reserve the right to (i) assert additional facts, points of law, and  
26 legal authorities not addressed herein; (ii) not pursue at trial certain contentions addressed  
27 herein; (iii) provide additional factual and/or legal support in connection with Defendants’  
28 proposed pretrial order or other future submissions to the Court; and (iv) respond to other  
matters that may be raised by Plaintiffs or the Court. This memorandum presents key  
facts and legal authorities but is not a comprehensive recitation of each of the facts and/or  
legal authorities supporting Defendants’ contentions.

1 documentary *The Cove*. During the Class Period, James Atchison was Chief Executive  
2 Officer of SeaWorld, Jim Heaney was Chief Financial Officer, and Marc Swanson was  
3 Chief Accounting Officer.

4 3. This case concerns disclosures by the Company regarding the impact of  
5 negative publicity related to *Blackfish*, a film that premiered on January 19, 2013 at the  
6 Sundance Film Festival. *Blackfish* was billed as a documentary and purported to  
7 chronicle the history of a SeaWorld whale that killed trainer Dawn Brancheau in 2010 at  
8 SeaWorld Orlando. In July 2013, the film was released in a small number of theaters in  
9 the United States and Canada. On October 24, 2013, *Blackfish* premiered on CNN.  
10 Thereafter, CNN frequently aired the film and covered it in news reports. In December  
11 2013, *Blackfish* was made available on Netflix in the United States.

12 4. *Blackfish* was widely covered by mainstream media, financial media and  
13 analysts both before and during the Class Period. In 4Q13 and 1Q14, the media reported  
14 that pressure from social media and animal rights activists had led to cancellations by  
15 certain bands and musicians of performances at the Bands, Brew & BBQ event (the  
16 “BBBQ Event”)—a concert series hosted at SeaWorld Orlando and Busch Gardens  
17 Tampa in 1Q14. Analysts also drew attention to the cancellations. It was also widely  
18 known that, beginning in 4Q13, certain of SeaWorld’s partners, sponsors, and co-  
19 promoters began facing pressure on social media to disassociate with SeaWorld. And in  
20 March 2014, a California legislator introduced legislation that proposed a ban on using  
21 orcas for entertainment purposes, which led to a new round of negative publicity.

22 5. SeaWorld disclosed negative publicity related to *Blackfish* as a risk factor in  
23 its SEC filings. When the California legislation was introduced, SeaWorld promptly  
24 added a disclosure concerning the risks posed by the bill to the Company’s business.

25 6. Plaintiffs allege that Defendants made misstatements on six days during the  
26 Class Period. Three of these alleged misstatements concern the factors impacting  
27 attendance trends in 3Q13, 4Q13, and 1Q14 and were disclosed in the Company’s SEC  
28 filings and also addressed on earnings calls. Three are statements to the press in August,

1 November, and December 2013 regarding the impact of *Blackfish* on performance and  
2 attendance. Plaintiffs also challenge a response to an analyst question given by Mr.  
3 Atchison on the Company's fiscal 2013 earnings call, held on March 13, 2014. Plaintiffs  
4 generally allege that statements by the Company that *Blackfish* was not noticeably  
5 impacting attendance or business were false or misleading, as were statements that  
6 attribute attendance trends to factors such as weather rather than negative publicity  
7 related to *Blackfish*.

8 7. None of the challenged statements concern the Company's financial  
9 reporting. Similarly, while Plaintiffs challenge disclosures concerning the reasons for  
10 attendance trends at the Company's parks, Plaintiffs do not allege that the Company  
11 misreported any attendance figures. Plaintiffs also did not conduct any expert or other  
12 analyses regarding the actual causes of attendance trends, and Plaintiffs have not  
13 identified any evidence indicating that the material reasons for attendance trends were  
14 other than those reported by the Company.

15 8. The August 13, 2014 earnings release Plaintiffs claim constituted a  
16 corrective disclosure reported 2Q14 earnings that missed expectations, revised  
17 downwards SeaWorld's 2014 earnings guidance, and explained that attendance in 2Q14  
18 had been impacted by issues including competition in Orlando and "demand pressures  
19 related to recent media attention surrounding proposed legislation in the state of  
20 California." The earnings release did not, however, revise or correct any prior  
21 statements, and the Company has never retracted, modified, or otherwise called into  
22 question the accuracy of any of the challenged disclosures.

23 9. Plaintiffs' damages expert, Mr. Chad Coffman, has opined that \$7.52 of the  
24 drop in SeaWorld's stock price after the alleged corrective disclosure is attributable to the  
25 Company's disclosure of demand pressures resulting from negative publicity, and that  
26 \$1.60 of the drop is attributable to the impact of increased competition. Mr. Coffman has  
27 also opined, using a theory known as "constant dollar inflation," that SeaWorld's stock  
28

1 price was inflated by this same \$7.52 amount during each day in the nearly year-long  
2 Class Period.

3 10. At trial, Plaintiffs will be unable to prove the required elements of  
4 materiality, falsity, and scienter for any of the alleged misstatements. Among other  
5 things, the evidence will show that as public awareness of *Blackfish* increased over the  
6 latter half of 2013, SeaWorld's attendance trends *improved*—driven by its flagship  
7 SeaWorld parks—such that the Company finished the year with strong financial results.  
8 The evidence will also show that SeaWorld and its senior management followed, and  
9 reasonably relied on, established processes in generating and analyzing attendance data  
10 and in making disclosures, and that none of those processes indicated any material impact  
11 from *Blackfish*. And when, in 2Q14, the Company identified a demand impact linked to  
12 publicity around the California legislation, it made appropriate disclosures to its  
13 investors.

14 11. Plaintiffs also will be unable to prove the required elements of loss causation  
15 and damages. Among other things, the evidence will establish that the August 13, 2014  
16 earnings release was not “corrective” of any alleged misstatements. Defendants will also  
17 demonstrate that Mr. Coffman has no factual or economic support for his assertion that  
18 SeaWorld's stock price was inflated by the same \$7.52 amount during each day in the  
19 nearly year-long Class Period.

## 20 **II. CONTENTIONS OF FACT AND LAW**

### 21 **A. Overview of Rule 10b-5 Claims**

22 12. “The required elements for a private securities fraud action are: (1) a  
23 material misrepresentation or omission of fact, (2) scienter, (3) a connection with the  
24 purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss.”  
25 *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008)  
26 (internal quotation marks omitted).

1           **i. Falsity**

2           13. “Liability [in a securities fraud case] depend[s] on the plaintiffs’ success in  
3 demonstrating that one of the statements made by the company was actually false or  
4 misleading.” *In re Convergent Tech. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991).  
5 “Thus, to prevail, the plaintiffs must demonstrate that a particular statement, when read in  
6 light of all the information then available to the market, or a failure to disclose particular  
7 information, conveyed a false or misleading impression.” *Id.* Plaintiffs must show that  
8 the challenged statement was false at the time it was made. *See In re GlenFed, Inc. Sec.*  
9 *Litig.*, 42 F.3d 1541, 1548-49 (9th Cir. 1993); *Khoja v. Orexigen Therapeutics, Inc.*, 899  
10 F.3d 988, 1008 (9th Cir. 2018) (“Falsity is alleged when a plaintiff points to defendant’s  
11 statements that directly contradict what the defendant knew at that time.”). In the case of  
12 securities fraud claims based on alleged omissions, “[d]isclosure is required . . . only  
13 when necessary to make . . . statements made, in the light of the circumstances under  
14 which they were made, not misleading.” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S.  
15 27, 44 (2011) (internal quotation marks omitted). “[C]ompanies can control what they  
16 have to disclose under these provisions by controlling what they say to the market.” *Id.*  
17 at 45.

18           **ii. Materiality**

19           14. A Rule 10b-5 claim requires, among other elements, a false statement or  
20 omission of material fact to investors. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341  
21 (2005). “The materiality of the misrepresentation or an omission depends on whether  
22 there is ‘a substantial likelihood that [it] would have been viewed by the reasonable  
23 investor as having significantly altered the total mix of information made available’ for  
24 the purpose of decisionmaking by stockholders concerning their investments.” *Retail*  
25 *Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d  
26 1268, 1274 (9th Cir. 2017) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32  
27 (1988)). Thus, a plaintiff asserting a claim of securities fraud is required to establish that  
28 the purported false or misleading statement is “a statement or omission that a reasonable



1 investor would have considered significant in making investment decisions.” *Ganino v.*  
2 *Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000). “The role of the materiality  
3 requirement is not to attribute to investors a childlike simplicity but rather to determine  
4 whether a reasonable investor would have considered the omitted information significant  
5 at the time.” *Hillson Partners Ltd. P’ship v. Adage, Inc.*, 42 F.3d 204, 213 (4th Cir.  
6 1994) (internal quotation marks omitted).

7 15. When a plaintiff claims that a statement is rendered false or misleading by  
8 an omission, the omitted fact must be material. *In re Cirrus Logic Sec. Litig.*, 946 F.  
9 Supp. 1446, 1454-55 (N.D. Cal. 1996). “[A] plaintiff must demonstrate that a failure to  
10 disclose particular information conveyed a false or misleading impression.” *Abromson v.*  
11 *Am. Pac. Corp.*, 114 F.3d 898, 902 (9th Cir. 1997). A plaintiff does this by showing  
12 “that there is a ‘substantial likelihood that the disclosure of the omitted fact would have  
13 been viewed by the reasonable investor as having significantly altered the total mix of  
14 information available.’” *In re Apollo Grp. Inc. Sec. Litig.*, 509 F. Supp. 2d 837, 843 (D.  
15 Ariz. 2007) (quoting *Basic*, 485 U.S. at 231-32). “[A] failure to disclose [is] material  
16 only when the company had certain, concrete information contradicting its optimistic or  
17 positive statements.” *Abromson*, 114 F.3d at 902. “Unlike affirmative statements, . . .  
18 omissions in the Rule 10b-5 context must be of material, actual *facts* (such as financial  
19 data) to be actionable.” *Cirrus Logic*, 946 F. Supp. at 1454. Thus, “a plaintiff cannot  
20 demonstrate a material omission on the basis of ‘speculative, nebulous evidence.’”  
21 *Abromson*, 114 F.3d at 902 (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407,  
22 1418 (9th Cir. 1994)).

### 23 **iii. Scierter**

24 16. Scierter must also be proven in order to establish liability under Rule 10b-5.  
25 See *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 975 (9th Cir. 1999). Scierter is  
26 a “mental state embracing intent to deceive, manipulate, or defraud.” *Id.* (quoting *Ernst*  
27 *& Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976)). It involves intentional  
28 conduct and can be shown only if a misleading statement is made with knowledge that it

1 is false or with reckless disregard for the truth. *See In re REMEC Inc. Sec. Litig.*, 702 F.  
2 Supp. 2d 1202, 1237 (S.D. Cal. 2010) (Anello, J.). “Negligence, even if inexcusable, is  
3 not sufficient.” SJ Ruling at 89 (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564,  
4 1569 (9th Cir. 1990) (en banc)).

5 17. Under Ninth Circuit law, “Plaintiffs can ‘establish scienter by proving either  
6 actual knowledge or recklessness.’” *In re REMEC*, 702 F. Supp. 2d at 1237 (internal  
7 quotation marks omitted). Recklessness is “a form of intentional or knowing  
8 misconduct” and “requires a showing of conscious or ‘deliberate recklessness.’” SJ  
9 Ruling at 89 (quoting *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 976-77 (9th  
10 Cir. 1999)). “The Supreme Court has not yet decided whether recklessness suffices to  
11 fulfill the scienter requirement.” SJ Ruling at 89 n.38 (citing *Matrixx Initiatives, Inc.*,  
12 563 U.S. at 48). Defendants contend that recklessness is insufficient, and raise this issue  
13 to preserve it for future appellate review.

14 18. “Plaintiffs must prove scienter as to the Individual Defendants before  
15 imputing it to SeaWorld.” SJ Ruling at 89 (citing *In re Maxwell Techs., Inc. Sec. Litig.*,  
16 18 F. Supp. 3d 1023, 1032 (S.D. Cal. 2014)); *see also In re Apple Comput., Inc.*, 127 F.  
17 App’x 296, 303 (9th Cir. 2005) (holding that a “corporation is deemed to have the  
18 requisite scienter for fraud only if the individual corporate officer making the statement  
19 has the requisite level of scienter at the time he or she makes the statement”). Thus, to  
20 hold SeaWorld liable, Plaintiffs must prove that the relevant corporate officer knew that  
21 the statement at issue was false when made or, at a minimum, acted with conscious and  
22 deliberate, reckless disregard for the statement’s truth.

#### 23 **iv. Reliance**

24 19. Reliance is an essential element of a Rule 10b-5 claim. *Dura Pharm.*, 544  
25 U.S. at 341-42. Indeed, “[r]eliance provides the requisite causal connection between a  
26 defendant’s misrepresentation and a plaintiff’s injury.” *Basic*, 485 U.S. at 243. While  
27 reliance may be presumed under the “fraud-on-the-market theory,” the presumption of  
28 reliance created by the fraud-on-the-market theory can be rebutted. *Id.* at 248-49. “Any



1 showing that severs the link between the alleged misrepresentation and either the price  
2 received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be  
3 sufficient to rebut the presumption of reliance.” *Id.* at 248; *accord In re REMEC*, 702 F.  
4 Supp. 2d at 1262 (“[O]ne way to rebut the fraud-on-the-market theory is to show that the  
5 plaintiff would have bought his stock at the same price had he known the information that  
6 was not disclosed or misrepresented.” (internal quotation marks omitted)); *Zlotnick v. TIE*  
7 *Comm’ns*, 836 F.2d 818, 823 (3rd Cir. 1988) (finding that since plaintiff “decided that  
8 the market price was not an accurate valuation of the stock at the time of his short sale,  
9 we should not presume that it was reasonable for him to rely on the market price at the  
10 time of his purchase”); *In re Safeguard Scis.*, 216 F.R.D. 577, 582 (E.D. Pa. 2003)  
11 (holding defendants rebutted presumption of reliance because Lead Plaintiff was a  
12 position trader “who typically focuses on technical price movements rather than price”);  
13 *Beissinger v. Rockwood Comput. Corp.*, 529 F. Supp. 770, 786-87 (E.D. Pa. 1981)  
14 (finding the presumption of reliance “can even be rebutted by a plaintiff’s own  
15 testimony”).

#### 16 v. Loss Causation

17 20. Federal securities laws are intended “not to provide investors with broad  
18 insurance against market losses but to protect them against those economic losses that  
19 misrepresentations actually cause.” *Dura Pharm.*, 544 U.S. at 345. Accordingly,  
20 plaintiffs must demonstrate loss causation, which is defined “as the plaintiff’s ‘burden of  
21 proving that the act or omission of the defendant alleged to violate this chapter caused the  
22 loss for which the plaintiff seeks to recover damages.’” SJ Ruling at 64 (quoting 15  
23 U.S.C. § 78u-4(b)(4)).

24 21. To establish loss causation, a plaintiff must prove that the company’s stock  
25 price declined as a result of a disclosure of facts that correct the prior misrepresentations,  
26 or reveal the omissions, underlying the alleged artificial inflation of the company’s stock  
27 price. *Dura Pharm.*, 544 U.S. at 343; *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp.  
28 2d 546, 551-53 (S.D.N.Y. 2008). Recovery is limited to “the loss the purchaser sustains

1 when the facts become generally known and as a result share value depreciates.” *Dura*  
2 *Pharm.*, 544 U.S. at 344. Without a corrective disclosure, a plaintiff cannot prove loss  
3 causation. *Id.*

4 22. Plaintiffs’ burden is akin to proving “proximate cause”—“a ‘causal  
5 connection’ between the fraud and the loss [that] trac[es] the loss back to ‘the very facts  
6 about which the defendant lied.’” *Mineworkers’ Pension Scheme v. First Solar Inc.*, 881  
7 F.3d 750, 753 (9th Cir. 2018). The mere fact that a stock price declines after relevant  
8 facts are disclosed is not sufficient to demonstrate loss causation because “lower price  
9 may reflect, not the earlier misrepresentation, but changed economic circumstances,  
10 changed investor expectations, new industry-specific or firm-specific facts, conditions, or  
11 other events, which taken separately or together account for some or all of that lower  
12 price.” *Dura Pharm.*, 544 U.S. at 343. “[T]he ultimate issue is whether the defendant’s  
13 misstatement, as opposed to some other fact, foreseeably caused the plaintiff’s loss.”  
14 *First Solar*, 881 F.3d at 753.

15 23. In addition, Plaintiffs also bear the burden of “distinguish[ing] the alleged  
16 fraud from the ‘tangle of [other] factors’ that affect a stock’s price.” *Omnicom*, 541 F.  
17 Supp. 2d at 553 (quoting *Dura Pharm.*, 544 U.S. at 343). If the company’s stock reacts  
18 to an “entire bundle of negative information,” in order to prove loss causation arising  
19 from a particular item of information within the bundle, a plaintiff must establish that the  
20 decline in price is attributable to the particular piece of information plaintiff maintains  
21 constituted a corrective disclosure of an earlier misrepresentation or omission. *Oscar*  
22 *Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 271 (5th Cir. 2007).

