**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| SJUNDE AP-FONDEN and THE CLEVELAND BAKERS AND TEAMSTERS PENSION FUND, individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>GENERAL ELECTRIC COMPANY and JEFFREY S. BORNSTEIN,<br><br>Defendants. | 17 Civ. 08457 (JMF) (GWG)<br><br>**ORAL ARGUMENT REQUESTED** |

# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants General Electric Company ("GE" or the "Company") and Jeffrey S. Bornstein (together, "Defendants") respectfully submit this Memorandum of Law in Support of Their Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.[1]

## PRELIMINARY STATEMENT

The time has come for this case to end. After five years and six amended complaints, Plaintiffs' few surviving claims all fail for lack of (i) loss causation, (ii) scienter, and (iii) material misstatements or omissions. Each of these requirements must be met, and none is. Under the Court's prior rulings, Plaintiffs' broad claims of securities fraud regarding GE Capital's long-term care insurance reserves[2] and GE Power's long-term service agreements[3] were reduced to a narrow set of claims regarding one type of factoring (related to receivables due one or more years in the future, *i.e.*, "long-term" or "LT" receivables) in one of GE's seven industrial segments (GE Power) for approximately nineteen months. Now that discovery is complete, those claims fail as well.

*First*, Plaintiffs cannot meet their burden as to loss causation, *i.e.*, to show that they suffered losses caused by the alleged revelation of information Defendants purportedly "misstated or omitted" concerning GE Power's LT factoring. The fundamental problem at the heart of Plaintiffs' claims is that the allegedly "corrective" disclosures upon which Plaintiffs have focused say nothing about LT factoring, but rather were simply quarterly announcements of certain consolidated financial results across GE's entire business (then consisting of eight different segments). As such, to meet their burden, Plaintiffs must establish that those disclosures reflected the materialization of a risk concealed by Defendants' alleged misrepresentations, *and* disaggregate any confounding

[1] Unless otherwise indicated, all internal citations and quotations are omitted, emphasis is added, and citations to "Ex. _" refer to exhibits to the Declaration of Blake T. Denton, submitted herewith.

[2] *See* Op. (Dkt. 185) at 16-36; Op. (Dkt. 206) at 16-23.

[3] *See* Op. (Dkt. 185) at 36-51; Op. (Dkt. 206) at 23-30.

factors or information that could have impacted GE's stock price. As Defendants have asserted from the outset, and as discovery has now confirmed, Plaintiffs cannot meet that burden. The methodology Plaintiffs' loss causation expert advances does not establish the existence of any causal connection between the information Plaintiffs claim should have been disclosed and the purportedly "corrective" events Plaintiffs identify. Likewise, he fails even to attempt to disaggregate certain confounding factors, and as to the confounding information he does address, his methodologies are fundamentally flawed and lack any explanatory power.

*Second*, Plaintiffs cannot meet their burden as to scienter. Plaintiffs no longer rely on the anonymous, low-level former-employee allegations that the Court cited in permitting their claims to move forward, and have failed to fill that hole in their case with new evidence of scienter. Despite obtaining discovery of over one million pages of documents, twenty SEC interviews, and fifteen depositions of GE witnesses, Plaintiffs cannot point to a single document or witness to support their claim that Mr. Bornstein or anyone else at GE acted with the requisite fraudulent intent. Instead, the record confirms that Defendants relied on an extensive and well-developed controls process and the expertise of the Disclosure Committee (of which Mr. Bornstein was *not* a member) to draft and approve the disputed disclosures. Further, Plaintiffs' scienter theory makes no sense given that Mr. Bornstein (and GE) bought significant amounts of GE stock while Defendants were supposedly perpetrating a fraud to inflate its price, and that Mr. Bornstein held all of his stock as the price declined, personally losing tens of millions of dollars.

