UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SJUNDE AP-FONDEN and THE CLEVELAND BAKERS AND TEAMSTERS PENSION FUND, individually and on behalf of all others similarly situated, Plaintiffs, v. GENERAL ELECTRIC COMPANY, JEFFREY R. IMMELT, JEFFREY S. BORNSTEIN, JAMIE MILLER, KEITH S. SHERIN, JAN R. HAUSER, and RICHARD A. LAXER, Defendants.	17 Civ. 08457 (JMF) (GWG) **ORAL ARGUMENT REQUESTED**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIFTH AMENDED COMPLAINT

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PRELIMINARY STATEMENT[1]

The Opposition unsuccessfully attempts to substitute argument for well-pleaded facts. Plaintiffs have not cured the fundamental deficiencies identified in the Court's Order. The Opposition overstates what the 5AC actually alleges, and what the 5AC does allege fails to state any claim. The 5AC should be dismissed with prejudice.

LTC Claims. Plaintiffs, without new facts, simply reargue their dismissed claims that GE misleadingly presented its LTC liabilities in its financial statements and MD&A table. Nothing offered by Plaintiffs' purported expert accountant changes the insufficiency of those allegations. Plaintiffs further abandon their claims that GE's LTC reserves were false and shift to an omission theory under Item 303. But Plaintiffs' concession that Defendants believed the adequacy of GE's LTC reserves also dooms their Item 303 claim, which requires Plaintiffs to plead Defendants' actual knowledge of a trend that would cause GE materially to increase those same reserves. Moreover, Plaintiffs do not even attempt to defend the speculative allegations of their purported actuarial expert—and with good reason: those allegations are about another company, not GE. If anything, that company's public adoption of the same assumptions after reviewing the same claims data further rebuts scienter here. Given the pleadings' inadequacy, the Opposition overstates the 5AC's sole new allegation regarding an unidentified PowerPoint presentation, vaguely described by an FE who had no contact with the Individual Defendants; does not know whether any of them reviewed supposed claims data in it (and does not even claim that most "received" it); and does not allege a material increase in projected reserves regardless.

LTSA Claims. As with the LTC claims, Plaintiffs move away from their "affirmative

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[1] Unless otherwise indicated, capitalized terms shall have the meanings ascribed to them in the Motion (Dkt. No. 196), citations and quotations are omitted, emphasis is added, and citations to "Ex. __" refer to exhibits attached to the Declaration of Blake T. Denton, submitted with the Motion (Dkt. No. 195), and the Supplemental Declaration of Blake T. Denton, submitted herewith.

misstatement" theory, relying again primarily on Item 303 "omission" claims. Plaintiffs no longer allege that GE's Contract Asset balance was misstated due to LTSA modifications and cumulative catch-up adjustments, but rather that these same practices allegedly constituted "known trends" that were "reasonably expect[ed]" to have a "material" impact on GE's financials. Notwithstanding this Court's guidance as to what Plaintiffs must plead to state such an Item 303 claim, the 5AC (just like the FAC) pleads no facts that would (i) establish any alleged trend, let alone (ii) quantify or otherwise plead any material impact thereof, or (iii) show that any such trend was "known" to Defendants. Instead, the 5AC's allegations are once again based on legally deficient and unsupported speculation from low-level FEs who do not claim any basis of knowledge for the "facts" they offer. Similarly, the 5AC and Opposition reveal that Plaintiffs' Item 303 factoring claim is based on inconsistent and implausible allegations that are insufficient to sustain any viable claim. Thus, Plaintiffs' LTSA claims all should be dismissed, this time with prejudice.

ARGUMENT

I. THE 5AC FAILS TO PLEAD A SECTION 10(B) CLAIM

A. Plaintiffs' LTC Claims Should Be Dismissed In Their Entirety

1. GE's Presentation Of Insurance Liabilities Is Not Actionable

Plaintiffs do not (and cannot) dispute that the 5AC offers no new facts to support Plaintiffs' already-dismissed allegations that Defendants misleadingly obscured or concealed LTC liabilities in GE's financial statements and annual SEC filings. *See* Mot. 9-13. Plaintiffs no longer challenge the accuracy of GE's LTC liabilities reflected in Note 11, and even concede that Item 303(a)(5) did not require GE to include LTC liabilities in its MD&A table. Opp. 3, 8. Plaintiffs thus confirm that there is no basis to alter the Court's prior determinations that (i) GE's presentation of LTC liabilities was "not misleading" because "no reasonable investor, having reviewed both the MD&A

table and Note 11 (as the filing directed her to do), could leave with the impression that GE's LTC liabilities were 'immaterial' or that GE's total insurance liabilities were 'declining' or materially less than they really were," Order 17-18; Mot. 9; and (ii) "the fact that GE disclosed the entirety of its insurance liabilities elsewhere in its Form 10-Ks defeats any finding that GE acted with the requisite scienter in omitting the liabilities from its tables." Order 19.

