UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE EASTERLY ROCMUNI HIGH INCOME MUNICIPAL BOND FUND	25-cv-6028 (DLC)

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFF'S MOTION TO STRIKE AND IN OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE, OR, IN THE ALTERNATIVE, TO CONVERT THE MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT, AND IN FURTHER SUPPORT OF LEAD PLAINTIFF'S MOTION TO STRIKE

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Defendants' Opposition (ECF No. 124) (the "Opposition" or "Opp.") to Lead Plaintiff Richard Fulford's ("Plaintiff") Motion to Strike and in Opposition to Defendants' Request for Judicial Notice, ECF No. 116 (the "Motion"), further elucidates why the Court should reject their attempt to assert a defendant-friendly factual record at the pleading stage. By submitting scores of extraneous documents with their motion to dismiss, Defendants ask the Court to disregard the long-standing requirement that it accept as true all well-pled factual allegations set forth in the Second Amended Complaint (the "Complaint"). Instead, Defendants have tailored their own set of facts to frame their merits defenses while invoking the Private Securities Litigation Reform Act of 1995's discovery stay. Not only do Defendants ignore that the Court is required to accept the facts alleged in the Complaint as true, but they also ask the Court to use these extraneous documents to make factual determinations and to dispute facts at the motion to dismiss stage. That is prejudicial to Plaintiff and the Class and is precisely what Rules 12(d) and 56 prohibit.

The Opposition rests on two untenable positions: that the Motion is procedurally improper, and that each of the challenged exhibits (the "Extraneous Exhibits") falls within a recognized category of judicially noticeable material. As set forth below, neither position withstands scrutiny.

I. ARGUMENT

A. Plaintiff's Motion is Procedurally Proper.

Defendants devote much of the Opposition to a strawman argument that the Motion is procedurally improper. This argument elevates form over substance and ignores the well-established authority of the Court to exercise its inherent discretion to manage its own proceedings and to exclude extraneous materials from consideration on a motion to dismiss consistent with Rules 12(d) and 56, and Rule 201. Moreover, Defendants ignore that the Motion also opposes Defendants' request for judicial notice, which is appropriate given that Rule 201 provides that "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to

be noticed."

While Defendants repeatedly mention that Rule 12(f) authorizes courts to strike material from "pleadings," and that motion-to-dismiss exhibits are not "pleadings" within the definition of Rule 7(a), Plaintiff has not argued otherwise. The Motion requests that the Court exercise its inherent authority and discretion to confine its review of motion to dismiss materials to those that are properly before it. Specifically, Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." The Rule expressly contemplates that the Court may exclude extraneous materials.[1]

In light of these rules and the narrow scope of Rule 201, this Court and others routinely consider motions to strike in securities litigation. *See*, *e.g.*, *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 287 (S.D.N.Y. 2013) ("Because determining the universe of properly considered materials is a necessary predicate to considering Kinross's motion to dismiss, the Court turns first to Austin's motion to strike . . ."). In *SEC v. Rosenberger*, the Court made clear that motions to strike are appropriate to challenge extraneous documents introduced at the pleading stage and it exercised its discretion to strike extraneous materials without reference to any particular rule.[2]

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[1] In *City of Sterling Heights Police & Fire Ret. Sys. v. Kohl's Corp*., 2015 WL 1478565, *1 (E.D. Wis. Mar. 31, 2015), the same lawyers representing the Easterly Defendants made the exact same meritless argument, which the court rejected.

[2] Defendants' authorities are irrelevant because they did not involve an attempt to introduce extraneous evidence at the pleading stage. In *In re WorldCom, Inc. Sec. Litig*., 2003 WL 22701241, at *8 (S.D.N.Y. Nov. 17, 2003), the Court denied a motion to strike a letter brief relating to a dispute whether counsel was soliciting absent class members with misleading statements about the action, and in *SEC v. Boock*, 2011 WL 3792819, at *10 (S.D.N.Y. Aug. 25, 2011), at summary

None of Defendants' authorities suggest that the Court is powerless to exclude extraneous materials simply because they are attached to a motion rather than a pleading. Defendants' principal authority, *Bazelle v. Novocure Ltd*., 2025 WL 843668, at *6 (S.D.N.Y. Mar. 18, 2025), affirmed the Court's inherent authority: "as it always does, the Court examines Defendants' exhibits to determine whether they are properly considered to resolve this motion to dismiss."[3]