#### 23 **vi. Damages**

24 24. Damages in a Rule 10b-5 case are limited to “the loss the purchaser sustains  
25 when the facts become generally known and as a result share value depreciates.” *Dura*  
26 *Pharm.*, 544 U.S. at 344. In determining the amount that the share value depreciated,  
27 “the non-fraud ‘contributing forces must be isolated and removed.’” *In re Williams Sec.*  
28

1 *Litig.*, 496 F. Supp. 2d 1195, 1264 (N.D. Okla. 2007) (citing *Robbins v. Koger Props.,*  
 2 *Inc.*, 116 F.3d 1141, 1447 n.5 (11th Cir. 1997)).

3 25. To “prove the amount of damages,” a “[p]recise apportionment is needed.”  
 4 *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 726 (11th Cir. 2012). Thus, “a  
 5 jury could properly conclude that (1) the plaintiff proved the defendant’s fraud  
 6 constituted a substantial cause of plaintiff’s loss and so find the defendant liable but (2)  
 7 the plaintiff failed to provide a method to discern by just and reasonable inference the  
 8 amount of plaintiff’s loss solely caused by defendant’s fraud, and so refuse to award the  
 9 plaintiff any damages.” *Miller v. Asensio & Co.*, 364 F.3d 223, 232 (4th Cir. 2004)  
 10 (citation omitted).

11 **B. Factual and Legal Contentions Concerning Plaintiffs’ Rule 10b-5 Claims**

12 **i. Evidence Of SeaWorld’s Performance During The Class Period**  
 13 **Will Undermine Plaintiffs’ Theory Of The Case**

14 26. Documentary and testimonial evidence introduced at trial will show that  
 15 SeaWorld did not experience material negative business impacts related to *Blackfish* or  
 16 associated negative publicity until 2Q14. Prior to 2Q14, the Company was concerned  
 17 about the risks presented by *Blackfish*, but neither the Individual Defendants nor other  
 18 parties responsible for the Company’s disclosures believed that those risks had  
 19 manifested so as to materially impact the Company. The evidence will show that these  
 20 beliefs were sincerely held. In addition, the evidence will show that these beliefs were  
 21 objectively reasonable in light of the Company’s strong performance during the vast  
 22 majority of the Class Period leading up to 2Q14, and the fact that the Company’s  
 23 financial performance and attendance trends improved during the latter half of 2013—the  
 24 period of time relevant to a substantial majority of the alleged misstatements—despite the  
 25 increasing prominence of *Blackfish* and associated negative publicity during the same  
 26 time period.

27 27. The evidence will also show that in 2Q14, SeaWorld experienced significant  
 28 declines in attendance and weak financial performance unlike anything in prior quarters

1 relevant to this action. Contemporaneous internal documents and witness testimony will  
2 demonstrate that the Company acted responsibly and in good faith to ascertain the causes  
3 of this poor performance, including commissioning research into whether *Blackfish*, the  
4 proposed California legislation, and related negative publicity could be a contributing  
5 factor, and that once the Company concluded that negative publicity was materially  
6 impacting demand, the Company timely disclosed the information to the market.

7 28. Significantly, Plaintiffs have not even purported to present any evidence that  
8 any of the internal data maintained by SeaWorld regarding attendance or revenue figures  
9 was misstated. None of Plaintiffs' claims involve allegations that the Company reported  
10 inaccurate or misleading revenue or attendance figures, or otherwise misstated any  
11 financial disclosures. Thus, Plaintiffs will have no basis to challenge at trial any of the  
12 substantial evidence that Defendants will adduce regarding the Company's financial  
13 performance. To the contrary, the uncontested accuracy of the Company's quantitative  
14 disclosures is itself strong evidence that none of the Defendants acted with intent to  
15 mislead or defraud investors during the Class Period.

16 29. In sum, evidence of SeaWorld's performance during the Class Period will  
17 establish that, contrary to Plaintiffs' contention, Defendants did not engage in a  
18 conspiracy to hide the existence of material *Blackfish* impacts, but rather that Defendants  
19 reasonably and in good faith believed that *Blackfish* was not materially impacting the  
20 business when making the contested statements.

21 (a) SeaWorld's 2013 Performance

22 30. The evidence will show that attendance steadily trended upward in the  
23 second half of 2013, even as *Blackfish* increasingly generated publicity. Although annual  
24 overall attendance at the Company was down in 2013 by 4.1 percent, due in part to  
25 pricing strategies aimed at reducing free admission and certain discounts, attendance  
26 trends improved steadily throughout the second half of the year. Specifically, after  
27 dropping by 9.5 percent in 2Q13, attendance improved significantly—with only a 3.6  
28 percent drop—in 3Q13, followed by a 1.4 percent drop in 4Q13 as compared to the prior

1 year. This was true even after *Blackfish* aired to a nationwide audience on CNN early in  
2 4Q13.

3 31. SeaWorld disclosed in its fiscal year 2013 SEC filings that: (i) the Company  
4 met its 2013 guidance, (ii) for full-year 2013, the Company achieved record revenue of  
5 \$1,460.3 million and record Adjusted EBITDA of \$439.1 million; (iii) 2013 revenue was  
6 up 3% versus prior year, Adjusted EBITDA was up 6% over prior year; and (iv) Adjusted  
7 Free Cash Flow was up 52% over prior year. SeaWorld also disclosed that the  
8 SeaWorld-branded parks experienced their highest-ever attendance levels in 4Q13.

9 32. The evidence will show that SeaWorld Orlando and SeaWorld San Diego  
10 had particularly strong performances, [REDACTED]  
11 [REDACTED]  
12 [REDACTED], Plaintiffs will  
13 be unable to establish that SeaWorld San Antonio, the Company's smallest SeaWorld-  
14 named park, was uniquely vulnerable to impacts from *Blackfish*-related negative  
15 publicity. To the contrary, the evidence will show that SeaWorld San Antonio was  
16 particularly *unlikely* to suffer any *Blackfish*-related attendance impacts. This disconnect  
17 between on-the-ground performance and susceptibility to *Blackfish*-related negative  
18 publicity will demonstrate the implausibility of Plaintiffs' claims. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 33. While Plaintiffs have no evidence that calls any of these quantitative  
24 financial performance disclosures into question, Defendants expect that Plaintiffs will  
25 attempt to argue that the Company's strong performance does not negate an inference  
26 that *Blackfish* materially impacted SeaWorld's attendance. These arguments are not  
27 supported by the evidence. First, Plaintiffs will likely attempt to present evidence  
28 showing that the Company only achieved these record results at the SeaWorld branded

1 parks because SeaWorld added a new park—Aquatica San Diego—in 2013. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 34. Second, Plaintiffs will likely attempt to prove that SeaWorld’s failure to  
6 meet internal budget projections demonstrates that *Blackfish* had a material negative  
7 impact on the Company’s results. But there is no internal evidence connecting budget  
8 shortfalls to *Blackfish*. To the contrary, the evidence will show that the Company  
9 connected its budget shortfalls to issues with the Company’s pricing strategy. Moreover,  
10 the securities laws “do not obligate companies to disclose their internal forecasts,” or  
11 whether they attained or failed to reach those internal forecasts, to the market. *In re N.*  
12 *Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 458 (S.D.N.Y. 2000); *see also Fosbre v.*  
13 *Las Vegas Sands Corp.*, 2017 WL 55878, at \*4, \*8 (D. Nev. 2017) (failure to meet “an  
14 internal timeline” and “an internal . . . budget” did not make statements that plans were in  
15 “progress” and being “steadily execute[d]” false).

16 35. Third, Plaintiffs will argue that attendance was inflated by “unprecedented”  
17 discounted tickets in 2013. But there is no evidence that the discounts—only in place at  
18 SeaWorld Orlando and Busch Gardens Tampa—were intended to counteract *Blackfish*,  
19 nor that they were unprecedented. Instead, the evidence will show that the discounted  
20 tickets were part of the Company’s ongoing efforts to optimize pricing, following  
21 substantial price increases and cancellations of promotions involving free and reduced-  
22 price attendance earlier in the year. [REDACTED]

23 [REDACTED]

24 [REDACTED] In any event,  
25 Plaintiffs’ attempt to characterize SeaWorld’s use of discounts and promotions to meet  
26 financial targets as evidence of fraud or impropriety is contrary to law. *See In re Bristol-*  
27 *Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 566 (S.D.N.Y. 2004) (“Offering  
28 incentives to meet sales or earnings goals is a common practice . . . .”); *In re ICN Pharm.*,



1 *Inc. Sec. Litig.*, 299 F. Supp. 2d 1055, 1061 (C.D. Cal. 2004) (an issuer’s “business  
2 decision to offer discounts to reach its sales targets” is not actionable).

3 36. Documentary evidence and witness testimony will further show that senior  
4 management did not believe *Blackfish* was impacting performance during 2013. For  
5 example, a December 7, 2013 email exchange among the park presidents of the  
6 SeaWorld-named parks—Terry Prather, John Reilly and Dan Decker—illustrates this  
7 point. Mr. Prather asked: “[w]ith all of the latest media coverage we are getting I was  
8 wondering what you guys are dealing with?” Mr. Reilly responded: “[w]e are fine. No  
9 effect on our business we can see. Protests but they were not coming anyway.” Mr.  
10 Prather agreed: “No impact on business. Just working on controlling the number of  
11 bands that cancel for our concert series.” This email is one of many internal documents  
12 reflecting the view that, while *Blackfish* was a public relations concern that presented  
13 risks to SeaWorld’s business, the Company did not believe that those risks had  
14 manifested or that the film was materially impacting the Company’s attendance or bottom  
15 line.

16 (b) SeaWorld’s 1Q14 Performance

17 37. [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 38. Ultimately, attendance in 1Q14 declined by [REDACTED]  
22 (13%). Much of this was anticipated due to the shift of the Easter holiday from the first  
23 to the second quarter versus the prior year. The evidence will further show that the  
24 Company understood that overall 1Q14 attendance was down for reasons unrelated to  
25 *Blackfish*. [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]

2 [REDACTED] Furthermore,  
3 the first quarter of the year—which, due to the seasonal nature of the Company’s  
4 business, is traditionally the quarter with the lowest attendance figures—has limited  
5 significance and is not a good indicator of the Company’s overall prospects. The  
6 evidence will show that analysts and investors understood this.

7 39. Moreover, although the media continued to report extensively on *Blackfish*,  
8 the evidence will show that senior management had reason to believe that the negative  
9 publicity associated with the film had not meaningfully impacted performance to date  
10 and, in any event, would subside. In January 2014, SeaWorld learned that *Blackfish* did  
11 not receive an Oscar nomination, and in February 2014 SeaWorld learned that *Blackfish*  
12 did not win a BAFTA award. Executives believed that the momentum *Blackfish* had  
13 generated in 4Q13 was on the decline. Analysts and investors held the same views.  
14 Indeed, the evidence will show that the BBQ Event moved forward with success.

15 40. While SeaWorld executives were concerned following the introduction of  
16 proposed California legislation late in 1Q14, there is no evidence that SeaWorld  
17 executives had knowledge of material impacts from *Blackfish*. The evidence will show  
18 that SeaWorld promptly added risk disclosure regarding the potential impact of the  
19 legislation in the Company’s Form 10-K and conducted specific research to monitor any  
20 potential impact from the proposed legislation.

21 41. Plaintiffs may attempt to show liability for alleged misstatements or  
22 omissions in 1Q14 by pointing to [REDACTED]  
23 [REDACTED]. The evidence will show,  
24 however, that at this point, with SeaWorld’s traditionally busiest season still ahead of it,  
25 similar concerns were not expressed regarding the other parks.

26 42. On March 13, 2014, SeaWorld announced that, for the full year of 2014, it  
27 expected to generate revenue in the range of \$1.490 billion to \$1.520 billion and Adjusted  
28



1 EBITDA in the range of \$450 million to \$465 million. On May 14, 2014, SeaWorld  
2 reaffirmed this guidance.

3 (c) SeaWorld's 2Q14 Performance

4 43. [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] SeaWorld disclosed demand issues related to  
15 SeaWorld San Diego and Orlando when it reported its 2Q14 results.

16 44. The evidence will show that when the Company's parks had poor attendance  
17 on Memorial Day weekend of 2014, SeaWorld employees expressed concern unlike  
18 anything in earlier internal documents. [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 45. The evidence will show that, following this unexpected attendance decline,  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED] Thus, the evidence will show that once a demand  
28

1 shortfall was identified, SeaWorld sought to understand—not bury—a potential problem,  
2 and made timely and proper disclosures to investors.

3 (d) Plaintiffs’ Evidence Of Business Impacts

4 46. Defendants anticipate that Plaintiffs will attempt to prove that *Blackfish* had  
5 a material financial impact on the Company during the Class Period through evidence of  
6 incremental costs incurred by the Company related to *Blackfish*, such as costs associated  
7 with public relations efforts aimed at countering *Blackfish*-related negative publicity.  
8 Plaintiffs have not alleged that the Company failed to properly account for these costs in  
9 its financial disclosures. Instead, Defendants expect that Plaintiffs will attempt to prove  
10 that statements that the film was not having a material impact on its business were false  
11 or misleading because the Company was incurring contemporaneous costs associated  
12 with *Blackfish*.

13 47. However, the evidence will show that the impacts Plaintiffs have  
14 purportedly identified, standing alone or taken together, were not material to SeaWorld.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 48. Other costs associated with cancelled promotions or catering events on  
22 which Plaintiffs rely are similarly immaterial. [REDACTED]

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 These incremental additional costs are immaterial whether viewed individually or in the  
3 aggregate.

4 49. The evidence will also show that the market was well aware that SeaWorld  
5 was expending time and resources addressing and responding to *Blackfish*. Indeed, the  
6 December 20, 2013 *Orlando Sentinel* article containing one of the alleged misstatements  
7 at issue in this case reported that SeaWorld was “launching a more aggressive  
8 counterattack” on *Blackfish* that included “full-page ads in eight of the country’s largest  
9 newspapers” and “could soon be followed by an online campaign,” all of which  
10 “suggest[ed] that the company . . . is concerned about potential long-term brand damage  
11 from ‘Blackfish.’” Similarly, on the March 13, 2014 earnings call that contains further  
12 alleged misstatements, Mr. Atchison explained that SeaWorld was continuing to monitor  
13 *Blackfish* and to take “proactive efforts around communicating with our guests and  
14 business partners and others” regarding the film and its related publicity.

15 50. This and other evidence will plainly show that reasonable investors did not  
16 interpret the Company’s statements regarding *Blackfish*’s lack of business impact as  
17 denials that the Company had incurred *any* costs in attempting to counter the film. To the  
18 contrary, investors and analysts were well aware that, among other things, SeaWorld had  
19 commenced a highly publicized ad campaign in response to *Blackfish* during the Class  
20 Period. The market fully expected and understood that such costs were being incurred  
21 and did not view such costs as *per se* material just because they were associated with  
22 *Blackfish*.

23 51. Plaintiffs will likely argue that misstatements regarding “quantitatively  
24 small” financial impacts can nonetheless be material because materiality “requires  
25 assessment of qualitative and quantitative factors so that even quantitatively small  
26 amounts can still present a materially misleading picture of a company’s health.” *SEC v.*  
27 *Yuen*, 2006 WL 1390828, at \*37 (C.D. Cal. Mar. 16, 2006). But *Yuen* and similar  
28 authorities stand for the uncontroversial and irrelevant proposition that a *financial*

1 *misstatement* in an SEC filing may be material even if quantitatively small if, for  
2 instance, the misstatement permits the company to reach an earnings target it otherwise  
3 would have missed. *See id.* (addressing materiality of quantitatively small earnings  
4 misstatement that “allowed [the defendant] to meet . . . financial targets”). No similar  
5 allegations or evidence exist here.

6 **ii. Plaintiffs Will Be Unable To Prove Their Claims Concerning**  
7 **Disclosures Regarding Factors Impacting Attendance**

8 52. Three of the challenged statements in this case are disclosures in SeaWorld’s  
9 SEC filings and earnings releases that attributed attendance declines to factors including  
10 pricing, weather, and the timing of holidays. Specifically, (i) SeaWorld’s 3Q13 SEC  
11 filings, filed on November 13, 2013, attributed attendance declines of 4.7% (first nine  
12 months) and 3.6% (3Q13) to factors including new pricing and yield management  
13 strategies, adverse weather and unfavorable timing of Easter and spring break; (ii) a 4Q13  
14 and fiscal year 2013 press release issued on March 13, 2014 attributed attendance  
15 declines of 1.4% (4Q13) and 4.1% (2013) to these same factors; and (iii) SeaWorld’s  
16 1Q14 SEC filings, filed on May 14, 2014, attributed attendance declines of 13% to  
17 factors including adverse weather and the shift of the Easter holiday from the first to the  
18 second quarter. In addition, Plaintiffs challenge substantially similar spoken statements  
19 made on earnings calls in which SeaWorld representatives restate for call participants the  
20 relevant attendance factor disclosures. Plaintiffs claim that these statements were  
21 materially misleading because they did not disclose any attendance impact related to  
22 *Blackfish*. Plaintiffs will not be able to prove these claims as to any of these statements.