In lieu of facts, Plaintiffs offer a handful of strained arguments that do not establish falsity or scienter. *First*, Plaintiffs assert that "investors did not know that Note 11 included the LTC liabilities that were omitted from the MD&A table." Opp. 16-17. But as the Court already found, the MD&A table expressly stated that it "*excluded long-term care*, variable annuity and other life insurance contracts," Ex. 19, 2014 10-K, at 82,[2] and "directed readers to Note 11," which broke out in tabular form GE's "investment contracts, insurance liabilities and insurance annuity benefits ... *in our run-off insurance operations* and holders of guaranteed investment contracts." *E.g.*, *id.* at 170; Order 17.[3] As before, these plain disclosures negate an inference of scienter, despite Plaintiffs' contrived criticism that terms like "run-off insurance" were undefined. Opp. 16-17; *see* Order 18 ("GE's omission of LTC liabilities from its MD&A table was not misleading because it

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[2] Plaintiffs reassert that GE failed to "describe the nature of the items excluded and why they are excluded" under SEC Financial Reporting Manual ("SEC FRM") § 9240.7, and that "Item 303 required disclosure of what rendered these obligations undeterminable in 2012…." Opp. 3, 16 n.12. Plaintiffs are wrong. First, the Court dismissed with prejudice Plaintiffs' untimely claims based on GE's 2012 MD&A table. Order 15-16. Second, as the Court held, starting in 2012, GE described the items excluded from the MD&A table (long-term care, variable annuity, and other life insurance contracts), *id.* 16-20, and explained why they were excluded (because they did not have reasonably determinable cash flows in the table's years) in compliance with SEC FRM § 9240.7.

[3] Nor does the fact that GE included LTC liabilities in this table in 2018 (following its reserve increase), ¶ 244, demonstrate "Defendants' knowledge of their obligation to include LTC liabilities in the MD&A Table" earlier. Opp. 19. SEC FRM § 9240.7 explicitly "permits management to apply its judgment in determining what items should be included or excluded from the table." *See also* SEC Release No. 33-9144 (allowing "flexibility so that the presentation [in the table] can reflect company-specific information in a way that is suitable to a registrant's business").

fully disclosed its total insurance liabilities in Note 11 (and elsewhere in its Form 10-Ks).").

Second, Plaintiffs argue investors could not discern the "magnitude" of the LTC liabilities included in Note 11. Opp. 17. But as the Court previously found, the MD&A table expressly "excluded long term care," provided readers with "explicit directions" to Note 11, and "for each year during the Class Period, the figure in Note 11 was many billions of dollars higher than the one in the MD&A table." Order 17, 19. That "ten-figure disparity means that no reasonable investor … could leave with the impression that GE's LTC liabilities were 'immaterial' or that GE's total insurance liabilities were 'declining' …." *Id.* 17-18. Plaintiffs' argument that an investor "could not have subtracted the 'Insurance liabilities' line item in the MD&A Table from Note 11" to obtain the *precise* amount of GE's LTC liabilities, Opp. 18, has no more merit than it did before, Order 17-18; Mot. 11, particularly given that no rule, regulation, or law required GE to disclose the precise amount.

Third, Plaintiffs claim that investors could not isolate GE's "far riskier" LTC liabilities from the other two categories of insurance liabilities in Note 11, and thus could not "gaug[e] the true risk" of GE's LTC liabilities. Opp. 18. In sole support, Plaintiffs offer their paid accountant's "expert" opinion that LTC should have been broken out as a separate line item in Note 11—but that accountant cites no rule, regulation, or law requiring such detailed disclosure. *Id.* 18-19. The fact that Dr. Roman Weil's opinion is divorced from any legal disclosure obligations is unsurprising, as he has no background in financial reporting or disclosure requirements. ¶¶ 74-77. Dr. Weil's opinion is entitled to no weight.[4] Mot. 12. And, given that Dr. Weil has no insight into

[4] Plaintiffs' cases on this point are inapposite. In *Contant v. Bank of America Corp.* (not a securities class action), the court held that "[p]laintiffs are *not* required to provide expert analysis at the pleading stage…." 2018 WL 5292126, at *6 (S.D.N.Y. Oct. 25, 2018). In *In re Platinum & Palladium Antitrust Litigation* (also not a securities class action), the court acknowledged it would be *improper* to rely on expert opinions at the pleading stage. 2017 WL 1169626, at *13 n.9

any Defendant's state of mind, his opinion cannot overcome the Court's prior holding that the "disclosure of [LTC] liabilities—and the explicit directions to readers as to how to find those disclosures [in Note 11]—strongly undercuts any inference that GE had the intention to deceive, manipulate, or defraud investors." Order 19-20 & n.9.

2. GE's LTC Disclosures Did Not Violate Item 303

The Court previously concluded that Plaintiffs had not satisfied the *Omnicare* pleading standard in alleging that GE's LTC reserves were misstated under GAAP. Order 20-26. In response, Plaintiffs have now abandoned those claims. Opp. 1, 8. Instead, Plaintiffs seek to repackage their allegations that GE's LTC reserves "were materially understating its future liabilities," and that "it was inevitable that GE would need to record a material charge to increase its LTC reserves," *e.g.*, ¶ 135, as an alleged Item 303 violation—arguing Defendants were required to disclose, but omitted, material "LTC trends, commitments, and uncertainties." Opp. 6-9. This repackaged theory also misses the mark.

First, because Plaintiffs no longer allege that GE's LTC reserves were misstated, their Item 303 claim necessarily fails as well. *Id.* 8. To plead a violation of Item 303, Plaintiffs must allege a "known trend[] or uncertaint[y]" related to LTC that Defendants "reasonably expect[ed]" would have a "material … unfavorable impact" on GE's financial condition—*i.e.*, a known trend that would necessitate a material increase in GE's GAAP LTC reserves. 17 C.F.R. § 229.303(a)(3)(ii). However, as this Court held and *Plaintiffs now admit*, Plaintiffs are unable to plead under *Omnicare* that Defendants did not actually believe GE's GAAP LTC reserves were inadequate or that GE's representations did not rest on a meaningful inquiry. Order 25-26; Opp. 8. This

(S.D.N.Y. Mar. 28, 2017). Finally, in *Speakes v. Taro Pharmaceutical Industries, Ltd.*, plaintiffs pled facts and proffered expert allegations that contradicted an analyst upon whom defendants relied, which the court indicated created enough of a factual dispute to move to discovery. 2018 WL 4572987, at *5 (S.D.N.Y. Sept. 24, 2018). Here, Dr. Weil's opinion creates no factual dispute.