Defendants also accuse Plaintiff of using the Motion to circumvent the Court's word-limit order. Defendants' criticism is ironic. It is Defendants who submitted Exhibit 1 to the Rein Declaration (ECF No. 113-1) containing over 3,600 words of argument and legal cross-referencing that are absent from their brief, circumventing the Court's 10,750-word limit. Any overlap between Plaintiff's arguments for excluding the Extraneous Exhibits and his merits argument arises from Defendants' introduction of extensive materials outside the Complaint at the pleading stage to dispute the Complaint's facts. Defendants identify no prejudice and, indeed, the Court set a schedule for briefing the Motion (ECF No. 121) and Defendants have had the opportunity to submit a 21-page brief, undermining any suggestion of gamesmanship.[4]

Defendants' procedural arguments ring hollow and should be rejected.

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judgment, the court denied a motion to strike documents not produced with automatic disclosures under Rule 26.

[3] Defendants' reliance on *Honig v. Hansen*, 2021 WL 4651475, at *3 (S.D.N.Y. Oct. 6, 2021), and *Locksley v. United States*, 2005 WL 1459101, at *4 (S.D.N.Y. June 15, 2005), is similarly misplaced because, unlike here, plaintiffs in those cases sought relief under Rule 12(f).

[4] Defendants' authorities are inapposite. In *Andrews v. Freemantlemedia N.A., Inc.*, 2014 WL 6686590, at *15-16 (S.D.N.Y. Nov. 20, 2014), the court struck plaintiff's motion because it was filed one business day after plaintiff requested leave and before the court ruled on the request for permission to file, and plaintiff conceded that the motion violated the court's individual pre-motion conference requirements. In *IHS Dialysis Inc. v. Davita, Inc.*, 2013 WL 1309737, at * 3 (S.D.N.Y. Mar. 31, 2013), defendant's motion to strike asserted arguments that were ignored in its motion to dismiss, which is the opposite of what Defendants argue here.

B. Defendants Cannot Satisfy Their Burden to Demonstrate That the Extraneous Exhibits Are Properly Before the Court.

1. The Morningstar Editorial Is Not Properly Noticed for the Fact of Publication and Is Used to Dispute Facts

Defendants' assertion that they only seek judicial notice of Exhibit 3 "for the fact of its publication" does not relieve them of their burden to establish judicial notice is appropriate. The Motion disputes that Defendants have established Rule 201's predicate that the adjudicative fact—here, the asserted "fact of its publication"—is "generally known" or "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Defendants suggest that the Court can skip this analysis, citing *Dingee v. Wayfair Inc.*, 2016 WL 3017401 (S.D.N.Y. May 24, 2016) (Cote, J.). However, in *Dingee*, unlike here, plaintiffs did "not contest that the Court may consider these documents." *Id*. at *4 n.2. The Second Circuit requires that a fact appropriate for judicial notice to be "common knowledge" or derived from "an unimpeachable source." *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc*., 146 F.3d 66, 70 (2d Cir. 1988). Defendants' arguments in footnotes are not evidence, raise questions of fact that cannot be resolved on a motion to dismiss, and do not come close to meeting the standard for judicial notice.[5]

Defendants mischaracterize the Morningstar editorial as "media coverage" and assert they use it to show publicity in "press articles" serving as a "storm warning." However, it is an editorial, which Defendants do not dispute, and Defendants provide no evidence establishing circulation, investor accessibility, or authenticity as of the asserted date.

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[5] Defendants' authorities (Opp. at 9) in which courts judicially noticed Morningstar documents involved ERISA actions and complaints that cited, referenced or relied on Morningstar documents, and none found that Morningstar documents provided a storm warning as a matter of law. *Anderson v. Intel*, 19-cv-4618-LKH (N.D. Cal.), ECF No. 113 at 39-41; *Phillips v. Cobham Advanced Elec. Solutions*, 23-cv-3785-EJD (N.D. Cal.), ECF No. 79 at 19, 21, 24-19; *White v. Chevron Corp.*, 16-cv-793-PJH (N.D. Cal.), ECF No. 41 at 11 n.10; *Wilcox v. Georgetown Univ.*, 18-cv-422 (D.D.C.), ECF No. 1 at 26.