23 53. The evidence will show that SeaWorld had a comprehensive disclosure  
24 process and reasonably evaluated factors potentially impacting its attendance. SeaWorld  
25 monitored the reasons for attendance declines throughout the Class Period. Like other  
26 public theme park companies, SeaWorld publicly reported quarterly attendance, revenue,  
27 and other financial metrics on an aggregate basis across all of its parks. Plaintiffs will be  
28

1 unable to demonstrate that the disclosures that resulted from this process were the  
2 product of fraud.

3 (a) SeaWorld’s Attendance Driver Analyses

4 54. William Joshua Powers, SeaWorld’s then-Director of Budgeting and  
5 Forecasting, was responsible for analyzing the impact of various factors on attendance,  
6 which were ultimately reported to investors. [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 [REDACTED] Defendants’ expert witness Karl Holz, a veteran  
16 executive of the theme park industry, will testify that the factors SeaWorld considered in  
17 these attendance driver analyses are factors that are understood by theme park  
18 professionals as relevant to park performance.

19 55. [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 56. In addition, the evidence will show both that Mr. Powers acted in good faith  
27 in creating the Attendance Analyses, and that no other person—whether an Individual  
28 Defendant or otherwise—directed Mr. Powers to conduct, or refrain from conducting,

1 any analyses as a result of concerns regarding potential *Blackfish* impact, otherwise  
2 pressured Mr. Powers to perform his calculations in any particular fashion, or caused the  
3 Company to report a result that was inconsistent with these analyses. The Individual  
4 Defendants’ testimony will corroborate this evidence and will also establish that the  
5 Individual Defendants relied in good faith on Mr. Powers’ attendance analyses. Plaintiffs  
6 will not be able to present any material, contradictory evidence, and without such  
7 evidence, this bottoms-up fact pattern—in which the challenged statements or their inputs  
8 were prepared by both internal and external professionals—“is inconsistent with a fraud  
9 orchestrated or deliberately ignored by the top officers of the corporation.” *In re PETCO*  
10 *Corp. Sec. Litig.*, 2008 WL 8876554, at \*6 (S.D. Cal. Apr. 29, 2008); *In re REMEC*, 702  
11 F. Supp. 2d at 1241-42 (no scienter where executive relied on “bottoms-up” procedures  
12 and the “competence and expertise” of lower level employees).

13 57. Plaintiffs’ claims regarding these disclosures will also fail because Plaintiffs  
14 will be unable to offer any evidence—whether documentary evidence, lay witness  
15 testimony, or expert opinion—that the factors identified in Mr. Powers’ analyses as  
16 material attendance drivers were incorrect. Plaintiffs also will not be able to offer any  
17 evidence that the Company’s attendance driver analyses deviated from industry or other  
18 professional standards. There is no evidence that any such industry or professional  
19 standards were in place and the Court excluded the testimony of Plaintiffs’ proffered  
20 expert Dr. James Gibson, who (among other methodological deficiencies) had attempted  
21 to apply inapposite academic research standards studies to the Company’s attendance  
22 analyses.

23 58. Even if Plaintiffs are able to present evidence that convinces the jury that  
24 Mr. Powers’ attendance analyses were inadequate in some respect, this will be  
25 insufficient to prove scienter. The jury will intuitively understand the difficulties  
26 inherent in measuring consumer sentiment and in attempting to ascertain the reasons why  
27 the unknown individuals who did not visit SeaWorld parks at a particular point in time in  
28 fact chose not to do so. Thus, even if the jury comes to agree with Plaintiffs’ criticisms

1 of Mr. Powers’ analyses, the “[f]ederal securities laws do not create a cause of action for  
2 corporate mismanagement that is not accompanied by deception.” *In re Impac Mortg.*  
3 *Holdings, Inc. Sec. Litig.*, 554 F. Supp. 2d 1083, 1094 (C.D. Cal. 2008); *see also In re*  
4 *Guess?, Inc. Sec. Litig.*, 174 F. Supp. 2d 1067, 1078 (C.D. Cal. 2001) (finding no support  
5 for inference that failure to anticipate future costs “was attributable to fraud, rather than a  
6 lack of caution, a lack of solid information, . . . or a momentary surplus of hubris”).

7 59. Defendants expect Plaintiffs will attempt to prove recklessness by pointing  
8 to the absence of evidence of a 4Q13-specific attendance drivers analysis. Plaintiffs may  
9 attempt to convince the jury that the reporting of attendance drivers for this period was  
10 reckless in the absence of evidence of an analysis specifically covering 4Q13. However,  
11 the evidence will show that overall attendance in 4Q13 declined only minimally, by 1.4%  
12 year-over-year, and that the flagship SeaWorld parks in San Diego and Orlando  
13 experienced record performance during this quarter. Given these facts, it was reasonable  
14 for the Company to conclude that the same attendance trends that had been in play in  
15 prior quarters remained relevant, and that no new, material negative driver of attendance  
16 had appeared since the past quarter. Even if Plaintiffs convince the jury that best  
17 practices would have required a robust analysis of this 1.4% year-over-year decline—or  
18 even that the absence of evidence of such an analysis is evidence of negligence—that will  
19 not suffice to meet Plaintiffs’ burden to prove that the Company acted with deliberate  
20 recklessness or fraudulent intent.

21 60. Finally, Plaintiffs may attempt to argue that the Company’s 1Q14  
22 disclosures of factors impacting attendance, made on May 13, 2014, were false or  
23 misleading because [REDACTED]

24 [REDACTED]  
25 [REDACTED]  
26 These concerns, however, related to performance during 2Q14, not 1Q14, and the  
27 Company’s statements regarding attendance concerned historical performance and the  
28 impact of the shift of Easter from the first to the second quarter. These statements were

1 consistent with the attendance driver analyses conducted by Mr. Powers, which, as  
2 discussed above, were conducted reasonably and in good faith. Moreover, the May 2014  
3 statements at issue in this case did not speak to whether *Blackfish*-related publicity was  
4 impacting the Company's business, or to the Company's anticipated performance in the  
5 upcoming second quarter.

6 (b) SeaWorld's Reporting And Disclosure Processes

7 61. The evidence also will show that SeaWorld maintained a comprehensive  
8 process and controls designed to ensure the integrity of its SEC filings and disclosures.  
9 This evidence will further undercut Plaintiffs' attempts to prove to the jury that  
10 SeaWorld's disclosures concerning attendance drivers were both false and made with  
11 scienter.

12 62. [REDACTED]

25 63. [REDACTED]



1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]

6 64. Plaintiffs will be unable to show that Defendants took steps to avoid  
7 discovering a *Blackfish*-related attendance impact, or changed or manipulated their  
8 internal processes in order to conceal or prevent disclosure of unfavorable information  
9 regarding *Blackfish* at any point in the Class Period. [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 [REDACTED] Consistent with this, the  
20 Individual Defendants will testify that they relied on the Disclosure Committee process,  
21 and the evidence will show that neither the Individual Defendants nor any other person  
22 interfered with the Disclosure Committee or instructed it to reach a particular result.

23 65. In addition to the attendance drivers analyses and Disclosure Committee  
24 process, [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]



(c) SeaWorld’s Risk Factor Disclosures

66. Evidence of SeaWorld’s robust risk disclosures regarding *Blackfish* will also demonstrate that SeaWorld took its reporting and disclosure obligations seriously during the Class Period and did not attempt to conceal or improperly minimize the risks presented by negative publicity resulting from *Blackfish*.

67. After *Blackfish* premiered at the Sundance Film Festival, SeaWorld updated its SEC filings to include the following risk factor disclosures:

An accident or an injury at any of our theme parks . . . that receives media attention, is the topic of a book, film, **documentary** or is otherwise the subject of public discussions, may harm our brands or reputation, cause a loss of consumer confidence in [SeaWorld], reduce attendance at our theme parks and negatively impact our results of operations. Such incidents have occurred in the past and may occur in the future. . . . The considerable expansion in the use of social media over recent years has compounded the impact of negative publicity.

\* \* \*

[I]n February 2010, a trainer was killed while engaged in an interaction with a killer whale. Following this incident, we were subject to an inspection by the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA), which resulted in three citations concerning alleged violations of the Occupational Safety and Health Act and certain regulations thereunder. . . . [T]his incident has been the subject of significant media attention, including television and newspaper coverage, a **documentary** and a book, as well as discussions in social media. This incident and similar events that may occur in the future may harm our reputation, reduce attendance and negatively impact our business, financial condition and results of operations.

68. The evidence will show that SeaWorld continued to update these disclosures, and added additional disclosures, as events associated with *Blackfish*

1 developed. On December 12, 2013, SeaWorld modified its disclosures to add that the  
2 death of Ms. Brancheau “continues to be” the subject of significant media attention. And  
3 after a California state legislator proposed a ban on holding in captivity or using wild-  
4 caught or captive-bred orcas for performance or entertainment purposes on March 7,  
5 2014, the Company further updated the Risk Factors in its 2013 Form 10-K, filed on  
6 March 21, 2014:

7 This incident has also been and continues to be the subject of  
8 significant media attention, including *extensive* television and  
9 newspaper coverage, a documentary and a book, as well as  
10 discussions in social media.

11 “Future amendments to existing statutes, regulations and treaties  
12 or new statutes, regulations and treaties may potentially restrict  
13 our ability to maintain our animals, or to acquire new ones to  
14 supplement or sustain our breeding programs or otherwise  
15 adversely affect our business. *For instance, in March of 2014 a*  
16 *bill was proposed by a California lawmaker that seeks to*  
17 *restrict our ability to display certain animals in that state.*

18 Additionally, from time to time, animal activist and other third-  
19 party groups may make claims before government agencies,  
20 bring lawsuits against us, *and/or attempt to generate negative*  
21 *publicity associated with our business. Such activities*  
22 sometimes are based on allegations that we do not properly care  
23 for some of our featured animals. On other occasions, such  
24 *activities* are specifically designed to change existing law or  
25 enact new law in order to impede our ability to retain, exhibit,  
26 acquire or breed animals. . . . In addition, negative publicity  
27 *associated with such activities* could adversely affect our  
28 reputation and results of operations.”

23 **iii. Plaintiffs Will Be Unable To Prove Their Claims Concerning**  
24 **Statements To The Press**

25 (a) The August 29, 2013 *Los Angeles Times* Article

26 69. On August 29, 2013, the *Los Angeles Times* published an article which  
27 quoted an email from SeaWorld’s Vice President of Corporate Communications, Fred  
28

1 Jacobs, stating that “*Blackfish* has had no attendance impact.”<sup>2</sup> This article followed up  
2 on an article published by *Bloomberg* on August 28, 2013 titled *SeaWorld Drops After*  
3 *Cutting Prices Amid Visitor Decline*, which discussed, *inter alia*, “negative publicity  
4 from a critical documentary over the use of killer whales in its theme parks.”<sup>3</sup> The  
5 *Bloomberg* article quoted another email sent by Mr. Jacobs stating, among other things,  
6 that the Company “can attribute no attendance impact at all from the movie.” Plaintiffs  
7 claim that this statement was materially false, and thus that *Blackfish* was already having  
8 a material impact on attendance at SeaWorld as of August 2013.

9 70. Plaintiffs will not be able to meet their burden of proving that *Blackfish* was  
10 having a material negative impact on SeaWorld’s attendance as of the end of August  
11 2013. To the contrary, the evidence will show that as of August 29, 2013, *Blackfish* was  
12 shown only in film festivals and select theaters in limited locations after it was released  
13 on July 19, 2013. It would not be broadcast to a national audience in the United States  
14 until October 2013. There is no evidence that SeaWorld parks were experiencing unusual  
15 or unexplained attendance or revenue declines at the time. Instead, the evidence will  
16 show that in 3Q13, when the statements were made, the Company’s attendance trends  
17 were improving, including at the flagship SeaWorld parks.

18 71. Other than letters and emails purporting to be from consumers criticizing  
19 SeaWorld and “claiming they would never visit a SeaWorld park again because of  
20 *Blackfish*,” *see* SJ Ruling at 78, Plaintiffs have identified no evidence that could even  
21  
22  
23

24 <sup>2</sup> In its Summary Judgment Ruling, the Court noted that “Plaintiffs contend that  
25 SeaWorld, through Jacobs, is the speaker of [these] August 2013 statements.” SJ Ruling  
at 77 n.29.

26 <sup>3</sup> Mr. Jacobs’ statement reported in *Bloomberg* that “[SeaWorld] can attribute no  
27 attendance impact at all to the movie” is no longer in the case. The Court ruled that since  
28 the *Bloomberg* article was published on “August 28, 2013, one day prior to the start of the  
class period . . . it is not actionable.” SJ Ruling at 77 & n.30.

1 lead to the inference that *Blackfish* had any attendance impact as of August 29, 2013.<sup>4</sup> As  
2 set forth in Defendants’ pending Motion *in limine* No. 7, those letters and emails are  
3 inadmissible as evidence that any person had actually made the decision not to visit  
4 SeaWorld due to *Blackfish*: they are hearsay statements made by unknown persons who  
5 may or may not actually exist. And apart from those inadmissible materials, all Plaintiffs  
6 have identified as ostensible proof of falsity is the absence of SeaWorld-commissioned  
7 studies specifically assessing *Blackfish* impact, and internal communications that suggest  
8 potential uncertainty regarding attendance declines without mentioning *Blackfish* as a  
9 possible cause. *See* SJ Ruling at 78.

10 72. Plaintiffs, however, will not be able to prove their case by putting to the side  
11 whether the Company’s statements were actually true or false and instead attempting to  
12 show that the Company had not conducted robust research studies to support causal  
13 statements regarding attendance. The truth of the latter proposition, even if established,  
14 does not demonstrate the falsity of the Company’s statements. And while this Court  
15 concluded that Plaintiffs’ claims survived summary judgment in part by analogy to  
16 *Matrixx Initiatives*, 563 U.S. at 49, in which “the defendant issued a press release  
17 suggesting certain studies had confirmed information when, in fact, no such studies  
18 existed,” *see* SJ Ruling at 93, there are crucial differences between statements by a  
19 pharmaceutical company regarding the results of clinical trials into drug side effects (as  
20 in *Matrixx*), and statements by a theme park operator reflecting its views on trends  
21 impacting customer attendance. Defendants are confident that the jury will reach the  
22 conclusion that holding entertainment businesses to the same standards of scientific rigor  
23 when discussing factors impacting their business as pharmaceutical firms are held to  
24 when discussing the results of clinical trials is unrealistic and contrary to investors’  
25 expectations and behavior.

26  
27 <sup>4</sup> In its Summary Judgment Ruling, the Court rejected Plaintiffs’ attempt to rely on  
28 documents that “were not prepared until months after the August 2013 statement” as  
evidence of an attendance impact at this time. SJ Ruling at 78 n.31.

1           73. The evidence will also show that Defendants did not make the August 29,  
2 2013 statement with scienter. As discussed in Defendants' pending Motion *in limine* No.  
3 4, the evidence will show that this statement was the result of a process in which Mr.  
4 Jacobs forwarded a reporter's questions to certain members of SeaWorld senior  
5 management for feedback, received responses from senior management, including "that  
6 [*Blackfish*] has had no notable impact on our business," and formulated a draft response  
7 which was then subject to further review and comment by management. That draft  
8 formed the basis of the Company's statement to the *Los Angeles Times*, which stated in  
9 relevant part: "As we were very clear with Bloomberg, we are not 'slashing prices'  
10 period. *Blackfish* has had no attendance impact." Plaintiffs have no evidence that any of  
11 the members of senior management who participated in formulating this response acted  
12 with scienter, and the Individual Defendants will testify credibly to the contrary at trial.  
13 And, for the reasons set forth in Defendants' Motion *in limine* No. 4, Mr. Jacobs'  
14 subsequent testimony that he purportedly did not believe this statement was true cannot  
15 form the basis for a finding of scienter against the Company, because Mr. Jacobs lacked  
16 responsibility for the contents of this statement and instead, in his role as communications  
17 officer, conveyed to the press the genuinely-held views of management. It is their intent  
18 that matters, not Mr. Jacobs'.

19           74. Even if the Court decides to permit the introduction of Mr. Jacobs'  
20 deposition testimony regarding his state of mind (and for the reasons articulated in  
21 Defendants' Motion *in limine* No. 4, it should not), that testimony, despite its improper  
22 and prejudicial nature, will not suffice to establish scienter on the part of the Company.  
23 Mr. Jacobs' intent cannot be imputed to the Company. Moreover, Mr. Jacobs' testimony  
24 also establishes that he believed his statements were inaccurate because he read them to  
25 be "unequivocal," not because he was aware of any actual impact from *Blackfish*:

26                   For this statement to be true, not a single person who was  
27                   contemplating a visit to SeaWorld and changed their mind  
28                   because of *Blackfish* came. That -- so the statement is  
                    unequivocal and I just can't conceive that it isn't -- you know,



1 that there wasn't at least one person out there who changed their  
2 mind about visiting SeaWorld because of *Blackfish*.