"concomitant conclusion" forecloses Plaintiffs' Item 303 claim. *See City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 129 F. Supp. 3d 48, 83 (S.D.N.Y. 2015). In *MetLife*, the court dismissed plaintiffs' Item 303 claims based on defendants' alleged duty to disclose a known uncertainty that could increase MetLife's reserves, because plaintiffs could not plead under *Omnicare* that defendants did not actually believe those reserves were adequate. *Id.* 83-84. As in *MetLife*, "it would make little sense for the Court now to hold that [Defendants] violated [] Item 303," when Plaintiffs have conceded their inability to plead subjective falsity under *Omnicare*, as that would "punish [Defendants] for failing to foresee something that [Plaintiffs] ha[ve] not shown was reasonably foreseeable." *Id.* 83. That is especially true where, as here, Plaintiffs cannot reconcile the inherent contradiction between their claims that Defendants were aware that a "brewing storm in [GE's] LTC portfolio had materialized years before GE first publicly hinted at a large LTC exposure in the summer of 2017," Opp. 1, and the "ineluctable fact" that GE's annual premium deficiency testing resulted in positive margins every year throughout the Class Period. ¶ 188; Order 28. Because "[t]he viability of [Plaintiffs'] Item 303 claim hinges on the already-rejected premise that [GE] misrepresented (within the meaning of the Exchange Act) the adequacy of its [LTC] reserves during the Class Period," it must be dismissed. *MetLife*, 129 F. Supp. 3d 84.

Second, Plaintiffs' Item 303 claim independently fails because the 5AC does not adequately allege any trend, commitment, or uncertainty related to LTC that was reasonably likely to have a material impact on GE's LTC reserves—let alone any Defendant's "actual knowledge" of the same. *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 95 (2d Cir. 2016). Plaintiffs identify four items that GE allegedly had a duty to disclose: (i) GE's "commitment" to fund "unusually risky LTC policies"; (ii) the "trend" of "negative claims experience" and "rising claim costs [] in the industry"; (iii) the "uncertainties" related to "GE's inability to unilaterally offset its mounting claims costs with premium increases"; and (iv) the "trend" of "persistently negative and worsening

claims experience." Opp. 6-7. None gives rise to a disclosure duty under Item 303.

As an initial matter, GE disclosed its "commitment" to reinsure LTC policies and related risks in its financial statements and SEC filings, which the Court found sufficient to demonstrate that "no reasonable investor … could leave with the impression that GE's LTC liabilities were 'immaterial.'" Order 17; *see, e.g.*, Ex. 47, 2014 10-K, at 144 (noting "significant mortality and/or morbidity risks" associated with liabilities for "traditional long-duration insurance contracts"). Next, neither Plaintiffs' references to industry publications and studies, ¶¶ 162-77, nor charges taken by other insurance companies, ¶¶ 178-86, establish negative industry trends that Defendants actually knew would be reasonably likely to materially impact *GE's* financials. Opp. 7; *accord Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 185 (S.D.N.Y. 2010) ("Merely alleging that there were signs of problems in the subprime mortgage market is not sufficient to show that the … defendants knew that their disclosures were false or misleading."). And, unquantified "uncertainties" arising out of GE's inability directly to seek regulatory approval for premium increases, ¶ 228, is not a material uncertainty for purposes of Item 303. *City of Warwick Mun. Emps. Pension Fund v. Rackspace Hosting, Inc.*, 2019 WL 452051, at *8 (S.D.N.Y. Feb. 5, 2019) (allegations must include the "anticipated magnitude" of an event); *In re Lions Gate Entm't Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 20 (S.D.N.Y. 2016) (allegations of a potential "very large" impact insufficient).

Plaintiffs are left to hinge their Item 303 claim on the purported "trend" of "persistently negative and worsening claims experience within GE's own LTC portfolio," attempting to argue Defendants' knowledge of that alleged trend is established by exaggerated characterizations of an unidentified PowerPoint newly-recalled by FE-2. Opp. 6, 10-13. Specifically, Plaintiffs argue that the 5AC "alleges that Defendants Immelt and Bornstein *personally reviewed* GE's deteriorating LTC claims data throughout the Class Period" via this PowerPoint, Opp. 10, but *the*

5AC does not say that. Instead, the 5AC merely states FE-2's *belief* that, following a five-person chain of custody between an unspecified presentation drafter and the person alleged to have presented it, "'without a doubt,' [a] presentation was received by Immelt, the CFO, and Zanin each year." ¶¶ 133-34. The 5AC does not allege that FE-2 had *any* contact with *any* Defendant, or had a basis to know what Mr. Immelt or Mr. Bornstein "personally reviewed," or if the PowerPoint contained "deteriorating LTC claims data." There is no allegation that FE-2 even saw the alleged PowerPoint containing annual data from 2016 or 2017. ¶ 63 (FE-2 left GE by January 1, 2017). Simply put, FE-2 was not "well[]placed," Opp. 1, to know what any Defendant actually knew. *See Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 589-90 (S.D.N.Y. 2011) (confidential witness allegations are "insufficient absent some allegation that the witness ... was privy to the individual defendants' knowledge").