*Third*, Plaintiffs cannot demonstrate that Defendants made any material misrepresentations or omissions. As to their Item 303 claim, Plaintiffs cannot carry their burden of establishing an actionable omission unless they demonstrate that the allegedly undisclosed information was material and related to one of the specifically enumerated metrics set forth in Item 303. In allowing

this claim to survive dismissal, the Court ruled that "[b]ecause factoring trades away future revenue for immediate cash, it stands to reason that GE's comprehensive factoring of LTSA receivables would have a material impact on future revenue." Op. (Dkt. 185) at 45. Discovery has shown beyond dispute, however, that factoring had no impact on current or future revenue at all, and therefore does not implicate Item 303's revenue requirements. Plaintiffs also appear to claim that GE Power's LT factoring was a "trend" likely to materially impact GE's "liquidity." That is also wrong. As Plaintiffs' experts admitted, because GE Power's LT factoring transactions involved arms-length, fair-value sales from GE Power (one GE segment) to GE Capital (another GE segment), they had no impact on GE's liquidity on a consolidated basis. At most, GE Power's LT factoring resulted in more of GE's total cash flow being reported as "Industrial CFOA," a non-GAAP metric that GE voluntarily reports, and to which Item 303 has no bearing given the lack of any impact on total company liquidity. With regard to their 2016 Form 10-K and January 20, 2017 earnings call claims, the statements Plaintiffs challenge were literally true and not misleading.

*Finally*, Plaintiffs' Section 20(a) claim fails because Plaintiffs cannot establish a primary violation and because there is no evidence of Mr. Bornstein's "culpable participation."

The Court should grant summary judgment in Defendants' favor.

## BACKGROUND[4]

### A. GE's Business During The Class Period[5]

GE is a diversified, global industrial company that was founded in 1892. SOF ¶ 1. During the Class Period, GE employed approximately 300,000 people across eight business segments

[4] Pursuant to Local Civil Rule 56.1 and Section 3(C)(v) of the Court's Individual Rules and Practices, Defendants have concurrently filed a Statement of Facts ("SOF") and have also provided a summary of the relevant background below.

[5] On April 11, 2022, the Court certified a class for the period of February 29, 2016 through January 23, 2018 (the "Class Period"). *See* Op. (Dkt. 314) at 10.

(Aviation, Capital, Healthcare, Energy Connections & Lighting, Oil & Gas, Power, Renewable Energy, and Transportation) that provided a wide range of products and services via 35 sub-segments operated by over 130 direct and indirect subsidiaries. *Id.* ¶¶ 4-6.

Plaintiffs' claims concern the business of GE Power, which manufactures, sells, and services gas-fired power plant turbines. More specifically, Plaintiffs' claims involve a subset of GE Power's "factoring" transactions, whereby GE Capital paid GE Power cash in exchange for LT receivables for work that GE Power had performed for customers and/or equipment that GE Power had delivered to customers under long-term service agreements ("LTSAs"). *See* Op. (Dkt. 314) at 2.

**B. GE Power's Long-Term Service Agreements**

During the Class Period, GE Power was one of the world's largest sellers of heavy-duty gas-powered turbines, which generated electricity for power plants. Gas Power Systems is GE Power's equipment manufacturing division, which designs, builds, and sells gas turbines. SOF ¶ 22. Power Services is the division of GE Power responsible for the delivery of maintenance, service, and upgrade solutions to customers with existing GE Power equipment. *Id.* ¶ 28.

Heavy-duty gas-powered turbines are large, complex pieces of industrial equipment that operate at intense heat and speeds, and thus many of their component parts need to be replaced multiple times over the life of the turbine. *Id.* ¶¶ 22, 44-46. When Gas Power Systems sells a customer a gas-powered turbine, Power Services often simultaneously enters into an LTSA with the customer. *Id.* ¶¶ 29, 35. LTSAs are long-term contracts under which Power Services agrees to maintain the turbine for the customer over its useful life, and in return the customer provides Power Services with cash payments at specified intervals over the life of the contract. *Id.* ¶ 36. Customers enter into LTSAs because Power Services assumes virtually all maintenance responsibilities for the customer, and often gives guarantees of minimum turbine performance,

availability, and efficiency. *Id.* ¶¶ 39-41. Power Services' costs to perform under LTSAs are not evenly spread over the life of the contract; instead, they are largely concentrated during planned outages, which occur once every few years and during which the unit is shut down and overhauled with many major parts being replaced. *Id.* ¶¶ 44-45, 51-52.