3 75. Similarly, Mr. Jacobs also testified at his deposition that he did not believe  
4 *Blackfish* had a material impact on attendance at times both before and after the August  
5 2013 statements. He testified that he could not identify a single person who did not come  
6 to SeaWorld because of *Blackfish*. In addition, Defendants will have no difficulty  
7 establishing at trial that Mr. Jacobs was not involved in SeaWorld's reporting and  
8 disclosure processes and possessed no knowledge of SeaWorld's attendance analyses.  
9 Thus, Mr. Jacobs' belief that "unequivocal" statements regarding attendance were  
10 rendered untrue because "at least one person" would have decided not to visit SeaWorld  
11 due to *Blackfish* will not suffice to show falsity, materiality, or scienter. The securities  
12 laws do not "attribute to investors a childlike simplicity," but rather focus on what "a  
13 reasonable investor would have considered . . . significant at the time." *Hillson Partners*,  
14 42 F.3d at 213. In keeping with this, the jury will readily comprehend that no reasonable  
15 investor took SeaWorld's statements regarding attendance impact as absolute assurances  
16 regarding the behavior of every single person who might potentially consider visiting  
17 SeaWorld.

18 (b) The November 14, 2013 Wall Street Journal Article

19 76. Plaintiffs claim that a November 14, 2013 article published by the *Wall*  
20 *Street Journal* contained a false or misleading statement by Mr. Atchison. The  
21 challenged statement provides: "I scratch my head if there's any notable impact from this  
22 film [*i.e.*, *Blackfish*] at all, and I can't attribute one to it," and "[i]ronically, our  
23 attendance has improved since the movie came out."

24 77. The evidence will show that this statement was not materially false or  
25 misleading, particularly when its context is considered. The *Wall Street Journal* article,  
26 titled *SeaWorld Profit Up 30%; Downplays 'Blackfish' Effect: Company Reported*  
27 *Growth in Revenue Per Visitor and Positive Attendance Trends*, focuses on the negative  
28 publicity SeaWorld was experiencing as a result of *Blackfish*. It states that "[a]ttendance

1 trends showed improvement during the quarter, even as the company contends with  
2 negative publicity regarding its namesake parks' killer whales," and that while "third-  
3 quarter attendance was down 3.6%, that marked an improvement from the 9.5% decline  
4 posted for the second quarter." The article notes that "[t]he company has faced a public-  
5 relations uproar following killer whale trainer Dawn Brancheau's 2010 death, which  
6 recently has been stepped up as the documentary film 'Blackfish' gains exposure to a  
7 broader audience." The article also explains that while SeaWorld "has been criticized for  
8 its response so far to the controversy surrounding the film," Mr. Atchison believes the  
9 Company "still hasn't felt much impact from the film":

10 "I scratch my head if there's any notable impact from this film  
11 at all, and I can't attribute one to it," the CEO said in an  
12 interview, adding: "Ironically, our attendance has improved  
13 since the movie came out."

14 "Blackfish" debuted at the Sundance Film Festival earlier this  
15 year and began a limited theatrical run in July. The film is now  
16 available on DVD and aired late last month on CNN.

17 According to Mr. Atchison, October was the company's best-  
18 performing month this year, adjusted for seasonality, and  
19 November "is following similarly."

20 78. The evidence will show, consistent with the information reported in this  
21 *Wall Street Journal* article, that the market clearly understood *Blackfish* was generating  
22 negative publicity, but that at this point, SeaWorld's financial performance was in line  
23 with or exceeded expectations—something Plaintiffs do not challenge—and thus had not  
24 been materially affected by the film. The evidence will also show that reasonable  
25 investors did not interpret Mr. Atchison's qualified statement as an unequivocal  
26 representation that *Blackfish* had absolutely no impact on the Company. Indeed, the  
27 article itself paraphrased Mr. Atchison's challenged comments in terms of *Blackfish* not  
28 having had "much impact."



1 (c) The December 20, 2013 *Orlando Sentinel* Article

2 79. Plaintiffs claim that a December 20, 2013 article published by the *Orlando*  
3 *Sentinel* contained a false or misleading statement by Mr. Atchison. The challenged  
4 statement provides that: “As much data as we have and as much as we look, I can’t  
5 connect anything really between the attention that the film has gotten and any effect on  
6 our business.” Plaintiffs will similarly be unable to prove that this statement constituted  
7 securities fraud.

8 80. As with Mr. Atchison’s November 2013 statement to the *Wall Street*  
9 *Journal*, the evidence will show that this statement was not materially false or  
10 misleading, particularly when its context is considered. The *Orlando Sentinel* article,  
11 titled *SeaWorld launches ‘Blackfish’ counterattack in ads*, states that “[a]fter months of  
12 dismissing ‘Blackfish’ as activist propaganda, SeaWorld Entertainment Inc. today is  
13 launching a more aggressive counterattack on the critical documentary” by placing “full-  
14 page ads in eight of the country’s largest newspapers.” The article reports that Mr.  
15 Atchison explained that the Company “decided to respond after several well-known  
16 performers backed out of concerts” in “an episode that has drawn international attention.”  
17 It also notes that while SeaWorld had not disclosed the cost of the ad campaign, the ad  
18 buys, “which could soon be followed by an online campaign,” “suggest[] that the  
19 company . . . is concerned about potential long-term brand damage from ‘Blackfish,’”  
20 whose performance it reports “has been ‘through the roof.’” The article concludes with  
21 the comments relied on by Plaintiffs:

22 Despite its high-profile response today, Atchison insisted that  
23 “Blackfish” and the negative publicity it has spawned have not  
24 hurt SeaWorld’s business. The company says it is on track to  
25 post core earnings of almost \$440 million on sales of nearly \$1.5  
26 billion, both of which would be company records.

27 “As much data as we have and as much as we look, I can’t  
28 connect anything really between the attention that the film has  
gotten and any effect on our business,” he said

1           81. The evidence will show, consistent with the facts reported in this article, that  
2 the market clearly understood *Blackfish* was generating negative publicity and SeaWorld  
3 was taking action, including expending Company resources, to respond. Thus, the  
4 possibility that Plaintiffs will be able to introduce documents into evidence or elicit  
5 testimony indicating that Company personnel were concerned about the potential impact  
6 of *Blackfish*, that the Company was experiencing consequences such as band  
7 cancellations, and that the Company devoted resources to combat the film and the  
8 publicity it generated, will not show the jury anything that the public did not already  
9 know or that reasonable investors did not already understand.

10                           **iv. Plaintiffs Will Be Unable To Prove Their Claims Concerning The**  
11                           **March 13, 2014 Earnings Call Statements**

12           82. Lastly, Plaintiffs contend that statements by Mr. Atchison in response to an  
13 analyst question on the Company's March 13, 2014 earnings call were false or  
14 misleading. The question and answer are reproduced below:

15                           *Barton Crockett (FBR Capital Markets Analyst):*

16                           “Great. Then if I could switch gears to get you to touch on the  
17 big thing that has been in the media. Obviously, the animal  
18 activism discussion from the documentary, from legislation,  
19 from bands making statements – it's been in the news.

20                           And if you have a fair response to that, in terms of it being  
21 unfair, given everything you guys do to help conservation and  
22 make that part of your brand. But leaving aside the fairness of it,  
23 I was just wondering you could comment on whether there's any  
24 impact that you've noticed at all on satisfaction or attendance or  
25 the desirability of SeaWorld for international licensees? Has this  
26 had any impact on any of that?”

27                           *Jim Atchison:*

28                           “Let me say it's a fair question, and as you might expect, we get  
asked it from time to time. The assertions made by the broader  
animal activist community are just a fundamental  
mischaracterization of how we care for animals and the  
important work we do with respect to conservation and

1 education and science. And I'll add inspiration by the millions  
2 of people who get close and connected with our animals and  
3 maybe leave our parks inspired in some way to make a  
4 difference for wildlife and wild places. For that we make no  
5 apologies. We're very proud of the work we do and how we do  
6 it.

7 With respect to the impact on our business, I get asked that a lot,  
8 too. As much as we're asked it, we can see no noticeable impact  
9 on our business. If you follow this – even this recent  
10 announcement, our SeaWorld parks had record attendance in the  
11 fourth quarter of the year, and are out-performing our other  
12 parks by considerable margin.

13 With respect to national surveys and data that we collect around  
14 our reputation efforts and image, there's awareness of the movie  
15 that kind of peaks and drops as CNN – who is one of the owners  
16 of the movie, by the way – CNN shows it repeatedly from time  
17 to time, so that does spike on occasion. But our surveys don't  
18 reflect any shift in sentiment about intent to visit our parks.

19 A matter of fact, the movie in some ways has actually made  
20 perhaps more interest in marine mammal parks, and actually  
21 even about us. We have seen that reflected through certain  
22 visitor profiles, and certain guest comments and things we get.  
23 The movie did not get an Oscar nomination in January, and we  
24 continue to take proactive efforts around communicating with  
25 our guests and business partners and others.

26 But ultimately the assertions by the animal rights, animal  
27 activist community – they don't necessarily burden themselves  
28 with fact, and we have to deal with that from time to time. But  
29 we have seen no impact on the business.”

30 83. Plaintiffs focus on three statements in Mr. Atchison's lengthy, discursive  
31 response: (1) “As much as we're asked it, we can see no noticeable impact on our  
32 business”; (2) “[O]ur surveys don't reflect any shift in sentiment about intent to visit our  
33 parks. A matter of fact, the movie in some ways has actually made perhaps more interest  
34 in marine mammal parks, and actually even about us”; and (3) “But we have seen no  
35 impact on the business.” The evidence will show that none of these statements were false

1 or misleading and that Mr. Atchison made these statements in good faith and without  
2 scienter.

3 84. As discussed above, these statements were made in the context of the  
4 Company achieving record results for 4Q13 and meeting its earnings targets. As Mr.  
5 Atchison made clear in this statement and will testify to at trial, the Company's view that  
6 there was "no noticeable impact" from the film was inseparably linked to the strong  
7 performance of the Company, and especially its flagship SeaWorld parks, during the  
8 latter half of 2013. No reasonable investor understood Mr. Atchison's answer to mean  
9 that SeaWorld had not incurred any incremental costs attributable to the film; to the  
10 contrary, Mr. Atchison expressly stated that the Company was engaged in tracking  
11 awareness of the movie as part of its "reputation efforts and image," and was  
12 "continu[ing] to take proactive efforts around communicating with our guests and  
13 business partners and others" regarding *Blackfish*. In sum, the evidence will show that a  
14 reasonable investor would have understood Mr. Atchison's statement to mean that the  
15 Company was proactively monitoring and addressing reputational issues related to  
16 *Blackfish*, but given its strong performance in 2013 as *Blackfish*'s visibility and market  
17 penetration increased, the Company did not believe the film was materially impacting its  
18 business.

19 85. In addition, the evidence will show that Mr. Atchison's references to  
20 SeaWorld's survey data were neither false, misleading, nor material. Mr. Atchison  
21 mentioned that awareness of *Blackfish* spiked and waned in accordance with the film  
22 being shown on CNN, that surveys did not demonstrate a shift in sentiment regarding  
23 intent to visit a SeaWorld park, and that "certain visitor profiles, and certain guest  
24 comments" had indicated that as a "matter of fact, the movie in some ways has actually  
25 made perhaps more interest in marine mammal parks, and actually even about  
26 [SeaWorld]." The commentary regarding awareness of the film rising and falling with its  
27 showings on CNN is uncontroversial and immaterial. Plaintiffs will be unable to prove  
28 that SeaWorld's surveys had shown as of that date a material impact on prospective

1 SeaWorld customers' intent to visit, much less that Mr. Atchison knowingly  
 2 misrepresented any such survey results.<sup>5</sup> Plaintiffs will also be unable to prove that Mr.  
 3 Atchison's statement regarding the movie generating additional interest with certain  
 4 visitors was false, misleading, or made with scienter. Nor will Plaintiffs be able to  
 5 demonstrate either falsity or materiality by claiming that investors understood Mr.  
 6 Atchison as somehow making the claim that *Blackfish* and related publicity was a net  
 7 benefit to the Company.

8  
 9 **v. Plaintiffs Will Be Unable To Prove Falsity Or Scienter Through  
 SeaWorld's Market Research**

10 86. The evidence will show that SeaWorld commissioned and conducted market  
 11 research during the Class Period that sought to monitor awareness of *Blackfish*, consumer  
 12 perceptions, and potential reputational impact. The Company also monitored social  
 13 media, and received daily and weekly reports compiling and summarizing social media  
 14 discussions of *Blackfish*.

15 87. The Company's market research included a weekly national survey of 1,000  
 16 respondents fielded beginning in July 2013, known as the "Omnibus Survey." Initially,  
 17 the survey tracked (i) awareness of *Blackfish* among U.S. consumers; (ii) whether  
 18 respondents could identify that the movie was about SeaWorld; and (iii) how many  
 19 people had seen, or intended to see, the movie. Beginning in January 2014, survey  
 20 respondents aware of *Blackfish* were also asked "To what degree would the Blackfish  
 21 movie influence your interest in visiting an aquarium or marine life park?" If introduced  
 22 into evidence, the survey results will show that in July and August 2013, awareness of the  
 23 film was minimal, then increased in the second half of 2013 (with some fluctuation),  
 24 while remaining a fairly small percentage even as of January and February 2014, for

25 \_\_\_\_\_  
 26 <sup>5</sup> To the contrary, as set forth in Paragraph 87 below, the Company's Omnibus Survey  
 27 results as of that date showed, consistent with Mr. Atchison's statement, that most  
 28 respondents were unaware of *Blackfish*. Of those that were aware, most were unaffected,  
 and a roughly similar percentage of respondents expressed the views that the film made  
 them either more or less likely to visit marine mammal parks.

1 which the survey reported awareness of the film ranging from 20 to 28 percent. Survey  
2 results available as of March 13, 2014 reflect that of the 24 percent of omnibus survey  
3 respondents who were aware of *Blackfish*, 21 percent said *Blackfish* made them more  
4 interested in visiting aquariums or marine mammal parks, 55 percent said it had no  
5 impact, and 24 percent said it made them less interested.

6 88. [REDACTED]

16 89. [REDACTED]

21 90. [REDACTED]

26 [REDACTED] Seven percent of that sub-population, [REDACTED]

27 [REDACTED], identified negative publicity as the basis for their decision. [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 91. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]<sup>6</sup>

16 92. Defendants expect that Plaintiffs will attempt to use evidence of this market  
 17 research to prove that the Company’s statements regarding *Blackfish* were false, and will  
 18 contend that the results of the market research either constitute direct evidence of a  
 19 material pre-2Q14 *Blackfish* impact, or are evidence that the Company lacked a sufficient  
 20 basis to make statements denying a material *Blackfish* impact. Plaintiffs will be unable to  
 21 establish either theory of liability.

22 \_\_\_\_\_

23 <sup>6</sup> Defendants also understand that Plaintiffs intend to introduce at trial evidence regarding  
 24 a survey prepared by the market research firm MKM Partners, and a “media mix analysis”  
 25 prepared by Initiative Media, LLC. As explained in Defendants’ Motion *in limine* No. 6,  
 26 however, both of these materials are inadmissible. [REDACTED]

27 [REDACTED]

28 [REDACTED] Because of this, neither Initiative’s nor  
 MKM’s views on SeaWorld attendance can properly be attributed to SeaWorld.



1           93. First, survey results do not themselves disclose a material impact on the  
2 Company's business or attendance. Instead, surveys at most identify reputational risks  
3 which may or may not manifest in a company's financial performance. Those were  
4 precisely the risks that SeaWorld disclosed to investors when it warned that *Blackfish*  
5 could "harm our reputation, reduce attendance and negatively impact our business."  
6 Second, even if market research results could properly be viewed as direct evidence of  
7 business impacts, the survey results described above do not demonstrate the existence of  
8 any such material impacts, and Plaintiffs will be unable to introduce evidence or adduce  
9 testimony demonstrating that the Company believed otherwise at the time any of the  
10 challenged statements were made. Lastly, as discussed further below, the evidence,  
11 including expert testimony, will show investors and analysts had access to similar,  
12 publicly available market research and other sources of information regarding corporate  
13 reputation and related business risks. Thus, far from establishing any Defendant's  
14 liability for securities fraud, any evidence that may be introduced at trial of SeaWorld's  
15 market research will instead only demonstrate that the Company acted reasonably and  
16 prudently in seeking to measure the potential risks posed by *Blackfish*.