Likewise, even if any Defendant actually reviewed the alleged PowerPoint (which the 5AC does not allege), the 5AC lacks allegations regarding any material "trends" identified in it. Notably, FE-2 does not allege that the presentation showed "adverse" claims experience. *See* ¶¶ 131-32; Mot. 20 n.18. Instead, the two relevant 5AC paragraphs only describe unexceptional, broad categories of "similar items": the level of claims and how they were "building" over an unknown time period; termination and interest rates, investments, and earnings; and a "hump" at some unknown time where projected reserves were expected to peak and then decline. ¶¶ 131-32; Mot. 20 n.19. Nowhere does the 5AC specify which reserves were expected to increase; when the "hump" would materialize; or, critically, how much the increase would be and whether it would be material. ¶¶ 131-32. Nor does FE-2 assert that this trend was unknown to the market; in fact, this growth and decline pattern is a natural attribute of benefit reserves, as the 5AC's own literature confirms. *See* Ex. 49, 2016 NAIC Study, at 71-73. FE-2 does not assert that the alleged PowerPoint reflected any concern with the current reserves, or (as the Opposition claims) that "the

worst was yet to come," Opp. 5; to the contrary, FE-2 explains that GE already "had to have reserve growth reflected on its financial statements." ¶ 132. Presumably recognizing these flaws, Plaintiffs construct arguments beyond the 5AC's actual allegations, but Plaintiffs cannot save the 5AC through attorney argument in their Opposition.[5] *See Goplen v. 51job, Inc.*, 453 F. Supp. 2d 759, 764 n.4 (S.D.N.Y. 2006).

Plaintiffs also now abandon their actuarial "expert" David Axene's speculative analysis of what Defendants would have actually known based on MetLife's statutory filings. The 5AC featured Mr. Axene's claim that, based on his review of those filings, there must have been "severe deficiencies" in GE's annual GAAP premium deficiency testing, such that GE must have used "grossly inaccurate" assumptions that were "inconsistent with its own claims experience." ¶¶ 197, 212. But Plaintiffs nowhere even mention Mr. Axene in their Opposition, and certainly do not address the fatal limitations of Mr. Axene's opinion raised in the Motion, including that Mr. Axene did not address any assumptions or claims experience related to ERAC (the larger of GE's two indirect reinsurance subsidiaries), or more broadly, *any* assumptions that *GE* used to set and test its GAAP LTC reserves. Mot. 14-19 & n.13. And, although Plaintiffs allege that GE's reinsured LTC policies were among "the riskiest" in the industry, Opp. 6, the 5AC fails to allege that GE's LTC reserves did not already account for these alleged "risk[y]" attributes.[6] ¶¶ 117-22. Plaintiffs'

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[5] Notably, this is not the first time Plaintiffs misstate FE-2's allegations in an effort to conjure an inference of scienter where none exists. *See* Order 21-22 n.10 ("Plaintiffs broadly assert that '*none* of the models used … were validated or approved by GE's Model Validation group.' … Upon closer inspection, however, what the Complaint actually alleges is that one former employee did '*not believe* that any of the models used … were validated or approved by GE's Model Validation group during his tenure'….") (citing FAC ¶¶ 175, 182).

[6] To the extent Plaintiffs rely on the contradictory theory that reserve increases taken by *other* LTC insurers constituted a trend or uncertainty for *GE*, Opp. 7 (citing ¶¶ 162-86), that argument is undercut by Plaintiffs' focus on how the particular attributes of each block of LTC policies factor into the reserve-setting and assessment process. ¶¶ 117-22; Opp. 7.

averment that they "amply allege" Defendants "knew of the trends plaguing GE's LTC portfolio," Opp. 10, is bare argument, unsupported by any well-pleaded facts. As before, GE's positive annual premium deficiency tests—further supported now by Plaintiffs' concession that Defendants subjectively believed GE's LTC reserves were adequate, Opp. 1, 8, and MetLife's adoption of the same reserve assumptions—undermine any allegation that Defendants actually knew of any trend in LTC claims data that was reasonably likely to have a material impact.[7] Order 29-30.

Finally, Plaintiffs, once again, still fail to adequately plead scienter, *i.e.*, that any Individual Defendant was "consciously reckless" regarding his or her duties under Item 303. *Id.* 26-30. As the Court found, to the extent any Defendant knew that GE remained exposed to "highly risky" LTC insurance liabilities, Opp. 13, he or she could still "believe in good faith that GE's insurance reserves were adequate to cover its liabilities," in light of the annual deficiency testing results. Order 30 n.14. GE's purported "outdated" pricing assumptions and mortality tables, Opp. 13, 15, were disclosed to regulators, adopted by MetLife in its filings, and *voluntarily* disclosed in an industry survey. *See* ¶¶ 136-46, 193-212. Further, Plaintiffs concede that UFLIC and ERAC, as GE Capital subsidiaries and long-term care reinsurers, were subject to federal and state regulatory supervision. Opp. 12 n.10. There is no allegation that UFLIC, ERAC, or GE concealed information from any regulator. That UFLIC and ERAC maintained an "open book" undermines any inference of scienter. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d

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[7] The Opposition asserts without support that MetLife adopted the same assumptions "not because they were correct, but because UFLIC—not MetLife—bore the financial responsibility for those policies." Opp. 15. But the 5AC nowhere alleges that, *see* ¶ 193, and the actual filings say the opposite. These filings reveal that independent actuaries retained by a major insurance player, as well as by multiple regulators, all concluded that based on the claims data the reserve assumptions were reasonable and appropriate, utterly rebutting the scienter allegations here. *See, e.g.*, Ex. 48, Virginia 2013 MetLife Filing 2015 Actuarial Report Letter, at 2, 5; Ex. 50, Kentucky 2017 MetLife Filing Actuarial Memorandum, at 2, 10.