In exchange for these services, Power Services typically bills customers through, among other methods, fees based on the number of hours the customer runs the turbine. *Id.* ¶ 53. Thus, as the customer runs the turbine and makes money (and the turbine incurs wear-and-tear), the customer pays a portion of its revenues to GE Power in exchange for GE Power's obligation to maintain the turbine. *Id.* ¶¶ 52-53. The LTSA structure aligns the interests of GE Power and its customers because both are financially incentivized to: (i) ensure the turbine is functioning, online, and generating electricity as frequently as possible (as both parties earn money when the turbine is running); and (ii) limit outages and unplanned service events, which are costly for GE Power and during which the customer is not generating electricity. *Id.* ¶¶ 38-43.

A result of this business model is that GE Power's incurrence of cost to perform under the LTSA is heavily concentrated in particular periods (*e.g.*, when outages occur), whereas customer payments come in over the life of the contract as the customer uses the turbine. *Id.* ¶¶ 44-45, 51-55. As such, there is a disconnect between the timing of GE Power spending cash to perform under the LTSA and when cash is received from the customer. *Id.* ¶ 55. Under U.S. Generally Accepted Accounting Principles ("GAAP"), GE Power accounts for its LTSAs under the cost-to-cost accounting model, wherein revenue is recognized when costs are incurred, not when customer billings are received. *Id.* ¶¶ 47-52. This means that GE Power recognizes revenue as it performs

its obligations under an LTSA (*i.e.*, as it incurs costs), based on the LTSA's total, lifetime estimated billings and costs.[6] *Id.* ¶¶ 51-56.

This disconnect between the costs GE Power incurs (and the resulting revenue recognition) and the payments owed from the customer gives rise to a "deferred balance," which measures the difference between the amount of revenue GE Power has recognized to date under an LTSA (*i.e.*, reflecting the proportion of total costs incurred thus far) and GE Power's customer billings to date (*i.e.*, reflecting cash). *Id.* ¶¶ 57-58. When revenue recognized on a contract is greater than the amount billed to the customer, that difference appears as a deferred asset on GE's balance sheet; conversely, when GE Power has billed the customer more than it has recognized in revenue, the difference appears as a deferred liability. *Id.* ¶¶ 59-60.

The company-wide deferred balance, which is the collective difference between revenue recognized and billings, is thus an asset GE carries on its books, representing the cash GE's customers will owe in the future for past work performed. *Id.* ¶¶ 59, 61-62. In other words, the deferred balance reflects the amount of revenue GE has already recognized because work was performed and cost expended by GE, but for which the customer's payment due date has not yet occurred. *Id.* ¶¶ 57-58.

### C. GE Engaged In Factoring And Reported It In Its SEC Filings For Decades

"Factoring" is a transaction in which a company sells its accounts receivable to a third party in exchange for cash. *Id.* ¶ 63. The practice is widespread among industrial businesses like GE Power that sell specialized equipment with large upfront costs for manufacturing, delivery, and

[6] For example, consider an LTSA under which GE Power projects it will bill the customer $200 million over the life of the contract, and will spend $100 million to service the contract over its life. If GE Power incurs costs of $10 million to perform under the contract in Year 1 (10% of the expected $100 million life-of-contract costs), then GE Power would record $20 million in revenue under the LTSA in Year 1 (10% of the expected life-of-contract billings).

installation. *See id*. ¶ 64. That is particularly the case where the company has to expend costs before receiving associated cash from the customer. *Id*. ¶¶ 87-88. Factoring allows businesses to align the timing of when they incur costs and when they receive cash by shortening the gap between those two events, and entails other benefits such as the mitigation of credit exposure (*i.e.*, the risk of non-payment). *Id*. ¶¶ 90-94, 147.

GE historically factored receivables where GE had already performed work for a customer and was simply awaiting payment. *Id*. ¶¶ 71-72. For decades, GE's industrial businesses factored billions of dollars of customer receivables each year, which enabled them to fund additional customer orders and grow. *See id*. ¶ 71. Many of these factoring transactions were conducted through GE Capital, which had a specialized division (Working Capital Solutions) that existed to help all of GE's industrial businesses manage their working capital and facilitate customer orders. *Id*. ¶¶ 69-70, 72-78. Factoring conducted between GE Capital and GE's industrial segments also allowed GE Capital to utilize its financial expertise to, *inter alia*, securitize and syndicate factoring transactions with third parties (thereby distributing risk), secure insurance and other hedges against risks associated with the receivables, and otherwise manage capital resources in a sophisticated and risk-minimizing manner for GE as a whole. *See id.* ¶¶ 79-80.