17           **vi. Plaintiffs Will Be Unable To Prove Materiality**

18           94. Plaintiffs will be unable to demonstrate that the alleged misstatements were  
19 material. Evidence and testimony introduced by Defendants, including the testimony of  
20 Defendants' expert witness Martin Dirks and cross-examinations of Plaintiffs' experts  
21 Chad Coffman and Steven Feinstein, will establish that during the Class Period, analysts  
22 and investors formed their opinions about SeaWorld's stock value based on independent  
23 analyses of the Company and relied on the financial performance data disclosed by the  
24 Company. That financial performance data has not been challenged by Plaintiffs, and  
25 Plaintiffs have not presented any evidence suggesting that such data was inaccurate or  
26 misstated.

27           95. The evidence will show that analysts and investors were aware of the risk to  
28 the Company posed by negative publicity generated by *Blackfish* during the Class Period.

1 The Company properly disclosed this risk in its SEC filings and the risk was widely  
2 discussed in the press, including in the same news articles Plaintiffs claim contain  
3 actionable misstatements. As Mr. Dirks will explain in his testimony, analysts tracked  
4 this risk independently using information such as publicly-available reputation surveys,  
5 data regarding *Blackfish*'s box office performance, and information regarding the level of  
6 interest in *Blackfish* as measured by online search queries and social media activity—*i.e.*,  
7 the same sources of information that SeaWorld was considering. For instance, sources  
8 such as YouGov made market research into the reputation of SeaWorld and numerous  
9 other companies available to the public, and the results of those surveys were reported on  
10 in the press. As one example, the results of a YouGov survey were discussed in the  
11 publication *Adweek* on January 10, 2014, which noted: “When [*Blackfish*] debuted, it  
12 didn’t damage the company’s reputation too much because few people saw it. Once it  
13 aired on CNN that all changed, but even then the dip in public perception was ‘slow but  
14 persistent’ rather than immediate and dramatic.” Such information was readily available  
15 to analysts and the investing public.

16 96. Thus, in stark contrast to cases involving disclosures relating to a company’s  
17 proprietary research or testing (such as the results of clinical trials for a drug in the  
18 development pipeline), analysts and investors had the ability to understand the risks  
19 posed by *Blackfish* and—so long as the Company provided accurate financial  
20 performance data, something Plaintiffs do not dispute—the ability to draw their own  
21 reasoned conclusions as to whether those risks had manifested so as to impact the  
22 Company’s performance. This is because market research is outward, not inward-  
23 looking: it evaluates public perception, not Company nonpublic information. *See, e.g.*,  
24 *Terra Sec. Asa Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441, 451 (S.D.N.Y. 2010)  
25 (plaintiffs’ reliance on market research that uncovered alleged fraud “itself demonstrates  
26 that the [allegedly concealed] information was public and readily available”).

27 97. Plaintiffs’ experts, Mr. Coffman and Mr. Feinstein, are expected to testify  
28 that the alleged misstatements were material because the impact of *Blackfish*-related

1 negative publicity was a topic of general interest to the market. Defendants, however,  
2 will demonstrate that the fact that a particular topic is of interest to the market does not  
3 mean that all information concerning that topic is material. As Mr. Coffman conceded at  
4 his deposition, it “wouldn’t be material” if a “single person didn’t go to SeaWorld”  
5 because of *Blackfish*. Thus, Plaintiffs will be unable to establish that alleged  
6 misstatements or omissions were material to the market simply because the subject matter  
7 “*Blackfish*” was of interest to analysts and investors. Instead, Plaintiffs will have to  
8 establish that the Company withheld or misrepresented *Blackfish*-related information *and*  
9 that such information was material. As discussed above, however, Plaintiffs will be  
10 unable to present any evidence that *Blackfish* was actually having a material impact on  
11 SeaWorld’s financial performance before 2Q14.

12 98. Lacking evidence of any such material impacts, Plaintiffs’ experts are  
13 expected to testify that the alleged misstatements were material because a “corrective  
14 disclosure” earlier in the Class Period stating in effect that “attendance at its parks, and  
15 SeaWorld’s business and reputation, were adversely impacted by *Blackfish*,” would have  
16 been viewed as material by the market. Yet, as Defendants will demonstrate on cross-  
17 examination, that logic is circular. It seeks to prove materiality by assuming that a  
18 material impact existed (and thus properly should have been disclosed) as of whatever  
19 earlier date the hypothetical disclosure would have been made. Therefore, this expert  
20 testimony will provide no basis for a finding of materiality.

21 99. Plaintiffs are also expected to present evidence and testimony in support of  
22 the proposition that Defendants’ statements misleadingly suggested to the market that  
23 Defendants’ internal research had specifically refuted the existence of any impact of  
24 *Blackfish*-related negative publicity on attendance at its parks, its business, or reputation.  
25 Plaintiffs will similarly be unable to demonstrate that any such purported suggestions  
26 were material to investors. To the contrary, Defendants will demonstrate that investors  
27 were able to independently assess reputational impact, and that investors did not view the  
28 Company’s equivocal statements regarding the results of survey research as material.

1 The evidence will also establish that investors could not have reasonably interpreted the  
 2 Company’s disclosures as absolute denials of *any* business or attendance impacts, no  
 3 matter how immaterial. Because of this, Plaintiffs and their expert witnesses will be  
 4 unable to overcome lack of affirmative evidence of material business impacts prior to  
 5 2Q14, and thus will be unable to demonstrate that any challenged statement was material  
 6 to a reasonable investor.

7 **vii. Plaintiffs Will Be Unable To Prove Reliance**

8 100. When certifying a class in this case, the Court held that Plaintiffs could rely  
 9 on the “fraud on the market” presumption of reliance set forth in *Basic, Inc. v. Levinson*,  
 10 485 U.S. 224, 247 (1988). However, the Supreme Court has made clear that where “a  
 11 plaintiff would have bought or sold the stock even had he been aware that the stock’s  
 12 price was tainted by fraud, then the presumption of reliance would not apply.”  
 13 *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 269 (2014) (“*Halliburton II*”).  
 14 Applying *Halliburton II*, courts have held that the presumption of reliance is rebutted  
 15 where, for example, evidence demonstrated that “even had [the plaintiff] known about the  
 16 fraud, it would not have mattered to him” because the plaintiff “was not misled about [the  
 17 subject of the fraud].” *In re Vivendi Universal, S.A. Sec. Litig.*, 123 F. Supp. 3d 424  
 18 (S.D.N.Y. 2015).

19 101. Here, Plaintiffs allege that Defendants misled the market because  
 20 “Defendants repeatedly assured investors that *Blackfish* . . . was not impacting  
 21 SeaWorld’s operations *in any way*.” However, both documents and testimony from  
 22 Westwood Management Corp. (“Westwood”)—which had full discretion to invest on  
 23 behalf of both APERS and PBU<sup>7</sup>—will demonstrate that Westwood believed that  
 24 *Blackfish* posed a risk to SeaWorld’s operations and in fact was impacting SeaWorld’s  
 25

26 <sup>7</sup> “An investment advisor’s knowledge and actions are imputed to a plaintiff” where, as  
 27 here, that plaintiff delegated investment decisions to its advisor. 1 McLaughlin on Class  
 28 Actions § 4:20 (13th ed. 2016) (citing *Tsereteli v. Residential Asset Securitization Trust*  
 2006-A8, 283 F.R.D. 199, 213 n.109 (S.D.N.Y. 2012)).

1 operations in the same sorts of ways Plaintiffs contend were concealed by SeaWorld from  
2 the marketplace. Westwood’s decision to continue purchasing SeaWorld securities at the  
3 market prices that Plaintiffs allege were inflated—fully appreciating the risk *Blackfish*  
4 posed to SeaWorld’s business and with an understanding that *Blackfish* had already  
5 impacted SeaWorld’s operations to some extent—will provide compelling evidence of  
6 how a reasonable investor would view the alleged misstatements and will demonstrate  
7 that reasonable investors did not draw or rely on the same unreasonable inferences upon  
8 which Plaintiffs seek to base their theory of liability here.<sup>8</sup>

9  
10 **viii. Evidence Of The Individual Defendants’ Stock Sales Will Undercut Plaintiffs’ Claim That Defendants Acted With Scienter**

11 102. There is no dispute that, except for shares withheld by the Company for the  
12 payment of tax liabilities incident to the vesting of shares of restricted stock, Mr.  
13 Swanson did not sell any SeaWorld stock during the Class Period. There is similarly no  
14 dispute that, [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 103. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED] This

23  
24 <sup>8</sup> This evidence of Lead Plaintiffs’ and other market participants’ awareness of the same  
25 issues and risks concerning *Blackfish* that Plaintiffs claim were concealed undermine not  
26 only reliance, but falsity and materiality as well. *See In re Worlds of Wonder Sec. Litig.*,  
27 35 F.3d 1407, 1417-18 (9th Cir. 1994) (recognizing that there is “no duty to disclose a risk  
28 ‘the market clearly understood’” (quoting *Convergent Techs.*, 948 F.2d at 513)); *see also*  
*In re Apple Comput. Sec. Litig.*, 886 F.2d 1109, 1119 (9th Cir. 1989) (finding that a  
statement was not misleading, because the truth was “well understood within the  
investment community”).

1 plan structure is wholly inconsistent with an intent to divest inflated stock prior to a  
2 major drop, and instead demonstrates that Mr. Atchison believed strongly in the  
3 Company's financial prospects at the time he put his plan into place. Moreover, the  
4 evidence will also show that [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] That course of conduct is similarly inconsistent with a finding that Mr.  
8 Atchison was motivated to commit securities fraud by considerations of personal profit.

9 104. The Court previously recognized that the Individual Defendants' stock sales  
10 during the Class Period did not give rise to an inference of intentional misconduct and, in  
11 fact, tended to negate the existence of a motive to commit fraud. *See* SJ Ruling at 90  
12 (noting that [REDACTED]  
13 [REDACTED] and that this "absence of a motive" was  
14 "relevant" to Plaintiffs' ability to prove scienter). The evidence at trial will reaffirm the  
15 Court's conclusions in this regard.

16 **ix. Plaintiffs Will Be Unable To Prove Loss Causation**

17 105. When plaintiffs "plead a causation theory based on market revelation of the  
18 fraud," courts "naturally evaluate[] whether plaintiffs have pleaded or proved the facts  
19 relevant to their theory." *First Solar*, 881 F.3d at 754. Here, Plaintiffs allege that "[t]he  
20 true facts became known . . . through a *corrective disclosure* on August 13, 2014." A  
21 corrective disclosure "is a disclosure that reveals the fraud, or at least some aspect of the  
22 fraud, to the market." *In re BofI Holding, Inc. Sec. Litig.*, 302 F. Supp. 3d 1128, 1135  
23 (S.D. Cal. 2018) (quoting *In re REMEC*, 702 F. Supp. at 1266-67). This Court has held  
24 that the issue of whether there is a corrective disclosure in this case is to be determined  
25 by a jury. SJ Ruling at 73 ("[A] reasonable jury could find . . . that the August 13, 2014  
26 disclosure constituted a corrective disclosure.").

27 106. Plaintiffs will not be able to prove, through their expert or otherwise, that  
28 there was any corrective disclosure. The evidence does not support Plaintiffs' contention



1 that the August 13, 2014 disclosure revealed any “truth” contradicting the alleged  
 2 misstatements. For example, Plaintiffs’ expert Mr. Chad Coffman opines that “[t]he  
 3 market clearly saw the disclosure as having broader implications and relating back not  
 4 just to the single event of the introduction of the legislation . . . or a single quarter’s  
 5 results, but to *Blackfish* itself and SeaWorld’s prior statements, including those denying  
 6 there had been a *Blackfish* impact.” However, cross examination of Mr. Coffman and/or  
 7 the testimony of Defendants’ expert Dr. Craig Lewis will demonstrate (among other  
 8 things) that Mr. Coffman’s assertion is based on a misreading of the alleged corrective  
 9 disclosure, and relies on out-of-context statements from cherry-picked media articles.

10 107. Plaintiffs “bear[] the burden of showing that [their] losses were attributable  
 11 to the revelation of the fraud and not the myriad other factors that affect a company’s  
 12 stock price.” *Bricklayers & Trowel Trades Int’l Pension Fund v. Credit Suisse Sec.*  
 13 *(USA) LLC*, 752 F.3d 82, 95 (1st Cir. 2014). In other words, a plaintiff must distinguish  
 14 the alleged fraud from the “tangle of factors” affecting a stock price on the day of an  
 15 alleged corrective disclosure. *Nuveen Mun. High Income Opportunity Fund v. City of*  
 16 *Alameda*, 730 F.3d 1111, 1123 (9th Cir. 2013).

17 108. Plaintiffs will not be able to prove that they can sufficiently isolate any loss  
 18 resulting from the alleged fraud from any loss resulting from the “tangle of factors”  
 19 affecting the stock on August 13, 2014. Cross examination of Mr. Coffman and/or the  
 20 testimony of Defendants’ expert Dr. Lewis will demonstrate (among other things) that  
 21 Mr. Coffman’s disaggregation analysis (i) contradicts an opinion offered earlier in this  
 22 case regarding the effect of non-public information on a stock price; (ii) contradicts  
 23 public information available to the market; and (iii) [REDACTED]

24 [REDACTED]

25 **x. Plaintiffs Will Be Unable To Prove Damages**

26 109. Damages in a Rule 10b-5 case are limited to “the loss the purchaser sustains  
 27 when the facts become generally known and as a result share value depreciates.” *Dura*  
 28 *Pharm.*, 544 U.S. at 344. Any damages model proffered by Plaintiffs must account for



1 the fact that “lower price may reflect, not the earlier misrepresentation, but changed  
2 economic circumstances, changed investor expectations, new industry-specific or firm-  
3 specific facts, conditions, or other events, which taken separately or together account for  
4 some or all of that lower price”—*i.e.*, it must identify the “tangle of factors affecting  
5 price.” *Id.* at 336. In determining the amount that the share value depreciated, “the non-  
6 fraud ‘contributing forces must be isolated and removed.’” *Williams*, 496 F. Supp. 2d at  
7 1264 (citing *Robbins*, 116 F.3d at 1447 n.5).

8 110. Plaintiffs’ expert Mr. Coffman is expected to offer the opinion that \$7.52 per  
9 share of SeaWorld’s stock drop on August 13, 2014 was attributable to the disclosure of  
10 the alleged fraud. Mr. Coffman relies on a “constant dollar inflation” (“CDI”)  
11 methodology which presumes that “the per share artificial inflation that is dissipated in  
12 response to a corrective disclosure should be carried back in time to the actionable  
13 misstatements and/or omissions.” Stated differently, Mr. Coffman opines that  
14 SeaWorld’s stock price would have dropped by \$7.52 per share if, at any time during the  
15 Class Period, SeaWorld had told investors that *Blackfish* was having some unspecified  
16 effect on its business, irrespective of the visibility of *Blackfish* at the time or the  
17 Company’s contemporaneous financial performance.

18 111. Under this Court’s rulings, “the jury is ultimately responsible for deciding  
19 whether CDI, or another calculation, is a reasonable measurement of damages.” SJ  
20 Ruling at 29. Defendants will demonstrate, as courts and commentators have recognized,  
21 that CDI methodology “prove[s] problematic [where] the market’s view of the  
22 circumstances of the company is . . . changing over the class period.” Allen Ferrell &  
23 Atanu Saha, *Forward-Casting 10b-5 Damages: A Comparison to Other Methods*, 37 J.  
24 CORP. L. 365, 371 (2012); *see also, e.g., In re Bear Stearns Cos., Inc. Sec., Derivative, &*  
25 *ERISA Litig.*, 263 F. Supp. 3d 446, 448 (S.D.N.Y. 2017) (rejecting constant dollar  
26 methodology in case concerning misstatements of company’s financial condition and  
27 mortgage assets because expert’s opinion that “disclosure of the alleged fraud at any time  
28 from June 25, 2007 through March 13, 2008 would have had the same effect on Bear

1 Stearns’s stock as the disclosures that it was entering into an emergency loan facility and  
2 being acquired for \$2 per share” was unreliable and speculative); *In re BP p.l.c. Sec.*  
3 *Litig.*, 2014 WL 2112823 (S.D. Tex. May 20, 2014) (constant dollar was appropriate for  
4 misstatements that understated severity of oil spill after it occurred, but not for pre-spill  
5 misrepresentations that understated the severity of a known risk).

6 112. Specifically, cross examination of Mr. Coffman and the testimony of Dr.  
7 Lewis will demonstrate that CDI is not an appropriate methodology in this case because,  
8 among other things, it fails to account for (i) the prolonged nature of the class; (ii)  
9 SeaWorld’s fluctuating (and largely positive) financial performance for much of the  
10 Class Period; and (iii) Plaintiffs’ own allegations that the impact of *Blackfish* fluctuated  
11 throughout the Class Period. Because it is Plaintiffs’ burden to show damages, a jury’s  
12 rejection of Mr. Coffman’s CDI methodology—the only methodology he proffers—will  
13 properly result in an award of zero damages against SeaWorld. *See Miller*, 364 F.3d at  
14 232 (jury in securities fraud case “could properly conclude that (1) the plaintiff proved  
15 the defendant’s fraud constituted a substantial cause of plaintiff’s loss and so find the  
16 defendant liable but (2) the plaintiff failed to provide a method to discern by just and  
17 reasonable inference the amount of plaintiff’s loss solely caused by defendant’s fraud,  
18 and so refuse to award the plaintiff any damages.” (citation omitted)).