173, 186 & n.62 (2d Cir. 2014).[8] As in the FAC, Plaintiffs' allegations in the 5AC—"namely, that GE's annual deficiency testing returned positive results year after year—foreclose a 'strong inference'" of scienter, and "suggest that Defendants had little reason to think trends or uncertainties in the LTC industry would have a material negative impact on GE's financial position." Order 29-30.[9]

3. Plaintiffs Do Not Allege A Significant Trends Disclosure Obligation

Plaintiffs also fail to plead any basis supporting their allegation that Defendants had a duty to make detailed disclosures regarding GE's LTC portfolio in the "Significant Trends & Developments" section of certain of GE's Form 10-Qs. Mot. 22-23. According to Plaintiffs, GE assumed a duty to disclose trends in its LTC portfolio because GE chose to disclose trends about other (entirely unrelated) aspects of GE's business. Opp. 9. But a "duty to speak [is] triggered only by speaking on a specific issue or topic," Order 32, and Plaintiffs do not point to any *LTC-related* disclosure in the Significant Trends & Developments section prior to Q2 2017 that was rendered misleading by the omission of the alleged "trends." Mot. 22-23. Nor do Plaintiffs even attempt to defend their claim that GE's later, voluntary disclosures in Q2 and Q3 2017 that the

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[8] Plaintiffs' cited scienter cases, Opp. 11, are inapposite. Unlike here, those cases involved confidential witnesses who directly interacted with the defendants (*Galestan v. OneMain Holdings, Inc.*, 348 F. Supp. 3d 282 (S.D.N.Y. 2018)) or who made specific allegations indicating a decline in demand noticeable at all levels of the company (*McKenna v. SMART Techs. Inc.*, 2012 WL 3589655 (S.D.N.Y. Aug. 21, 2012)). Plaintiffs do not (and cannot) make those allegations here. Plaintiffs' remaining scienter arguments, Opp. 13, 16 (timing of certain executive departures), fail for the reasons stated in the Order. Order 27-30.

[9] Plaintiffs argue in a footnote that the unsubstantiated "scienter" of third- and fourth-tier subsidiary (UFLIC and ERAC) non-defendant employees can be imputed to GE. Opp. 11 n.9. Not so in the Second Circuit. *See Friedman v. Endo Int'l PLC*, 2018 WL 446189, at *4 (S.D.N.Y. Jan. 16, 2018) ("[I]n the absence of allegations giving rise to a strong inference of scienter on the part of the Individual Defendants, Plaintiffs cannot establish scienter on the part of Endo itself."). In any event, Plaintiffs' only basis for arguing scienter for any of these low-level employees is the same discredited PowerPoint that is insufficient to plead any Individual Defendant's scienter.

Company had "experienced elevated claim experience" were insufficient to convey the relevant "trend or development." *Id.* 23. And Plaintiffs completely fail to allege any facts demonstrating that any Defendant omitted any such information with scienter. *See* Opp. 9; Order 27-28.

4. GE's Public Statements Regarding LTC Were Not False Or Misleading Nor Made With Scienter

Finally, Plaintiffs identify no reason why this Court should not again dismiss their claims based on alleged misstatements and omissions regarding GE's LTC exposure. Order 30-36.

First, Plaintiffs assert without basis that "the Court did not previously assess" Mr. Bornstein's July 22, 2016 statement that "[p]ortfolio quality remains stable." Opp. 20. Plaintiffs relied upon this exact same statement in the FAC, *see* FAC ¶ 146, and the Court dismissed the entirety of Plaintiffs' LTC claims, including "statements about GE Capital's LTC insurance exposure and its overall portfolio risk." Order 16; *see also id.* 30. In any event, the challenged statement is not actionable, especially given GE's positive annual premium deficiency tests and Plaintiffs' new concession that Defendants believed the reserves were adequate. *See also* Ex. 3, No. 10 (noting that statement is also puffery and an opinion).

Second, Plaintiffs incorrectly contend that the Court dismissed their prior claims because they previously "focus[ed] on GE's complete departure from the LTC business," but they now "allege misstatements regarding the continuing risk from [GE's] retained LTC portfolio." Opp. 20. But the Court already considered and rejected this retained-risk argument. *See* Order 31.

Third, Plaintiffs also fail to plead that any Defendant acted with scienter in making these statements. *See id.* 30-36. Plaintiffs fall back on the alleged PowerPoint presentation here too, as well as UFLIC's and ERAC's annual statutory filings. Opp. 21-22. But the 5AC does not even allege that the speakers of the challenged statements—Mr. Laxer or Mr. Bornstein—ever saw the PowerPoint, let alone "identify any specific information known or available to Messrs. Bornstein

or Laxer that contradicted their statements." Order 34-35.[10] Under the PSLRA, Plaintiffs' failure to raise such particularized allegations alone is sufficient to dismiss these claims. *See id.* 13-14.

B. Plaintiffs' LTSA Claims Should Be Dismissed In Their Entirety

1. Plaintiffs' Item 303 Claim Based Upon LTSA Modifications Fails

As with the prior complaints in this action, the 5AC does not plead facts that establish a "known trend[]" of LTSA modifications that was "reasonably expect[ed]" to have a "material … unfavorable impact" on GE's financial performance, as required by Item 303. 17 C.F.R. § 229.303(a)(3)(ii); *see* § 229.303(a)(1). The Order found the FAC deficient because there "[we]re no allegations of how many LTSAs were 'de-scoped,' or how many customers' payments deferred, or what overall effect such modifications would have on GE's overall financial position." Order 43-44. Despite the Court's guidance, the 5AC *still* does not provide any of that information—something undisputed in the Opposition. *See* Opp. 32-33.