GE's business practice of factoring receivables was well known to investors and specifically disclosed in the "intercompany transactions" section of GE's SEC filings. *See id.* ¶¶ 112-29, 147. During the Class Period, the drafting and approval of these SEC filings was within the purview of GE's Disclosure Committee, which met at least twice each quarter. *Id*. ¶¶ 105, 142. The Disclosure Committee consisted of various subject matter experts, including from GE's controllership, investor relations, financial planning and analysis, treasury, and legal functions. *Id*. ¶¶ 106-07. The Disclosure Committee process was also buttressed by oversight from other groups

within and without GE, including internal and external auditors. *Id.* ¶ 108. As a result of this process, GE's disclosures concerning factoring (like GE's other disclosures to investors) evolved over time, with the consistent goal of aiding investors in understanding GE's business, including, notably, in response to questions about cash from investors in 2017. *See id.* ¶¶ 112-29.

**D. GE Power's Long-Term Factoring**

In late 2015, GE Power began to factor with GE Capital certain customer receivables due more than one year in the future (*i.e.*, LT receivables) in order to better align the outlay of costs with its receipt of cash. *Id.* ¶¶ 89, 92-94. These LT factoring transactions were predominantly related to upgrade or other hardware sales, through which GE Power built new equipment and sold it to the customer pursuant to a contract that allowed for installment payments over a period of time. *Id.* ¶¶ 89, 96. GE Power then factored the customer's installment payments with GE Capital in exchange for immediate cash. *Id.* ¶ 93.

Upgrades are a form of equipment overhaul in which turbine parts are replaced with technologically more advanced components that meaningfully improve turbine output, efficiency, and longevity. *Id.* ¶¶ 30-33. For example, GE Power's F-class turbines that were originally sold in the late 1990s and early 2000s were aging by the beginning of the Class Period and required upgrades to remain competitive against newer units from GE Power's competitors. *See id.* ¶¶ 24, 34, 143. For customers, upgrades were beneficial because they resulted in (i) a more efficient turbine (meaning cheaper to operate), (ii) increased output, and (iii) longer asset life. *See id.* ¶¶ 31-34. For GE, upgrades were beneficial because they: (i) could be sold at a profit; (ii) protected GE Power's installed base from competitors; and (iii) made the turbine more efficient, which resulted in greater utilization payments to GE Power if the customer had an LTSA. *See id.*

During the Class Period, GE Power sold many different upgrades to its customers, including, notably, its state-of-the-art Advanced Gas Path ("AGP"), which upgraded almost 70%

of a turbine's components, resulting in extended lifetimes, lower emissions, and lower costs. *Id.* ¶¶ 32-33. As with any business, some customers could not or would prefer not to pay for upgrades upfront, preferring instead to pay over time, but the high cost to GE Power to build an upgrade meant that GE Power preferred to receive cash at the point of sale. *Id.* ¶¶ 87-88.

Thus, factoring provided a financing solution that facilitated the transaction for both parties. Specifically, factoring of LT receivables enabled the sale of hardware, such as AGPs, by better aligning the timing of outlays of cash GE Power spent to manufacture and install the AGP with the receipt of cash for the same. *Id.* ¶¶ 92-94, 147. Simultaneously, factoring allowed the customer to pay for the AGP over time as it enjoyed the benefits of the installed AGP. *Id.* Therefore, LT factoring facilitated customer transactions by functioning as financing for upgrades to existing GE Power turbines. *See id.* ¶ 92.

All of GE Power's LT factoring involved selling receivables to GE Capital. *See id.* ¶ 89. Because LT factoring simply involves selling a receivable in exchange for cash where revenue has already been recognized, LT factoring does not impact current or future revenue or earnings. *See id.* ¶¶ 63, 71-72. Finally, because the LT factoring transactions were intercompany transactions, whereby GE Power sold receivables to GE Capital in exchange for cash, they had zero net impact on total company cash or liquidity. *See id.* ¶¶ 71-81, 112-29.