19 113. Even in the event the jury awards some damages to Plaintiffs, cross  
20 examination of Mr. Coffman and the testimony of Dr. Lewis will demonstrate that those  
21 damages must be far lower than the per share damages identified by Mr. Coffman.

22 114. Dr. Lewis will explain that SeaWorld’s stock price only ever saw a  
23 statistically significant increase following any of the alleged misstatements on March 14,  
24 2014. No statistically significant price increases occurred in response to any of the other  
25 alleged misstatements. Thus, even ignoring confounding positive news also disclosed on  
26 March 14, 2014, Dr. Coffman’s analysis implies that the maximum potential artificial  
27 inflation attributable to any of the alleged misstatements is the amount that allegedly  
28 entered the stock as of that date, *i.e.*, \$1.03 per share.

1           115. Dr. Lewis will also explain how minor commonsense modifications to Mr.  
2 Coffman’s damages and apportionment methodologies result in significantly lower per-  
3 share damages on Mr. Coffman’s own terms. For example, Mr. Coffman’s  
4 apportionment methodology is based on the unsupported assumption that 50% of  
5 SeaWorld Orlando’s attendance decline between 1H13 and 1H14, and 100% of SeaWorld  
6 San Diego’s and SeaWorld San Antonio’s declines, were solely the result of *Blackfish*.  
7 However, the public disclosures to which the market was reacting disclosed that  
8 SeaWorld Orlando’s decline was the result of increased competition, not *Blackfish*.  
9 Removing SeaWorld Orlando from Mr. Coffman’s calculation results in damages of only  
10 \$5.92 per share. In addition, the public disclosure to which the market reacted at most  
11 support the assertion that a portion of SeaWorld San Diego’s attendance decline, not the  
12 entirety of the decline, could be attributable to publicity related to *Blackfish*. Applying  
13 Mr. Coffman’s 50% assumption to SeaWorld San Diego’s attendance decline results in  
14 damages attributable to the alleged fraud of only \$2.47 per share.

15           116. In the alternative, Dr. Lewis will also explain that the use of revenue rather  
16 than attendance as the measure of decline from 1H13 to 1H14—a measurement that  
17 would be more consistent with investors’ concerns—also reduces Plaintiffs’ potential  
18 recoverable damages. For example, assuming that impact of *Blackfish* and the California  
19 legislation was restricted to SeaWorld San Diego, but accounted for the entirety of that  
20 park’s year-over-year revenue decline, artificial inflation would be estimated at \$3.65 per  
21 share.

22           117. Lastly, any such damages award must be properly apportioned, as required  
23 by the PSLRA. The PSLRA provides that a defendant “against whom a final judgment is  
24 entered in a private action shall be liable solely for the portion of the judgment that  
25 corresponds to the percentage of responsibility of that covered person.” 15 U.S.C.  
26 § 78u-4(f)(2)(B)(i). A defendant may be jointly and severally liable “only if the trier of  
27 fact specifically determines that such covered person knowingly committed a violation of  
28 the securities laws.” *Id.* § 78u-4(f)(2)(A). The PSLRA specifies that for these purposes

1 “reckless conduct by a covered person shall not be construed to constitute a knowing  
2 commission of a violation of the securities laws by that covered person.” *Id.*  
3 § 78u-4(f)(10)(B). It also requires the jury to answer special interrogatories for each  
4 Defendant and “each of the other persons claimed by any of the parties to have caused or  
5 contributed to the loss” regarding: (1) whether they violated the federal securities laws;  
6 (2) the “percentage of responsibility of such person, measured as a percentage of the total  
7 fault of all persons who caused or contributed to the loss;” and (3) whether such person  
8 “knowingly” violated federal securities laws. *Id.* § 78u-4(f)(3)(A). Proper apportionment  
9 pursuant to these provisions of the PSLRA will further reduce any damages recoverable  
10 by Plaintiffs at trial.

11 **xi. Rule 10b-5 Claims Against The Individual Defendants Will Fail**

12 118. For the same reasons as those discussed above, the evidence will show that  
13 the Individual Defendants did not commit any violations of Section 10(b) or Rule 10b-5  
14 with respect to any of the challenged statements. Because of this, Plaintiffs will not be  
15 able to prove any Rule 10b-5 claims against any Individual Defendant.

16 119. Moreover, the Individual Defendants cannot be held liable under Rule 10b-5  
17 for the alleged misstatements and omissions that they did not “make.” *See Janus Capital*  
18 *Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (limiting liability under  
19 Rule 10b-5 to the “maker” of a statement—*i.e.*, “the person or entity with ultimate  
20 authority over the statement, including its content and whether and how to communicate  
21 it”). Consistent with this authority, the Court concluded that Plaintiffs had not alleged  
22 that “all the Individual Defendants were the makers of each alleged misstatement or  
23 omission for Rule 10b-5 purposes.” SJ Ruling at 96; *see also id.* at 95 (“Plaintiffs do not  
24 allege, nor do they argue in their brief, that each of the Individual Defendants should be  
25 considered the maker of every statement for purposes of Rule 10b-5.”).

1           **C. Factual and Legal Contentions Concerning Plaintiffs’ Section 20(a)**  
2           **Claim**

3           120. Plaintiffs assert claims against the Individual Defendants and Blackstone  
4 under Section 20(a) of the Exchange Act. To establish control person liability, a plaintiff  
5 must prove: (1) a primary violation and (2) that the defendant exercised actual power or  
6 control over the primary violator. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065  
7 (9th Cir. 2000). Section 20(a) of the Exchange Act (15 U.S.C. § 78t(a)) provides:

8                     Every person who, directly or indirectly, controls any person  
9                     liable under any provision of this chapter or of any rule or  
10                    regulation thereunder shall also be liable jointly and severally  
11                    with and to the same extent as such controlled person to any  
12                    person to whom such controlled person is liable, unless the  
13                    controlling person acted in good faith and did not directly or  
14                    indirectly induce the act or acts constituting the violation or  
15                    cause of action.

16           121. Adjudication of whether a defendant is a controlling person for purposes of  
17 Section 20(a) requires assessment of the defendant’s “participation in the day-to-day  
18 affairs of the corporation and the defendant’s power to control corporate actions.”  
19 *Kaplan v. Rose*, 49 F.3d 1363, 1382 (9th Cir. 1994). That a defendant had the authority  
20 to exert power or control over another defendant, or that a defendant had power or  
21 influence over the general corporate affairs of the company is insufficient. *Howard*, 228  
22 F.3d at 1065, 1067.

23           122. Moreover, even if a defendant is found to be a controlling person, the  
24 defendant may assert a “good faith” defense to the violation. *See* 15 U.S.C. § 78t(a); *see*  
25 *also Hollinger*, 914 F.2d at 1575; *Paracor Fin., Inc.*, 96 F.3d at 1161. To do so, a  
26 defendant must prove “the absence of scienter” and a failure to “directly or indirectly  
27 induce” the violations at issue. *See Howard*, 228 F.3d at 1065.

28           123. As discussed above, Plaintiffs will not be able to prove at trial the predicate  
element of a primary violation of the federal securities laws under Rule 10b-5. For this  
reason alone, Plaintiffs cannot prevail on their Section 20(a) claims. But even if Plaintiffs

1 could prove the first element of their Section 20(a) claim, Plaintiffs will be unable to  
2 establish control person liability. First, the evidence will show that the Individual  
3 Defendants and Blackstone did not exercise actual power or control over the primary  
4 violator with respect to the conduct at issue. Second, even if Plaintiffs are able to  
5 establish that either Blackstone or the Individual Defendants exercised control with  
6 respect to one or more of the challenged statements, the evidence will show that  
7 Blackstone and the Individual Defendants “acted in good faith and did not directly or  
8 indirectly induce the act or acts constituting the violation or cause of action,” 15 U.S.C. §  
9 78t(a), and thus cannot be held liable for any predicate primary violations.

10  
11 **i. Blackstone Did Not Exercise Actual Power Or Control For  
Statements Made After December 17, 2013**

12 124. The evidence will show that Blackstone did not “exercise actual power or  
13 control” over SeaWorld with respect to any statements made after December 17, 2013.  
14 While investment funds affiliated with Blackstone and certain co-investors (the  
15 “Blackstone-Affiliated Funds”) held a majority of SeaWorld’s common stock  
16 immediately after SeaWorld’s initial public offering, the Blackstone-Affiliated Funds  
17 subsequently reduced their holdings, to 42.8% of SeaWorld’s common stock as of  
18 December 17, 2013, and then to 22.6% on April 9, 2014. Thus, Blackstone held only a  
19 minority stake in SeaWorld as of December 17, 2013. Blackstone did not hold a majority  
20 of seats on SeaWorld’s board of directors at any time during the Class Period.

21 125. Evidence of “ownership of stock and a position as a Board member” is  
22 insufficient where plaintiffs fail to make a “showing that [the defendant] was active in the  
23 day-to-day affairs of [the company] or that [the defendant] exercised any specific control  
24 over the preparation and release of” the statements at issue. *Howard*, 228 F.3d at 1067  
25 n.13; *see also Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1163-64 (9th  
26 Cir. 1996). Here, the evidence will show that Blackstone did not manage the day-to-day  
27 affairs of SeaWorld and did not exercise specific control over the preparation and release  
28 of the statements at issue.



1                   **ii. Blackstone Is Entitled To A Good Faith Defense**

2           126. In all events, the evidence will show that Blackstone is entitled to a good  
3 faith defense for the entire Class Period. At all times Blackstone and its designated  
4 directors acted in good faith and did not directly or indirectly induce the act or acts  
5 constituting the alleged violation or cause of action. There is no evidence that Blackstone  
6 had “any specific control” over the challenged statements. [REDACTED]

7 [REDACTED]  
8 [REDACTED]

9 [REDACTED] Evidence introduced at trial will demonstrate that  
10 Blackstone and its affiliated directors never directed anyone to make statements that they  
11 knew to be misleading, and that, to their knowledge, all of the information that SeaWorld  
12 made public was fair and accurate. Plaintiffs will not be able to overcome this evidence.

13                   **iii. Plaintiffs Will Be Unable To Establish That Each Individual**  
14                   **Defendant Was A Control Person With Respect To Each**  
15                   **Challenged Statement**

16           127. The evidence will also show that the Individual Defendants did not exercise  
17 actual power or control over the statements they did not make. Mr. Swanson did not have  
18 any power or control over the August 29, 2013, November 14, 2013, December 20, 2013  
19 and March 13, 2014 statements; (ii) Mr. Heaney did not have any power or control over  
20 the August 29, 2013, November 14, 2013 and December 20, 2013 statements; and (iii)  
21 Mr. Atchison did not have any power or control over the August 29, 2013 statements or  
22 Mr. Heaney’s May 14, 2014 statement. Plaintiffs cannot seriously contend that the  
23 Individual Defendants had control over each other.

24           128. Nevertheless, even if they are found to be controlling persons, the evidence  
25 will show that the Individual Defendants are entitled to a good faith defense. At trial, the  
26 Individual Defendants will testify that they never directed anyone to make statements that  
27 they knew to be misleading, and that, to their knowledge, all of the information that  
28 SeaWorld made public was true.



### 1 III. ABANDONED ISSUES

2 129. Plaintiffs have abandoned their claims under Sections 11, and 12(a)(2), and  
3 15 of the Securities Act of 1933 (the “Securities Act Claims”). Plaintiffs originally  
4 asserted the Securities Act Claims in the Consolidated Amended Complaint (“CAC”),  
5 filed on February 27, 2015. ECF No. 42. Following dismissal of the CAC on March 31,  
6 2016, *see Baker v. SeaWorld Entm’t, Inc.*, 2016 WL 2993481 (S.D. Cal. Mar. 31, 2016),  
7 Plaintiffs filed the SAC on May 31, 2016 and dropped the Securities Act Claims. *See*  
8 ECF No. 123. The Ninth Circuit has held that a plaintiff waives causes of action alleged  
9 in an original complaint that are then “voluntarily” not alleged in an amended complaint  
10 *See, e.g., Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (“But for any claims  
11 voluntarily dismissed, we will consider those claims to be waived if not replead.”); *see*  
12 *also Heath v. Google LLC*, 2018 WL 398463, at \*1 (N.D. Cal. Jan. 12, 2018) (“[T]he  
13 Court finds that [plaintiff] has waived her disparate impact claim by failing to re-plead it  
14 after it was voluntarily withdrawn over two years ago.”). As Plaintiffs did not re-plead  
15 the Securities Act Claims after they were dismissed, these claims have been abandoned.

16 130. For the same reasons, Plaintiffs have also abandoned claims asserted in the  
17 CAC under Sections 10(b) and 20(a) of the Exchange Act that were not asserted in the  
18 SAC.

19 131. Because the Securities Act Claims have been abandoned, Defendants do not  
20 intend to rely at trial on defenses No. 4 (Plaintiffs’ claims against Defendants are barred,  
21 in whole or part, to the extent that they are beyond the applicable statute(s) of limitations  
22 and/or repose) and No. 5 (Plaintiffs’ claims are barred, in whole or part, because  
23 Defendants acted with due diligence and/or did not know, and in the exercise of  
24 reasonable care could not have known or had reasonable grounds to believe, that any  
25 misstatements or omissions of material fact existed in any of SeaWorld’s filings with the  
26 SEC or press releases or any statement issued in connection therewith or otherwise),  
27 except insofar as evidence relevant to such defenses is also relevant to other claims,  
28 defenses, or issues in this action. *See* ECF No. 149.

1           132. In addition, Plaintiffs have abandoned the “materialization of the risk”  
 2 theory of loss causation and damages.<sup>9</sup> The SAC alleges that “[w]hen the true facts  
 3 became known *and/or the materialization of the risks that had been concealed by*  
 4 *Defendants occurred*, the price of SeaWorld common stock declined immediately and  
 5 precipitously as the artificial inflation was removed from the market price of the stock,  
 6 causing substantial damage to Plaintiffs and the members of the Class.” SAC ¶ 253  
 7 (emphasis added). However, at the hearing addressing Plaintiffs’ Motion for Class  
 8 Certification, Plaintiffs’ counsel conceded: “[T]his is not a case about a materialization of  
 9 the risk theory. This is a corrective disclosure case.” Nov. 13, 2017 Tr. at 48:9-11. In  
 10 granting class certification, the Court expressly found that “Plaintiffs do not advance a  
 11 materialization of the risk theory of damages.” *Baker v. SeaWorld Entm’t, Inc.*, 2017 WL  
 12 5885542, at \*14 (S.D. Cal. Nov. 29, 2017). As a result, this theory of loss causation and  
 13 damages has been abandoned.

#### 14 **IV. WITNESSES**

15           133. Pursuant to Local Rule 16.1(f)(2) and Federal Rule of Civil Procedure  
 16 26(a)(3)(A) and (B), Defendants provided Plaintiffs with their witness list on December  
 17 6, 2019. Defendants intend to call the following witnesses to give live testimony at trial.  
 18 Witnesses identified with an asterisk may be called to testify.

WITNESS	PARTY AFFILIATION, ADDRESS, AND PHONE NUMBER (WHERE KNOWN)
James Atchison	c/o Katten Muchin Rosenman LLP, Michael J. Diver, 525 West Monroe Street, Chicago, Illinois, 60661-3693 (312-902- 5200)

25 \_\_\_\_\_  
 26 <sup>9</sup> “The ‘materialization of the risk’ approach, adopted by some circuits, recognizes loss  
 27 causation where a plaintiff shows that ‘misstatements and omissions concealed the price-  
 28 volatility risk (or some other risk) that materialized and played some part in diminishing  
 the market value’ of a security.” *Nuveen*, 730 F.3d at 1120 (quoting *Lentell v. Merrill  
 Lynch & Co., Inc.*, 396 F.3d 161, 176-77 (2d Cir. 2005)).