Because they are unable to plead the necessary facts, Plaintiffs are left to argue (incorrectly, and contrary to the Court's Order) that they are not required to do so. Citing two Second Circuit opinions that do not help them, Plaintiffs insist that Defendants' "demand" for the particularized allegations called for by the Order is "misplaced" because "Item 303's disclosure obligations … do not turn on restrictive mechanical or quantitative inquiries." *Id.* This argument misses the point: while Item 303 does not prescribe a particular formula, it does require Plaintiffs to plead enough particularized information to identify (i) a known trend (ii) that is reasonably expected to have a material impact. 17 C.F.R. §§ 229.303(a)(1), (a)(3)(ii). Without some form of quantification, Plaintiffs here cannot establish a "trend[]," much less one "reasonably expect[ed]"

[10] The 5AC alleges only that FE-2 believes "Immelt and the CFO" received the PowerPoint and does not identify any information in the PowerPoint that contradicted the relevant public statements. ¶¶ 131-34.

to have a "material" impact on GE's consolidated financials, *id.*—which is confirmed by Plaintiffs' own cited cases. In *Panther Partners Inc. v. Ikanos Communications, Inc.*, the court credited allegations that a chip defect impacted "100% for all chips sold to clients representing 72% of revenue." 681 F.3d 114, 122 (2d Cir. 2012). Likewise, in *Litwin v. Blackstone Group, L.P.*, the court credited allegations regarding the dollar amounts of the defendant's relevant investments and holdings, as well as the percentage of total assets under management represented by those amounts. 634 F.3d 706, 720-22 (2d Cir. 2011).[11] But Plaintiffs do not even attempt to provide *any* information—qualitative or quantitative—that would plead the elements required by Item 303.

Instead, Plaintiffs are left with abstract allegations of LTSA practices that Plaintiffs contend "push[ed] out payment dates," "remov[ed] low-margin revenue components," or "provided additional concessions," Opp. 31 (citing ¶¶ 360-61, 366-67, 417-18), and the conclusory assertions that "GE Power Services Europe had nearly exhausted its LTSA modification opportunities by the end of 2017" and was "addict[ed]" to factoring, *id.* 33 (citing ¶¶ 363, 386-90). None of those provides specific details on such practices or their financial magnitude, much less how they would impact GE's consolidated financials. Accordingly, none of Plaintiffs' allegations pleads an Item 303 claim. *See, e.g.*, *Rackspace Hosting*, 2019 WL 452051, at *6-8 (allegation that "guidance was unachievable without the recurring revenue" from a contract did not show "reasonably likely" material effect); *Lions Gate*, 165 F. Supp. 3d at 20 (allegations of possible SEC settlement and legal accruals failed to establish reasonably likely material effect); *In re Francesca's Holdings Corp. Sec. Litig.*, 2015 WL 1600464, at *17 (S.D.N.Y. Mar. 31, 2015) (allegations of two vendor issues failed to plead a "trend" because complaint alleged no facts

[11] Both cases also involved claims under Sections 11, 12(a), and 15 of the Securities Act of 1933 that were not based on allegations of fraud, so the plaintiffs were not subject to the heightened pleading standards applicable here. *See Panther Partners*, 681 F.3d at 120; *Litwin*, 634 F.3d at 715.

suggesting that the vendor relationships "were getting any worse").

Plaintiffs also repeatedly argue that the ASC 606 accounting change—the effects of which all were publicly disclosed—somehow evidences a reduction in "value" of GE's LTSA Contract Assets, claiming they became "worth" half as much as they were pre-ASC 606. Opp. 32 n.24 & 33. But ASC 606 did nothing to change the economic value of GE's LTSAs in any way—their terms, revenues, and costs remained unchanged. *See* Mot. 26-27 & n.23; *see also* Order 38-39. And indeed, as Plaintiffs concede, the 5AC abandons any claim that "GE's statements of its historical Contract Assets were false," Opp. 30 n.23, either before or after ASC 606.

In any event, Plaintiffs fail to plead that any alleged trend was (i) "known" to Defendants, as required by Item 303 or (ii) recklessly disregarded by Defendants, as required to plead scienter. Plaintiffs merely argue that unspecified reports "were *accessible* to GE senior management" and that "all commercial people" in Power "had *access*" to internal software systems. *Id.* 34. But Plaintiffs' allegations suffer from the same critical deficiency: none says anything about what Defendants actually knew or saw. Mot. 27 (citing *Campo v. Sears Holdings Corp.*, 371 F. App'x 212, 217 (2d Cir. 2010); *Goplen*, 453 F. Supp. 2d at 768); *see also* Order 43. Because the 5AC still does not allege the requisite facts, Plaintiffs' Item 303 claim based on Power's LTSA modifications should again be dismissed.

2. Plaintiffs' Item 303 Claim Based Upon Alleged Utilization Fails

The 5AC also fails to plead an Item 303 claim based upon alleged declines in customer utilization. To plead a "trend" of declining utilization, Plaintiffs rely almost exclusively on a single unsupported sentence from the 533-paragraph Complaint, which alleges that "FE-5 stated that from 2010 into the Class Period, GE realized through its monitoring of customer utilization that usage of oil and gas turbines by customers was down 80-90%." ¶ 347; *see* ¶¶ 352-53, 409-10; Opp. 25-26. But Plaintiffs' inherently implausible interpretation of a single, isolated, non-

particularized statement from a low-level FE who left GE at the start of the Class Period cannot save Plaintiffs' claims. *See* Mot. 30 n.26.