Defendants respond with generalized assertions that "it is generally proper to take judicial notice of articles and websites." Unlike Defendants' authorities, there is no evidence in the record concerning the circulation or publicity of the Morningstar editorial at the time it was purportedly posted. Defendants' authorities involved widespread news and media fact reporting, including disclosures in issuer SEC filings, major newspapers with vast circulation, and lawsuits. The Morningstar editorial was not disclosed in the Fund's SEC filings and there is zero evidence in the record of publicity or circulation.

Citing *Patsy's Italian Rest., Inc. v. Banas*, 575 F. Supp. 2d 427, 443 n.18 (E.D.N.Y. 2008), Defendants argue that "it is generally proper to take judicial notice of articles and Web sites published on the Internet" "because they are easily verifiable through a simple web search, and thus are 'generally known within the trial court's territorial jurisdiction' and 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" Defendants ignore that in *Patsy's*, the court took judicial notice of an online article for the fact of a restaurant's location during a post-trial proceeding to ensure compliance with an injunction, not at the pleading stage. *Patsy's*, 575 F. Supp. 2d at 443 n.18. Similarly, in *Driessen v. Natwest Bank PLC*, 2013 WL 12073444, at *2 n.2 (D. Conn. Oct. 25, 2013), the court took judicial notice of web addresses because they are not subject to reasonable dispute. Judicial notice of these unquestionable facts is a far cry from what Defendants request here, a distinction the court in *Driessen* highlighted. *Id.* (noting it would be inappropriate to judicially notice webpage whose source and reliability are unknown).

Defendants' reliance on the Wayback Machine to establish as a matter of law that access to the Morningstar editorial was not restricted in 2023 falls flat. In *Lee v. Springer Nature Am., Inc.*, 769 F. Supp. 3d 234, 249-50 (S.D.N.Y. 2025), which Defendants cite, the court rejected

defendants' reliance on the Wayback Machine as a "bridge too far." In *Lee*, the court found "no case in which a court has accepted the Wayback Machine . . . for the ways in which that page could have been used at that distant time. It is not at all clear that the Wayback Machine accurately reflects the complex functionality of a webpage at an earlier time, as opposed to simply the content it contained. The inference that it does so can 'reasonably be questioned' . . . It is not a proper subject for judicial notice." *Id*.

Even assuming, *arguendo*, the Court permits judicial notice of the Morningstar editorial for the fact of its publication, it cannot constitute a "storm warning." The Morningstar editorial does not suggest the probability of wrongful conduct by Defendants. ECF No. 117 at 9-10. Further, the price of the Fund's shares increased on the date it was purportedly published, undermining a finding that the editorial was, as a matter of law, a storm warning. This falls well short of the standard for inquiry notice that requires that the misconduct "must be probable, not merely possible," and "must be such that it relates directly to the misrepresentations and omissions" Plaintiff alleges in the Complaint. *Meyer v. Seidel*, 89 F. 4th 117, 135 (2d Cir. 2023); *Fed. Hous. Fin. Agency for Fed. Nat'l. Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 120 (2d Cir. 2017).

Defendants' authorities are distinguishable and confirm that the Morningstar editorial was not a storm warning. For example, plaintiffs in both *Stewart v. Loring Estates LLC*, 2020 WL 3002363, at *12 (E.D.N.Y. Feb. 26, 2020) and *Koch v. Christie's Int'l PLC*, 785 F. Supp. 2d 105, 115-16 (S.D.N.Y. 2011) admitted awareness of information that put them on inquiry notice of the claims alleged in those cases. In *Stewart*, the court found plaintiffs on notice based on admissions in their complaint and facts publicized by *Reuters*, *The New York Post*, and *Newsday*. 2020 WL 3002363, at *12. In *Koch*, the court declined to find notice based on the publication of over ten

news articles and a public lawsuit, however, the court found notice based on plaintiff's admissions at deposition that he had read press reports and had conducted testing showing awareness of possible injury. 785 F. Supp. 2d at 115-16. Defendants do not suggest Plaintiff's possible awareness of the Morningstar editorial that would have provided a "storm warning" and do not come close to providing "uncontroverted evidence" of notice. *Marshall v. Milberg LLP*, 2009 WL 5177975, at *3 (S.D.N.Y. Dec. 23, 2009); *Koch*, 785 F. Supp. 2d at 114.