1 2 3 4	Joseph Baratta*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
5 6	Jonas Bhatti*	c/o Kessler Topaz Meltzer & Check LLP, 280 King of Prussia Road, Radnor, PA 19087
7 8 9	Daniel Brown*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
10 11 12	Toni Caracciolo*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
13 14 15 16	Kelly Flaherty Clark*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
17 18 19	David D' Alessandro*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
20 21 22	Daniel Decker*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
23 24 25	Peter Frey*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
26 27 28	Elizabeth Gulacsy*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)

1 2 3 4	Marilyn Hannes*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
5 6 7	James Heaney	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
8 9 10	Jill Kermes*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
11 12	Thomas Lieu*	c/o Westwood Management Corp., 200 Crescent Court, Suite 1200, Dallas, TX 75201
13 14	A representative of MarketVision Research*	5151 Pfeiffer Road, Suite 300, Cincinnati, Ohio, 45242 (800-232-4250)
15 16 17	Bruce McEvoy*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
18 19 20	William Joshua Powers*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
21 22 23 24	John Reilly*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
25 26 27	Kelly Repass*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)

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1 2 3	Gail Stone*	c/o Kessler Topaz Meltzer & Check LLP, 280 King of Prussia Road, Radnor, PA 19087
4 5 6	Marc Swanson	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
7 8 9	George Anthony Taylor*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)
10 11 12	Peter Wallace*	c/o Simpson Thacher & Bartlett LLP, Jonathan Youngwood, 425 Lexington Avenue, New York, New York, 10017 (212-455-2000)

13  
14 **A. Designated Experts**

15 134. Pursuant to Local Rule 16.1(f)(2) and Federal Rule of Civil Procedure  
16 26(a)(3)(A) and (B), Defendants provided Plaintiffs with their witness list on December  
17 6, 2019. Defendants intend to call the following expert witnesses to give live testimony  
18 at trial.

19 **i. Martin Dirks**

20 135. Martin Dirks, c/o Simpson Thacher & Bartlett LLP, 425 Lexington Avenue,  
21 New York, New York, 10017 (212) 455-2000, is the founder of Investment Strategy &  
22 Analysis, an expert witness and consulting firm in San Francisco, California, which  
23 provides research on individual stocks and on option trading services to several equity  
24 portfolio managers. Since 2011, Mr. Dirks has been a Board Member of The Federated  
25 Employees' Retirement System for the City of San José, California, where he advises  
26 staff on portfolio manager selection and investment strategy issues. He serves as a Senior  
27 Adjunct Professor in the Master of Business Administration ("MBA") program at Golden  
28

1 Gate University in San Francisco, California, where he teaches Portfolio Management, an  
2 advanced investments course.

3 136. Mr. Dirks also is Head of the Investment Committee at Multiverse Capital  
4 and serves as an advisor to Oakpeak Equity Partners, a private equity investment firm and  
5 two early-stage investment technology companies, Inferess and HedgeSight. He received  
6 a Master in Business Administration degree from Harvard Business School in 1987 and a  
7 Bachelor of Science (Engineering Physics) from Bemidji State University in 1979. Mr.  
8 Dirks has over thirty years of institutional investment experience with expertise in  
9 securities valuation and analysis, hedge fund management, analysis of corporate  
10 accounting fraud, and other investment-related issues. Based on his work experience,  
11 Mr. Dirks has deep industry knowledge about the information, research, and methods that  
12 institutional investors consider in analyzing stocks and making investment decisions.

13 137. Mr. Dirks has been retained by Defendants to evaluate whether the alleged  
14 misstatements or omissions were material to a reasonable investor—that is, to evaluate  
15 whether there is a substantial likelihood that a reasonable investor would have viewed  
16 alternative disclosures by Defendants during the Class Period stating that, in their  
17 opinion, Blackfish was affecting the Company’s business and its attendance (the “but-for  
18 world”), as having significantly altered the “total mix” of available information. Mr.  
19 Dirks has also been retained to respond to the opinions expressed by other experts in this  
20 matter concerning the subjects of Mr. Dirks’s opinions, including those of Chad Coffman  
21 and Steven P. Feinstein.

22 **ii. Craig M. Lewis**

23 138. Craig M. Lewis, c/o Simpson Thacher & Bartlett LLP, 425 Lexington  
24 Avenue, New York, New York, 10017, (212) 455-2000, is the Madison S. Wigginton  
25 Professor of Finance at the Owen Graduate School of Management at Vanderbilt  
26 University. Dr. Lewis has published papers about accounting fraud, convertible debt  
27 financing, corporate capital formation, forecasting stock market volatility, herding by  
28 equity analysts, and the regulation of financial markets in leading economic and finance



1 journals, including the Journal of Financial Economics, the Review of Financial Studies,  
2 and the Journal of Econometrics, among others. He has received a number of best paper  
3 awards for his research, including the 2001 Fama-DFA Prize for the Best Paper Published  
4 in the Journal of Financial Economics in the Areas of Capital Markets and Asset Pricing  
5 for my research on equity analysts' earnings forecasts.

6 139. Dr. Lewis serves on a number of editorial boards at leading academic  
7 journals including the Journal of Corporate Finance and the Journal of Business Finance  
8 & Accounting. Dr. Lewis served as the Director of the Division of Economic and Risk  
9 Analysis and as Chief Economist at the U.S. Securities and Exchange Commission  
10 ("SEC") from June 2011 to May 2014, where he also was an Economic Fellow from  
11 January 2011 to June 2011. He also served as Vice Chairman, Committee on Emerging  
12 Risk, International Organization of Securities Commissions (IOSCO) from July 2013 to  
13 May 2014. Prior to beginning his academic career, Dr. Lewis worked at Arthur Young &  
14 Company from 1978 to 1981, where he passed the Certified Public Accounting Exam in  
15 the State of Ohio. He received a Ph.D in Finance from the University of Wisconsin-  
16 Madison in 1986, a Master of Science in Finance from the University of Wisconsin-  
17 Madison in 1982, and a Bachelor of Science (Accounting) from Ohio State University in  
18 1978.

19 140. Dr. Lewis has been retained by Defendants to assess whether SeaWorld's  
20 August 2014 disclosure regarding the proposed California legislation constituted a  
21 corrective disclosure. Dr. Lewis has also been retained to respond to the opinions  
22 expressed by other experts in this matter concerning the subjects of Dr. Lewis's opinions,  
23 including those of Chad Coffman, and Steven P. Feinstein.

24 **iii. Karl Holz**

25 141. Karl Holz, c/o Simpson Thacher & Bartlett LLP, 425 Lexington Avenue,  
26 New York, New York, 10017, (212) 455-2000, is the Principal at Karl Holz Advisors  
27 LLC. Mr. Holz spent 22 years with the Walt Disney Company until his retirement in  
28 February 2018. During his time at Disney, Mr. Holz served as President, Disney Cruise



Line; Senior Vice President of Walt Disney World Operations; Vice President of Epcot; and several other senior leadership roles. In 2004, he was appointed President and COO of Disneyland Resort Paris and six months later became Chairman and CEO. From 2008 through 2018, he served as president of Disney Cruise Line and New Vacation Operations. Prior to joining Disney, he served as Vice President of Theme Park and Restaurant Operations at Knott’s Berry Farm. Mr. Holz received a bachelor’s degree in business administration from the State University of New York at Fredonia in 1973.

142. Mr. Holz has been retained by Defendants to provide an opinion regarding the factors that typically impact theme park attendance.

**B. Deposition Designations**

143. Defendants designate the following written and/or videotaped excerpts of deposition testimony for introduction at trial, in the event the relevant witnesses are unavailable at the time of trial. Pursuant to Local Rule 16.1(f)(2) and Federal Rule of Civil Procedure 26(a)(3)(A), Defendants provided Plaintiffs with these designations on December 6, 2019.

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17	Repass, Kelly	August 1, 2018	8:15-8:20
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18		135:2-136:3
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**V. EXHIBITS***Baker v. SeaWorld Entertainment, Inc.*, Case No. 3:13-cv-02129-MMA-AGS

## List of Defendants' Exhibits

<b>Exhibit No</b>	<b>Date Marked</b>	<b>Date Admitted</b>	<b>Description<sup>10</sup></b>
A			APERS-00010-APERS-00013
B			APERS-00031-APERS-00082
C			APERS-00485-APERS-00485
D			APERS-00486-APERS-00487
E			APERS-00674-APERS-00675
F			APERS-00676-APERS-00715
G			BakerBX0000839-BakerBX0000841
H			BakerBX0001374-BakerBX0001375
I			BakerBX0008160-BakerBX0008163
J			BakerBX0009803-BakerBX0009804
K			BakerBX0057569-BakerBX0057570
L			BakerSW0000735-BakerSW0000753
M			BakerSW0001545-BakerSW0001563
N			BakerSW0002457-BakerSW0002475
O			BakerSW0003410-BakerSW0003528
P			BakerSW0004657-BakerSW0004675
Q			BakerSW0005162-BakerSW0005180
R			BakerSW0005329-BakerSW0005446
S			BakerSW0005899-BakerSW0005900
T			BakerSW0005950-BakerSW0005951
U			BakerSW0006291-BakerSW0006364
V			BakerSW0006365-BakerSW0006381
W			BakerSW0006382-BakerSW0006394
X			BakerSW0006467-BakerSW0006483
Y			BakerSW0006589-BakerSW0006676
Z			BakerSW0008163-BakerSW0008191
AA			BakerSW0008261-BakerSW0008289
AB			BakerSW0008347-BakerSW0008364
AC			BakerSW0008846-BakerSW0008846

<sup>10</sup> The bates ranges encompassed herein include both consecutive whole numbers within the range and bates numbers within the range containing appended subordinate numbers (e.g. BakerSWXXXXXXXX\_001).

1	AD		BakerSW0008855-BakerSW0008856
2	AE		BakerSW0009079-BakerSW0009079
	AF		BakerSW0009621-BakerSW0009622
3	AG		BakerSW0010199-BakerSW0010199
4	AH		BakerSW0010277-BakerSW0010279
	AI		BakerSW0010396-BakerSW0010410
5	AJ		BakerSW0010499-BakerSW0010499
6	AK		BakerSW0011430-BakerSW0011443
	AL		BakerSW0011444-BakerSW0011455
7	AM		BakerSW0011853-BakerSW0011870
8	AN		BakerSW0012803-BakerSW0012825
	AO		BakerSW0016136-BakerSW0016150
9	AP		BakerSW0016279-BakerSW0016406
10	AQ		BakerSW0016637-BakerSW0016764
	AR		BakerSW0017809-BakerSW0017825
11	AS		BakerSW0020931-BakerSW0020944
12	AT		BakerSW0021028-BakerSW0021031
13	AU		BakerSW0021239-BakerSW0021240
	AV		BakerSW0021757-BakerSW0021758
14	AW		BakerSW0022023-BakerSW0022024
15	AX		BakerSW0022668-BakerSW0022669
	AY		BakerSW0022673-BakerSW0022675
16	AZ		BakerSW0022719-BakerSW0022720
17	BA		BakerSW0022807-BakerSW0022809
	BB		BakerSW0023025-BakerSW0023026
18	BC		BakerSW0024681-BakerSW0024682
19	BD		BakerSW0024694-BakerSW0024695
	BE		BakerSW0024933-BakerSW0024933
20	BF		BakerSW0024979-BakerSW0024981
21	BG		BakerSW0026381-BakerSW0026383
	BH		BakerSW0027302-BakerSW0027303
22	BI		BakerSW0027565-BakerSW0027566
23	BJ		BakerSW0027999-BakerSW0028000
24	BK		BakerSW0028167-BakerSW0028168
	BL		BakerSW0028192-BakerSW0028193
25	BM		BakerSW0028366-BakerSW0028367
26	BN		BakerSW0028477-BakerSW0028478
	BO		BakerSW0028584-BakerSW0028584
27	BP		BakerSW0028718-BakerSW0028719
28	BQ		BakerSW0029223-BakerSW0029237

1	BR		BakerSW0029264-BakerSW0029266
2	BS		BakerSW0037443-BakerSW0037444
	BT		BakerSW0038817-BakerSW0038817
3	BU		BakerSW0039897-BakerSW0039929
4	BV		BakerSW0041230-BakerSW0041233
	BW		BakerSW0041423-BakerSW0041439
5	BX		BakerSW0042068-BakerSW0042084
6	BY		BakerSW0042105-BakerSW0042106
	BZ		BakerSW0042949-BakerSW0042966
7	CA		BakerSW0043584-BakerSW0043585
8	CB		BakerSW0044262-BakerSW0044278
	CC		BakerSW0044437-BakerSW0044438
9	CD		BakerSW0044956-BakerSW0044972
10	CE		BakerSW0046297-BakerSW0046297
	CF		BakerSW0046756-BakerSW0046756
11	CG		BakerSW0047285-BakerSW0047290
12	CH		BakerSW0047376-BakerSW0047387
	CI		BakerSW0048102-BakerSW0048103
13	CJ		BakerSW0048298-BakerSW0048302
14	CK		BakerSW0048923-BakerSW0048926
	CL		BakerSW0048930-BakerSW0048952
15	CM		BakerSW0049917-BakerSW0049919
16	CN		BakerSW0050245-BakerSW0050248
	CO		BakerSW0050261-BakerSW0050262
17	CP		BakerSW0053036-BakerSW0053037
18	CQ		BakerSW0054063-BakerSW0054066
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22	FY		BakerSW0142682-BakerSW0142700
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18	HG		BakerSW0164053-BakerSW0164054
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22	HM		BakerSW0169051-BakerSW0169491
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24	HP		BakerSW0178212-BakerSW0178212
25	HQ		BakerSW0179116-BakerSW0179121
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27	HT		BakerSW0183798-BakerSW0183798
28	HU		BakerSW0183800-BakerSW0183803

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22	JA		BakerSW0193831-BakerSW0193849
23	JB		BakerSW0195203-BakerSW0195205
	JC		BakerSW0198924-BakerSW0198926
24	JD		BakerSW0199383-BakerSW0199389
25	JE		BakerSW0204969-BakerSW0204993
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26	JG		BakerSW0207541-BakerSW0207551
27	JH		BakerSW0218558-BakerSW0218560
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4	JN		BakerSW0221203-BakerSW0221205
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8	JT		BakerSW0222079-BakerSW0222089
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9	JV		BakerSW0222255-BakerSW0222272
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22	KN		BakerSW0226406-BakerSW0226408
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23	KP		BakerSW0226683-BakerSW0226685
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6	LE		BakerSW0281612-BakerSW0281635
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7	LG		BakerSW0286044-BakerSW0286046
8	LH		BakerSW0286529-BakerSW0286544
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21	MB		BakerSW0348559-BakerSW0348812
22	MC		BakerSW0352584-BakerSW0352598
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10	MY		BakerSW0389071-BakerSW0389073
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11	NA		BakerSW0389495-BakerSW0389496
12	NB		BakerSW0389914-BakerSW0389915
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13	ND		BakerSW0390371-BakerSW0390373
14	NE		BakerSW0390815-BakerSW0390815
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7	OI		BakerSW0472023-BakerSW0472028
8	OJ		BakerSW0472073-BakerSW0472076
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19	QN		BakerSW0503666-BakerSW0503713
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21	QQ		BakerSW0503843-BakerSW0503938
22	QR		BakerSW0503939-BakerSW0503959
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23	QT		BakerSW0503983-BakerSW0503983
24	QU		BakerSW0503984-BakerSW0503984
	QV		COFFMAN-03047-COFFMAN-03070
25	QW		COFFMAN-01775-COFFMAN-01826
26	QX		DIRKS_SW00064-DIRKS_SW00074
	QY		DIRKS_SW00085-DIRKS_SW00095
27	QZ		DIRKS_SW00096-DIRKS_SW00100
28	RA		DIRKS_SW00101-DIRKS_SW00109



1	RB		DIRKS_SW00110-DIRKS_SW00120
2	RC		DIRKS_SW00121-DIRKS_SW00129
	RD		DIRKS_SW00130-DIRKS_SW00138
3	RE		DIRKS_SW00139-DIRKS_SW00145
4	RF		DIRKS_SW00146-DIRKS_SW00154
	RG		DIRKS_SW00155-DIRKS_SW00155
5	RH		DIRKS_SW00156-DIRKS_SW00169
6	RI		DIRKS_SW00170-DIRKS_SW00181
	RJ		DIRKS_SW00182-DIRKS_SW00192
7	RK		DIRKS_SW00193-DIRKS_SW00202
8	RL		DIRKS_SW00203-DIRKS_SW00203
	RM		DIRKS_SW00204-DIRKS_SW00211
9	RN		DIRKS_SW00212-DIRKS_SW00229
10	RO		DIRKS_SW00230-DIRKS_SW00236
	RP		DIRKS_SW00237-DIRKS_SW00244
11	RQ		DIRKS_SW00245-DIRKS_SW00254
12	RR		DIRKS_SW00255-DIRKS_SW00264
	RS		DIRKS_SW00265-DIRKS_SW00274
13	RT		DIRKS_SW00275-DIRKS_SW00285
14	RU		DIRKS_SW00291-DIRKS_SW00299
15	RV		DIRKS_SW00300-DIRKS_SW00313
	RW		DIRKS_SW00314-DIRKS_SW00327
16	RX		DIRKS_SW00328-DIRKS_SW00339
17	RY		DIRKS_SW00340-DIRKS_SW00340
	RZ		DIRKS_SW00341-DIRKS_SW00351
18	SA		DIRKS_SW00352-DIRKS_SW00356
19	SB		DIRKS_SW00357-DIRKS_SW00363
	SC		DIRKS_SW00364-DIRKS_SW00371
20	SD		DIRKS_SW00372-DIRKS_SW00379
21	SE		DIRKS_SW00389-DIRKS_SW00397
	SF		DIRKS_SW00398-DIRKS_SW00413
22	SG		DIRKS_SW00414-DIRKS_SW00424
23	SH		DIRKS_SW00435-DIRKS_SW00447
	SI		DIRKS_SW00465-DIRKS_SW00511
24	SJ		DIRKS_SW00523-DIRKS_SW00542
25	SK		DIRKS_SW00543-DIRKS_SW00574
	SL		DIRKS_SW00575-DIRKS_SW00584
26	SM		DIRKS_SW00585-DIRKS_SW00605
27	SN		DIRKS_SW00606-DIRKS_SW00612
28	SO		DIRKS_SW00613-DIRKS_SW00625