As an initial matter, FE-5's allegation vaguely states that utilization "by customers" was down 80-90%: it does not say which, or how many, customers experienced such a drop, or for how long the alleged drop occurred, let alone that the drop amounted to a known trend that would materially affect GE. While the Opposition argues that this allegation should be read to allege a worldwide customer utilization decrease, Opp. 25-26, Plaintiffs fail to allege with particularity any basis for FE-5—a low-level employee from 2010 to 2013 in a satellite office in Europe (not Power's U.S. headquarters), ¶ 65—to know about any purported 80-90% drop in turbine utilization worldwide. FE-5 does not cite any actual document, report, or even conversation upon which his statement was based. FE-5 does not claim to have had a global role, or even to have learned of this data through unsubstantiated hearsay from someone who did have such a role. Instead, Plaintiffs only argue that "GE realized [this drop] through its monitoring of customer utilization," ¶¶ 347-48; Opp. 29, but FE-5 does not claim to have had any involvement with that alleged monitoring. Further absent are any allegations that FE-5 had interactions with any members of corporate or Power leadership, much less the Individual Defendants. *See In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 579-80 (S.D.N.Y. 2014) (rejecting allegations by witnesses not "alleged to have been involved in the … discovery and disclosure of the … issue, the subsequent investigation, or any of the related updates"); *see also In re Lehman Bros. Sec. & Erisa Litig.*, 2013 WL 3989066, at *4 (S.D.N.Y. July 31, 2013). This lack of particularity is fatal to Plaintiffs' claim.

This failure is even more egregious because Plaintiffs' strained interpretation of FE-5's allegation is not even remotely plausible. If utilization dropped by 80-90% across Power's entire multi-billion dollar LTSA portfolio, it would have had a catastrophic impact, requiring drastic changes in LTSA life-of-contract revenue projections (due to GE's use of a three-year average of

historical utilization for forecasting, *see* ¶¶ 336-39, 356) and, as a result, correspondingly massive negative cumulative catch-up adjustments. Yet no such massive adjustments are reflected in GE's financials (which Plaintiffs no longer dispute were properly stated).[12] *See* Opp. 30 n.23; ¶ 365; *see also* Order 38. Furthermore, Plaintiffs cite numerous additional FEs who were both more senior to FE-5 in GE Power and actually at the Company during the Class Period when this trend allegedly existed. Yet not a single one of them corroborates FE-5's vague statement, much less confirms Plaintiff's interpretation of that statement as being a "worldwide" trend. As such, the Court is left with nothing but a single vague sentence describing a low-level employee's supposition that there was an 80-90% drop in the utilization of an unspecified number of customers, without a shred of support or particularization.[13]

Plaintiffs' Item 303 claim also fails for lack of actual knowledge or scienter. Plaintiffs offer no particularized allegations that Defendants knew of the supposed trend or recklessly failed to disclose it. *See* Mot. 31-32. As the Motion explained and the Opposition ignores, the 5AC lacks any allegation that any Defendant ever saw or knew about any of the alleged customer-level "data" being monitored many levels below the GE management Defendants.[14] *Id*. 32.

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[12] The claimed 80-90% drop is also inconsistent with Plaintiffs' own statements regarding market demand. The Opposition argues that the global gas power market experienced "stagnating growth of roughly 1% in Europe and modest declines in the United States." Opp. 23 n.19 (citing ¶¶ 340-41). GE technology "produces more than one-third of the world's electricity," so even if GE was somehow disproportionately impacted, a drop of 80-90% on GE turbines would have a dramatic effect on global power production. *E.g.*, Ex. 51, June 26, 2018 Form 8-K, at 7. Such a global drop is not alleged, is contrary to the 5AC, and, in fact, never took place.

[13] The conclusory statements of FE-7 that one of Power's regional business units decided to model utilization using a three- rather than one-year average, Opp. 25 (citing ¶ 356), specify no particular utilization declines at any point and thus do not substantiate FE-5's statement as to any period. No other FEs, documents, or disclosures support Plaintiffs' implausible theory that utilization declined at 80-90% during the Class Period.

[14] Nor do FE-7's allegations demonstrate any Defendant's knowledge. Opp. 29-30. Not only does FE-7 fail to describe any specific utilization decline, Mot. 30-31 n.27, but alleged second- or

Accordingly, the Item 303 claim for alleged utilization declines should be dismissed.[15]

3. Plaintiffs' Item 303 Claim Based Upon Factoring Fails

The Opposition confirms that Plaintiffs' Item 303 factoring claim rests upon a faulty foundation. In addition to Plaintiffs' failure to plead particularized allegations establishing financial impact, as required under Item 303, Mot. 33-34, the Opposition cannot overcome the gaps and inconsistencies in FE-9's alleged basis for knowledge of factoring at Power during the relevant time period. And to bolster FE-9's statements, Plaintiffs offer only generalized allegations about GE's internal LTSA monitoring, Opp. 36 & n.26, which cannot amount to scienter. Plaintiffs do not establish that any Defendants knew the results of alleged "monitoring" conducted many levels below them, or even plead with specificity what it would have shown.[16]

Ultimately, Plaintiffs fail to explain how FE-9 could have knowledge about factoring when he did not work at GE Power during the relevant time period. *See* Mot. 33. By FE-9's own

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third-hand knowledge of a manager's modeling decisions at a sub-division of one of GE's businesses is not enough to impute knowledge to any Defendant, including GE. *See Barrett v. PJT Partners Inc.*, 2017 WL 3995606, at *8 (S.D.N.Y. Sept. 8, 2017) (employee's knowledge not imputable where "it [wa]s not alleged that [he] was a part of [the unit]'s senior management, … or that he reported directly to senior management"); *Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 304 (S.D.N.Y. 2019) (scienter of subsidiary's CEO not attributable to parent because CEO "was one or two rungs below [parent's] senior management").