**E. GE's 2016 Performance**

By the end of 2016, natural gas-fired turbines remained a dominant power-generation technology, owing to its reliability, relatively low cost, and the prevalence of low-cost natural gas in many markets, and the fact that the general global demand for electricity was rising. *See id.* ¶¶ 145-46. In 2016, GE Power achieved strong results, including the sale of 470 upgrades (up from 275 in 2015) and the introduction of a new high-efficiency turbine (the HA turbine). *Id.* ¶¶ 148-51, 168. And, GE Power's revenues increased (up 25% compared to 2015), along with its

operating profits (up 11%). *Id.* ¶ 170.

Securities analysts covering GE also had positive predictions for GE Power in 2017, including in terms of the market for the sale of AGP upgrades. *See id.* ¶¶ 143-44, 147. GE agreed, telling investors that "Power [] had very strong earnings growth in 2016 and we expect the same in 2017," including because of the "fantastic opportunity to have a great year in services in 2017 . . . driven by upgrades." *Id.* ¶ 148. GE Power expected over 1,000 upgrade sales in total for 2017, and the sale of 155 to 165 AGPs specifically. *Id.* ¶ 150. GE Power similarly forecasted that the majority of its LT factoring transactions in 2017 would be done in order to provide financing for upgrades to customers. *See id.* ¶ 135.

As GE closed its 2016 books, GE's Disclosure Committee began the process of reviewing and editing GE's Form 10-K for year-end 2016, which would be published in February of 2017. *See id.* ¶¶ 163-70. At the same time, GE prepared to host its January 20, 2017 earnings call with investors to discuss the results of the fourth quarter and total year of 2016. *See id.* ¶¶ 152-62.

In advance of this earnings call (as with every earnings call), GE employees prepared documents to assist senior management in discussing GE's performance and to answer anticipated questions from analysts, which involved the collection of data from GE's various segments and divisions and drafting talking points for Q&A sessions, as well as other informational documents. *See id.* ¶¶ 137-42, 152-60. That process included the preparation of information for Mr. Bornstein by GE's financial planning and analysis staff (specifically, by Mr. Brian Weverman) about GE's cash flows for 2016, including total factoring-related cash flows. *Id.* ¶¶ 155-60. Among the materials Mr. Weverman prepared for Mr. Bornstein was a slide titled "External factoring reporting," which was included in the binder Mr. Bornstein had on-hand for the earnings call. *Id.* ¶¶ 156-57.

On January 20, 2017, GE held its earnings call for the fourth quarter of 2016. Mr. Bornstein was asked the following question by an analyst during the investor Q&A portion of that call:

> Since I only have one question I'd love to focus on cash here. And within that, Jeff, is there any factoring this quarter from GE Capital into GE industrial?
>
> And then also while it's the strongest cash flow quarter in a while, still a little bit below what we thought you guys implied when we talked about it before. Then as you think about it progressing through 2017 and beyond maybe just talk a little more about the cash flow initiative comp that really can give investors confidence that the cash flow part of the story is improving.

*Id*. ¶ 161. Mr. Bornstein responded, relying on the preparation materials he had been given:

> Okay, there's a lot in that. So let me start with the fourth quarter, Steve.
>
> **We improved working capital in fourth quarter about $5.2 billion** which the best we can tell is the strongest working capital quarter the Company has ever had. And I want to just give you some of the pieces on that.
>
> So **within working capital accounts receivable generated about $0.5 billion**, $1.2 billion generation in inventory, $1.8 billion generation in AP, a lot of that being renegotiated terms. We have talked about realigning or aligning suppliers with customers in terms of the time sync between build and collect.
>
> And then $1.7 billion on progress. Orders were a bit better, as a result progress is a bit better. That's how you get to $5.2 billion.
>
> So **within that accounts receivable performance you asked about factoring**. **For the total year, factoring with GE Capital was a $1.6 billion change for the year. It was $1.7 billion last year, so actually year-to-year it was $100 million less of a benefit in the year between what we did with GE Capital around factoring**. And in the fourth quarter importantly, and you see it because our receivables improved $500 million, is from the third to fourth quarter of 2015, the benefit was $2.3 billion, the benefit going from this past third quarter to this quarter was $700 million.
>
> So it was actually down $1.6 billion year-to-year between third and fourth quarter each of those years. So there's very good underlying performance here. It's not just about, it's actually very little to do with GE Capital factoring.