Finally, contrary to Defendants' argument that they only seek judicial notice of the fact of publication, Defendants rely on the Morningstar editorial to dispute the Complaint's allegations that the Fund's registration statements and prospectuses contained materially false and misleading statements. ECF No. 112 at 1, 8-10, 27-30. That is the very definition of using a publication for its truth, which is not a proper use of a judicially noticed fact.

2. Exhibit 41 Is Misleading and Is Used to Dispute Facts

Judicial notice of the Fund's price quotations does not permit Defendants' merits arguments on materiality at the pleading stage. Defendants do not deny that they use Exhibit 41 to argue that investors purportedly reacted negatively to the Morningstar editorial as reflected in a "modest" stock decline. ECF No. 115 at 27. The Court should reject this improper evidentiary weighing or, at a minimum, decline to consider Exhibit 41 at the pleadings stage. Should the Court weigh this evidence, Defendants do not deny that in the days after the Morningstar editorial was purportedly dated the Fund's price per share ***increased***, which undermines Defendants' assertions that the Morningstar editorial was a storm warning.

Unlike the historical price exhibits judicially noticed in Defendants' authorities, which were complete, accurate tabular records listing daily open, high, low, close, volume, and adjusted

prices,[6] Exhibit 41 is Defendants' bespoke graphic that selectively summarizes price information through compressed charts, does not accurately and transparently depict daily prices, and is a graphical presentation that conveys a misleading impression that cannot be judicially noticed.

3. Exhibits 21-24 Are Used to Dispute Facts

While Defendants assert that it is blackletter law to judicially notice SEC filings, Defendants do not dispute that "even documents that may be considered on a motion to dismiss normally should not be considered for the truth of any statements made therein . . . This makes sense given that the Court should not find facts by weighing competing inferences on a motion to dismiss." *SEC v. Medallion Fin. Corp.*, 2022 WL 3043224, at *2 (S.D.N.Y. Aug. 2, 2022) (declining to consider SEC filings). Exhibits 21-24 are cited by Defendants to undermine materiality, for their truth, and used to raise competing factual inferences. ECF No. 117 at 13-14. Accordingly, Exhibits 21-24 should not be considered at this stage.[7]

4. Exhibits 31-35 Are Used to Dispute Facts

Defendants argue that they cite Exhibits 31 and 32, extraneous media articles about the municipal bond market, "not for the truth." But their briefing deploys these articles to substantively support defenses about the collapse of the Fund that dispute the Complaint's allegations. ECF No.

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[6] *See In re FUBOTV Inc. Sec. Litig.*, 21-cv-01412 (ALC) (S.D.N.Y.), ECF No. 53-5; *Glantz* v. *James River Grp. Holdings, Ltd.*, 23-cv-10000 (S.D.N.Y.), ECF No. 23-6. In *In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 512 n.5 (S.D.N.Y. 2009), the court obtained stock price information directly from Yahoo!, and did not, as Defendants suggest here, rely on a bespoke and misleading depiction.

[7] Defendants' authorities are distinguishable. In *Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 643 (S.D.N.Y. 2015), plaintiffs did not oppose judicial notice. In *Nw. Biotherapeutics, Inc. v. Canaccord Genuity LLC*, 2023 WL 9102400, at *12 (S.D.N.Y. Dec. 29, 2023), the court declined to consider SEC filings that were "immaterial to the Court's analysis of the instant motion." Likewise, Exhibits 21-24 are not cited in the Complaint and Defendants offer them for their truth, which is not pertinent in determining whether the Complaint states a claim.

117 at 14-15. Defendants fail to explain how extraneous articles concerning market turbulence in April 2025 have any bearing on the motion other than for their purported truth—that external market forces caused the Fund to collapse. That is precisely the kind of "truth of the matter asserted" use that Rule 201 forbids.

Defendants assert that Exhibits 33-35—which are not cited in the Complaint or the Fund's registration statements and prospectuses and do not mention the Fund or Defendants—are judicially noticeable "merely to demonstrate that 'information was publicly available.'" However, Defendants ignore that they improperly use these documents to dispute the Complaint's allegation that throughout the Class Period the Fund exceeded its represented limit of no more than 15% in illiquid assets. ECF No. 112 at 20.