[15] And GE's disclosures of market pressures and their potential effect on Power's performance foreclose liability. Mot. 28-29 & n.25. Disclosure of market pressures (rather than specific company events) suffices if the company connects those pressures to its financial position—which GE did. *See, e.g.*, *Plumbers & Steamfitters Local 137 Pension Fund v. Am. Express Co.*, 2017 WL 4403314, at *17-19 (S.D.N.Y. Sept. 30, 2017), *aff'd sub nom. Pipefitters Union Local 537 Pension Fund v. Am. Express Co.*, 773 F. App'x 630 (2d Cir. 2019).

[16] With regard to Mr. Bornstein's statement quoted in Paragraph 430 of the 5AC, the Court previously held that GE's disclosure of the amount of receivables factored "undercuts" Mr. Bornstein's scienter, Order 53-54, and the 5AC pleads no new facts that would support a different result. And Plaintiffs ignore that FE-9 did not even claim to attend the meeting at which Mr. Bornstein allegedly stated GE was "in too deep" to stop factoring, ¶ 402, and that FE-9's statement is inconsistent with Plaintiffs' own theory that GE had *already* departed from that practice by the end of 2016, Mot. 34. Further, notwithstanding Defendants' express invitation, Mot. 35, Plaintiffs cannot identify any knowledge or scienter allegations regarding any other Individual Defendant.

allegations, he was only aware of factoring while Power and Renewables were "under the same management umbrella" until 2015. *See* Opp. 36 n.26; ¶ 400; *see also Frankfurt-Tr. Inv. Luxemburg AG v. United Techs. Corp.*, 336 F. Supp. 3d 196, 222-23 (S.D.N.Y. 2018) (discrediting FE allegations where no FE "attended a meeting" with any defendants and where the FEs "worked mainly within a single [business] unit, so they had no insight" regarding other business units), *aff'd sub nom. Kapitalforeningen Lægernes Invest v. United Techs. Corp.*, 779 F. App'x 69 (2d Cir. 2019). In light of these deficiencies, Plaintiffs' Item 303 factoring claim should be dismissed.

4. GE's Public Statements Regarding LTSA Contract Assets And Factoring Were Not False Or Misleading Nor Made With Scienter

Finally, having abandoned many of their affirmative misstatement claims in favor of Item 303 disclosure claims, Plaintiffs make only a weak attempt to defend those that remain. As to the three statements the Court already found inactionable, Plaintiffs offer no legitimate response. Mot. 36; *see also* Order 50-54. Indeed, the very factual allegations that Plaintiffs now argue save their claims already appeared in the FAC. *See* Opp. 37-38.[17]

As to Mr. Bornstein's April 21, 2017 remarks regarding his expectations for customer utilization based on "similar trends in the prior years," the Opposition does little more than repeat vague statements by FE-5 and FE-7. *See id.* 38-39 (citing ¶¶ 340-57). But Plaintiffs must demonstrate with particularity "why and how" a challenged statement is false, *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 526 (S.D.N.Y. 2015), and they do no such thing. Not only are those FE

[17] The reasons Plaintiffs offer for departing from the Court's prior rulings, Opp. 37-38, make no sense. For example, Plaintiffs allege no particularized facts that would establish a "liquidity crisis" from cumulative catch-up adjustments, *see supra* § I.B.1, let alone one that renders false Mr. Bornstein's statement about "good underlying performance," Opp. 37-38. Likewise, Plaintiffs' own allegations that cumulative catch-up adjustments generated "paper" revenues and not cash, *e.g.*, ¶ 358, undermine their claim that Mr. Bornstein made an actionable misstatement by explaining that there would be "no cash associated with" the switch to ASC 606, Opp. 38; ¶ 432.

statements wholly unsupported, as discussed *supra* § I.B.2, but Plaintiffs do not explain how allegations that relate to (at the latest) events in 2016 could contradict statements made by Mr. Bornstein in April of 2017. *See* Opp. 25 (citing ¶¶ 347, 352, 356, 410). And Plaintiffs fail entirely to address Defendants' argument that Mr. Bornstein's statement constituted an inactionable opinion. *See id.* 38-39; Mot. 37. Accordingly, Plaintiffs' misrepresentation claims fail.[18]

II. THE 5AC FAILS TO PLEAD A SECTION 20(A) CLAIM

Despite the Court's request for more detailed briefing on their Section 20(a) claims, Plaintiffs do not meaningfully address Defendants' arguments. *See* Mot. 38-40 (citing cases). Plaintiffs simply rely on a summary list of the Individual Defendants' alleged titles and two of their signatures on certain SEC filings. Opp. 39. Such conclusory allegations are insufficient, even under Federal Rule of Civil Procedure 8. *See* Mot. 38-39 & n.33.

As to culpable participation, the weight of authority in this Circuit requires Plaintiffs to plead each Individual Defendant's culpable participation in a primary fraud with the same particularity required to plead scienter. *Id.* 39. As explained above and in Defendants' Motion, Plaintiffs fail to plead any particularized facts showing that any Individual Defendant knew or was reckless in not knowing of any alleged fraud committed by GE.

CONCLUSION

The 5AC states no claim under the stringent pleading requirements of Rule 9(b) and the PSLRA. In view of the more than two years that have passed and six complaints that have been filed, Defendants respectfully request that the 5AC be dismissed with prejudice.

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[18] Plaintiffs also do not meaningfully address Defendants' arguments regarding their claim based on GE's 2016 Form 10-K. Opp. 39 n.31. Defendants respectfully submit it should now be dismissed for the reasons articulated in the Motion. Mot. 37-38.

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Respectfully submitted,

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