1	SP		DIRKS_SW00626-DIRKS_SW00644
2	SQ		DIRKS_SW00645-DIRKS_SW00663
	SR		DIRKS_SW00664-DIRKS_SW00675
3	SS		DIRKS_SW00676-DIRKS_SW00696
4	ST		DIRKS_SW00697-DIRKS_SW00711
	SU		DIRKS_SW00712-DIRKS_SW00715
5	SV		DIRKS_SW00716-DIRKS_SW00716
6	SW		DIRKS_SW00717-DIRKS_SW00720
	SX		DIRKS_SW00721-DIRKS_SW00739
7	SY		DIRKS_SW00740-DIRKS_SW00750
8	SZ		DIRKS_SW00755-DIRKS_SW00762
	TA		DIRKS_SW00763-DIRKS_SW00765
9	TB		DIRKS_SW00766-DIRKS_SW00773
10	TC		DIRKS_SW00774-DIRKS_SW00777
	TD		DIRKS_SW00780-DIRKS_SW00780
11	TE		DIRKS_SW00781-DIRKS_SW00781
12	TF		DIRKS_SW00782-DIRKS_SW00788
13	TG		DIRKS_SW00789-DIRKS_SW00791
	TH		DIRKS_SW00792-DIRKS_SW00794
14	TI		DIRKS_SW00797-DIRKS_SW00818
15	TJ		DIRKS_SW00819-DIRKS_SW00821
	TK		DIRKS_SW00828-DIRKS_SW00835
16	TL		DIRKS_SW00836-DIRKS_SW00837
17	TM		DIRKS_SW00838-DIRKS_SW00844
	TN		DIRKS_SW00845-DIRKS_SW00846
18	TO		DIRKS_SW00847-DIRKS_SW00851
19	TP		DIRKS_SW00852-DIRKS_SW00857
	TQ		DIRKS_SW00858-DIRKS_SW00867
20	TR		DIRKS_SW00868-DIRKS_SW00870
21	TS		DIRKS_SW00871-DIRKS_SW00873
	TT		DIRKS_SW00874-DIRKS_SW00877
22	TU		DIRKS_SW00878-DIRKS_SW00924
23	TV		DIRKS_SW00925-DIRKS_SW00928
	TW		DIRKS_SW00929-DIRKS_SW00940
24	TX		DIRKS_SW00950-DIRKS_SW00981
25	TY		DIRKS_SW00986-DIRKS_SW00986
26	TZ		FJ000015-FJ000015
	UA		HOLZ_SW00008-HOLZ_SW00009
27	UB		HOLZ_SW00010-HOLZ_SW00011
28	UC		HOLZ_SW00012-HOLZ_SW00021



1	UD		HOLZ_SW00022-HOLZ_SW00025
2	UE		HOLZ_SW00026-HOLZ_SW00027
	UF		HOLZ_SW00031-HOLZ_SW00042
3	UG		HOLZ_SW00043-HOLZ_SW00045
4	UH		HOLZ_SW00120-HOLZ_SW00123
	UI		HOLZ_SW00524-HOLZ_SW00525
5	UJ		HOLZ_SW00526-HOLZ_SW00527
6	UK		HOLZ_SW00528-HOLZ_SW00530
	UL		HOLZ_SW00539-HOLZ_SW00542
7	UM		LEWIS_SW00080-LEWIS_SW00084
8	UN		LEWIS_SW00125-LEWIS_SW00125
	UO		LEWIS_SW00137-LEWIS_SW00150
9	UP		LEWIS_SW00217-LEWIS_SW00224
10	UQ		LEWIS_SW00234-LEWIS_SW00245
	UR		LEWIS_SW00430-LEWIS_SW00437
11	US		LEWIS_SW00438-LEWIS_SW00446
12	UT		LEWIS_SW00447-LEWIS_SW00455
	UU		LEWIS_SW00456-LEWIS_SW00471
13	UV		LEWIS_SW00472-LEWIS_SW00487
14	UW		LEWIS_SW00488-LEWIS_SW00494
15	UX		LEWIS_SW00495-LEWIS_SW00503
	UY		LEWIS_SW00504-LEWIS_SW00516
16	UZ		LEWIS_SW00517-LEWIS_SW00538
17	VA		LEWIS_SW00539-LEWIS_SW00542
	VB		LEWIS_SW00564-LEWIS_SW00567
18	VC		LEWIS_SW00568-LEWIS_SW00569
19	VD		LEWIS_SW00577-LEWIS_SW00579
	VE		LEWIS_SW00580-LEWIS_SW00582
20	VF		LEWIS_SW00583-LEWIS_SW00584
21	VG		LEWIS_SW00585-LEWIS_SW00587
	VH		LEWIS_SW00594-LEWIS_SW00595
22	VI		LEWIS_SW00606-LEWIS_SW00607
23	VJ		LEWIS_SW00608-LEWIS_SW00612
24	VK		LEWIS_SW00623-LEWIS_SW00625
	VL		LEWIS_SW00626-LEWIS_SW00629
25	VM		LEWIS_SW00631-LEWIS_SW00632
26	VN		LEWIS_SW00643-LEWIS_SW00643
	VO		LEWIS_SW00644-LEWIS_SW00651
27	VP		LEWIS_SW00652-LEWIS_SW00660
28	VQ		LEWIS_SW00661-LEWIS_SW00666

1	VR			LEWIS_SW00670-LEWIS_SW00670
2	VS			LEWIS_SW00679-LEWIS_SW00679
3	VT			LEWIS_SW00680-LEWIS_SW00682
4	VU			LEWIS_SW00683-LEWIS_SW00683
5	VV			LEWIS_SW00684-LEWIS_SW00684
6	VW			LEWIS_SW00685-LEWIS_SW00686
7	VX			LEWIS_SW00730-LEWIS_SW00765
8	VY			PBU-00387-PBU-00409
9	VZ			WESTWOOD_000003- WESTWOOD_000006
10	WA			WESTWOOD_000055- WESTWOOD_000058
11	WB			WESTWOOD_000256- WESTWOOD_000295
12	WC			WESTWOOD_000370- WESTWOOD_000374
13	WD			WESTWOOD_000375- WESTWOOD_000381
14	WE			WESTWOOD_000994- WESTWOOD_001001
15	WF			WESTWOOD_001033- WESTWOOD_001035
16	WG			WESTWOOD_001097- WESTWOOD_001102
17	WH			WESTWOOD_001150- WESTWOOD_001150
18	WI			WESTWOOD_001163- WESTWOOD_001165
19	WJ			WESTWOOD_001309- WESTWOOD_001309
20	WK			WESTWOOD_001385- WESTWOOD_001386
21	WL			WESTWOOD_010140- WESTWOOD_010147
22	WM			WESTWOOD_010192- WESTWOOD_010198
23	WN			WESTWOOD_010318- WESTWOOD_010329
24	WO			WESTWOOD_010771- WESTWOOD_010774

1	WP			WESTWOOD_010780- WESTWOOD_010783
2	WQ			WESTWOOD_011088- WESTWOOD_011089
3	WR			WESTWOOD_011117- WESTWOOD_011127
4	WS			WESTWOOD_011130- WESTWOOD_011282
5	WT			WESTWOOD_011318- WESTWOOD_011323
6	WU			WESTWOOD_011594- WESTWOOD_011595
7	WV			WESTWOOD_011603- WESTWOOD_011603
8	WW			WESTWOOD_011614- WESTWOOD_011615
9	WX			WESTWOOD_011983- WESTWOOD_011985
10	WY			WESTWOOD_012003- WESTWOOD_012005
11	WZ			WESTWOOD_012009- WESTWOOD_012012
12	XA			WESTWOOD_012041- WESTWOOD_012044
13	XB			WESTWOOD_012972- WESTWOOD_012975
14	XC			WESTWOOD_013715- WESTWOOD_013716
15	XD			Defendants' Demonstrative 1
16	XE			Defendants' Demonstrative 2
17	XF			Defendants' Demonstrative 3
18	XG			Defendants' Demonstrative 4
19	XH			Defendants' Demonstrative 5
20	XI			Defendants' Demonstrative 6
21	XJ			Defendants' Demonstrative 7
22	XK			Defendants' Demonstrative 8
23	XL			Defendants' Demonstrative 9
24	XM			Defendants' Demonstrative 10
25	XN			Defendants' Demonstrative 11
26	XO			Defendants' Demonstrative 12
27	XP			Defendants' Demonstrative 13

1	XQ		Defendants' Demonstrative 14
2	XR		Defendants' Demonstrative 15
3	XS		Defendants' Demonstrative 16
4	XT		Defendants' Demonstrative 17
5	XU		Defendants' Demonstrative 18
6	XV		Defendants' Demonstrative 19
7	XW		Defendants' Demonstrative 20
8	XX		SeaWorld Entertainment, Inc.'s Securities Registration Statement (Form S-1), filed with the SEC on December 27, 2012
9	XY		SeaWorld Entertainment, Inc.'s Securities Registration Statement (Form S-1/A), filed with the SEC on February 12, 2013
10	XZ		SeaWorld Entertainment, Inc.'s Securities Registration Statement (Form S-1/A), filed with the SEC on April 18, 2013
11	YA		SeaWorld Entertainment, Inc.'s Prospectus (Form 424B4), filed with the SEC on April 19, 2013
12	YB		SeaWorld Entertainment, Inc.'s Press Release (Form 8-K), filed with the SEC on August 13, 2013
13	YC		SeaWorld Entertainment, Inc.'s Quarterly Report (Form 10-Q), filed with the SEC on August 14, 2013
14	YD		SeaWorld Entertainment, Inc.'s Press Release (Form 8-K), filed with the SEC on September 11, 2013
15	YE		SeaWorld Entertainment, Inc.'s Quarterly Report (Form 10-Q), filed with the SEC on November 13, 2013
16	YF		SeaWorld Entertainment, Inc.'s Press Release (Form 8-K), filed with the SEC on November 13, 2013
17	YG		SeaWorld Entertainment, Inc.'s Securities Registration Statement (Form S-1/A), filed with the SEC on December 9, 2013
18	YH		SeaWorld Entertainment, Inc.'s Prospectus (Form 424B4), filed with the SEC on December 12, 2013

1	YI			SeaWorld Entertainment, Inc.’s Press Release (Form 8-K), filed with the SEC on January 13, 2014
2				
3	YJ			SeaWorld Entertainment, Inc.’s Press Release (Form 8-K), filed with the SEC on March 13, 2013
4				
5	YK			SeaWorld Entertainment, Inc.’s Annual Report (Form 10-K), filed with the SEC on March 21, 2014
6				
7	YL			SeaWorld Entertainment, Inc.’s Securities Registration Statement (Form S-1), filed with the SEC on March 24, 2014
8				
9	YM			SeaWorld Entertainment, Inc.’s Press Release (Form 8-K), filed with the SEC on April 2, 2014
10				
11	YN			SeaWorld Entertainment, Inc.’s Securities Registration Statement (Form S-1/A), filed with the SEC on April 2, 2014
12				
13	YO			SeaWorld Entertainment, Inc.’s Prospectus (Form 424B4), filed with the SEC on April 4, 2014
14				
15	YP			SeaWorld Entertainment, Inc.’s Press Release (Form 8-K), filed with the SEC on May 14, 2014
16				
17	YQ			SeaWorld Entertainment, Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on May 15, 2013
18				
19	YR			SeaWorld Entertainment, Inc.’s Press Release (Form 8-K), filed with the SEC on August 13, 2014
20				
21	YS			SeaWorld Entertainment, Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on August 13, 2013
22				
23	YT			Statement of Changes in Beneficial Ownership (Form 4), filed on behalf of Marc Swanson with the SEC on January 2, 2014
24				
25				
26	YU			Statement of Changes in Beneficial Ownership (Form 4), filed on behalf of James Heaney with the SEC on December 6, 2013
27				
28				

1	YV			SeaWorld Entertainment Inc.’s Annual Report (Form 10-K), filed with the SEC on February 26, 2016
2				
3	YW			SeaWorld Entertainment Inc.’s Annual Report (Form 10-K), filed with the SEC on March 1, 2017
4				
5	YX			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on November 13, 2014
6				
7	YY			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on May 8, 2015
8				
9	YZ			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on August 15, 2015
10				
11	ZA			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on November 6, 2015
12				
13	ZB			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on May 6, 2016
14				
15	ZC			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on August 05, 2016
16				
17	ZD			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on November 9, 2016
18				
19	ZE			SeaWorld Entertainment, Inc.’s Press Release (Form 8-K), filed with the SEC on March 17, 2016
20				
21	ZF			SeaWorld Entertainment Inc.’s Quarterly Report (Form 10-Q), filed with the SEC on May 23, 2013
22				
23	ZG			SeaWorld Entertainment, Inc., 2Q13 Earnings Call Transcript, August 13, 2013 5:00 PM ET, <i>Bloomberg</i>
24				
25	ZH			SeaWorld Entertainment, Inc., 1Q13 Earnings Call Transcript, May 22, 2013 5:00 PM ET, <i>Bloomberg</i>
26				
27				
28				

1	ZI			SeaWorld Entertainment Inc.'s Quarterly Report (Form 10-Q), filed with the SEC on August 14, 2014
2				
3	ZJ			SeaWorld Entertainment, Inc., 2Q14 Earnings Call Transcript, August 13, 2014 9:00 AM EST, <i>Bloomberg</i>
4				
5	ZK			Cedar Fair, L.P.'s Press Release (Form 8-K), filed with the SEC on August 8, 2013
6				
7	ZL			Cedar Fair, L.P.'s Quarterly Report (Form 10-Q), filed with the SEC on August 8, 2013
8				
9	ZM			Six Flags Entertainment Corp.'s Annual Report (Form 10-K), filed with the SEC on February 20, 2014
10				
11	ZN			Cedar Fair, L.P.'s Quarterly Report (Form 10-Q), filed with the SEC on May 9, 2014
12				
13	ZO			SeaWorld Entertainment, Inc.'s Press Release (Form 8-K), filed with the SEC on March 13, 2014
14				
15	ZP			SeaWorld Entertainment, Inc., 2Q13 Earnings Call Transcript, August 13, 2013, <i>S&amp;P Capital IQ</i>
16				
17	ZQ			SeaWorld Entertainment, Inc.'s Press Release (Form 8-K), filed with the SEC on May 22, 2013
18				
19	ZR			SeaWorld Entertainment, Inc.'s Press Release (Form 8-K), filed with the SEC on April 9, 2014
20				
21	ZS			Garcia, Jason, "SeaWorld launches 'Blackfish' counterattack in ads," <i>Orlando Sentinel</i> , December 20, 2013
22				
23	ZT			Stynes, Tess and Michael Calia, "SeaWorld 3rd-Quarter Profit Up 30%; Downplays 'Blackfish' Effect," <i>Wall Street Journal</i> , November 14, 2013
24				
25	ZU			Deposition of Jonas Bhatti dated June 28, 2017, Exhibit 7
26				
27	ZV			Deposition of Jonas Bhatti dated June 28, 2017, Exhibit 9
28				
	ZW			Deposition of Elizabeth Gulacsy dated August 30, 2019, Exhibit 9



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ZX			Deposition of Gail Stone dated July 7, 2017, Exhibit 5
ZY			Deposition of Gail Stone dated July 7, 2017, Stone Exhibit 15
ZZ			Deposition of Westwood Management Corporation, 30(b)(6) Corporate Representative Thomas Lieu dated July 13, 2017, Exhibit 17
AAA			Deposition of Westwood Management Corporation, 30(b)(6) Corporate Representative Thomas Lieu dated July 13, 2017, Exhibit 20
AAB			Deposition of Westwood Management Corporation, 30(b)(6) Corporate Representative Thomas Lieu dated July 13, 2017, Exhibit 21
AAC			Deposition of Thomas Lieu dated November 29, 2018, Exhibit 4
AAD			Deposition of Thomas Lieu dated November 29, 2018, Exhibit 13
AAE			Deposition of Thomas Lieu dated November 29, 2018, Exhibit 20
AAF			Deposition of Thomas Lieu dated November 29, 2018, Exhibit 26



1 Dated: December 13, 2019

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2  
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23 Los Angeles, CA 90067-3012  
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