5. Exhibits 36-38 Are Not Authoritative Federal Agency Pronouncements and Are Used to Dispute Facts

Defendants' argument that MSRB publications are akin to federal agency reports is meritless. The SEC has commented that the MSRB "is not [a federal] agency but rather a 'self-regulatory organization.'" *See* Self-Regulatory Organization; Proposed Rule Change; Municipal Securities Rulemaking Board, 56 FR 28194-01, 1991 WL 291672, at n.69 (June 19, 1991). Accordingly, MSRB documents are not entitled to judicial notice as authoritative statements of federal agencies, and Defendants cite no authority holding otherwise. Defendants cherry pick from the MSRB's charts and analyses—which are not adjudicative facts—and assume the information is truthful in support of their factual assertion that investors in the Fund were aware of the facts that the Complaint alleges were not disclosed and that investors "accepted these risks." ECF No. 122 at 1. Defendants' argument raises a question of fact that cannot be resolved on a motion to dismiss.

6. Exhibits 39-40 Are Used to Dispute Facts

Defendants use Exhibit 39 (a default notice concerning one of the Fund's assets) and Exhibit 40 (an offering document concerning one of the Fund's assets) to raise questions of fact and dispute materiality by arguing that the information set forth in them was true and was "equally available to both parties." Defendants' arguments that certain, purportedly "public," information precludes Plaintiff's claims ignores that under the Securities Act of 1933 ("Securities Act"), the duty to disclose rests on Defendants.

Defendants' argument that a document on the MSRB's EMMA website is "no different than taking notice of a document filed" with the SEC is specious. Unlike Defendants' authorities, the Fund did not disclose these documents to investors in its SEC filings. There is no mention of the MSRB or its EMMA website in any of the Fund's registration statements or prospectuses at issue in the Complaint and, contrary to Defendants' argument, it is not a government website. The Court should reject Defendants' use of these extraneous documents to dispute the Complaint's allegations and that conflict with Defendants' disclosure obligations under the Securities Act.

7. Defendants' Summary Exhibits 1-2 Should Be Stricken

Defendants admit Exhibit 1 "lists … the applicable grounds for dismissal in Defendants' motion to dismiss" and cross-references "the locations of applicable arguments," conceding it is an argumentative roadmap that regurgitates arguments in their brief. While Defendants argue that Exhibit 1 is for Court's convenience, it is hard to see the convenience of a complex, 22-page exhibit where the Complaint alleges just 12 statements across ten pages of the Complaint.

Contrary to Defendants' arguments, Exhibit 2 is inaccurate. Exhibit 2 contains attorney emphasis and highlights risks relating to investment products called "inverse floaters"—risks not at issue in the Complaint—and does so in a way that misleads by conflating distinct instruments and risk factors. The Court should not credit curated excerpts masquerading as neutral summaries

of SEC filings to resolve disputes over context and materiality.[8]

II. CONCLUSION

For the reasons in Plaintiff's opening brief and in this reply, the Court should grant the Motion, or in the alternative, convert Defendants' motion to dismiss into a motion for summary judgment, and provide Plaintiff a reasonable opportunity to take discovery on factual issues raised by Defendants, and the Court should strike Exhibits 1 and 2.

Dated: May 14, 2026

Respectfully submitted,

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[8] In contrast, in *Micholle v. Ophthotech Corp*., 2019 WL 4464802, at *16 (S.D.N.Y. Sept. 18, 2019), there is no indication that the summary exhibit contained irrelevant risk disclosures and attorney highlighting and emphasis.

CERTIFICATE OF COMPLIANCE

I certify that this memorandum of law contains 3,442 words and complies with the type-volume limitation of Local Civil Rule 7.1(c) of the Local Rules of United States District Courts for the Southern and Eastern District of New York, dated January 2, 2026, and the Individual Practices in Civil Cases of the Hon. Denise Cote, United States District Judge, effective December 19, 2024. I also certify that this brief complies with the typeface and type style requirements of Local Civil Rule 7.1(b)(1)-(3).

/s/ Jeffrey P. Campisi
Jeffrey P. Campisi

CERTIFICATE OF SERVICE

I, Jeffrey P. Campisi, hereby certify that, on May 14, 2026, I caused the foregoing to be served on all counsel of record by filing the same with the Court using the CM/ECF system which will send electronic notices of the filing to all counsel of record.

/s/ Jeffrey P. Campisi
Jeffrey P. Campisi