*Id*. ¶ 162. As relevant here, the $1.6 and $1.7 billion numbers concerning year-over-year changes in factoring with GE Capital were taken directly from the above-described slide provided to Mr.

Bornstein by Mr. Weverman. *See id.* ¶¶ 157-60.

After the earnings call, GE continued to prepare its Form 10-K, including disclosures related to cash generation. *See id.* ¶¶ 165-68. Notably, GE's Disclosure Committee considered and ultimately implemented changes to the "intercompany transactions" section of GE's Form 10-K as a result of the Disclosure Committee's view that LT factoring differed from the other factoring described in this section, because LT factoring was predominantly related to providing customers with financing whereas GE's other factoring was not. *See id.* ¶ 119.[7] Of note, GE's 2016 Form 10-K significantly expanded the "intercompany transactions" section from a handful of paragraphs relating to GE as a whole, to multiple pages describing GE's intercompany transactions, as well as specific information concerning effects on cash flows, enabled orders, GE's Aviation segment, pensions, and company guarantees. *See id.* ¶ 120; *compare* Ex. 4, GE 2015 Form 10-K at 85, *with* Ex. 2, GE 2016 Form 10-K at 87-88. Plaintiffs have contended that these changes were made by GE employees in order to cover up Mr. Bornstein's alleged misstatements on the January 20, 2017 earnings call, *see* Sixth Am. Compl. (Dkt. 280-1) ("6AC") ¶¶ 584-90, but there is no evidence to support this theory in any discovery documents or testimony.

**F. GE's 2017 Performance**

Despite GE's and others' optimism about the gas power market heading into 2017, changing dynamics in the power industry led to a severe, abrupt, and unexpected downturn in the global power market in 2017. *See* SOF ¶¶ 171-85. For example, by November 2017, industry

[7] Following cash underperformance in the first quarter of 2017, the Disclosure Committee refined the disclosures in the "intercompany transactions" section of GE's SEC filings to provide more information to investors about GE's cash flows. *See* SOF ¶¶ 123-29. Specifically, the Disclosure Committee determined to add, *inter alia*, narrative disclosures concerning LT factoring across GE, including the amount of receivables remaining on GE Capital's balance sheet and any effects on GE's cash from operating activities ("CFOA"). *See id.* ¶¶ 127, 129; *see also id.* ¶¶ 12-13.

analysts predicted retractions to global demand for new gas power, which would make 2017 "the most subdued capacity market since" 2002. *See id.* ¶ 176. The effects of this downturn were felt across the industry, manifesting as declines in the profitability of gas-fired power plants and decreased utilization of gas turbines. *See id.* ¶¶ 175-85. GE Power's two main competitors, Siemens and Mitsubishi, recognized the severity of the power market downturn, too; for instance, Siemens announced significant job cuts and one of Siemens' board members stated that the power "market is *burning to the ground*." *See id.* ¶¶ 180-85; *see also id.* ¶¶ 181 (Mitsubishi "lowered its earnings outlook"), 183 (citing press release from Siemens; "[t]he power generation industry is experiencing disruption of unprecedented scope and speed").

For GE Power specifically, the downturn in 2017 lowered demand from its customers, causing GE Power to underperform on its forecasts, including lower-than-expected sales of new gas turbines and upgrades to existing turbines, lower-than-expected usage of GE Power's equipment by customers (resulting in lower service-related revenues like repairs for outages), and a significant build-up of unsold inventory. *See id.* ¶¶ 186-216. Because the vast majority of GE Power's planned LT factoring in 2017 was for receivables created through new sales in 2017, the lower-than-expected-sales also resulted in lower-than-expected LT factoring. *See id.* ¶¶ 135, 150.

Simultaneously, in 2017, GE faced a number of other publicly disclosed challenges and developments that were unrelated to LT factoring, or to any of Plaintiffs' remaining claims. Those challenges included: (i) decreased expectations for sales of GE Aviation engines; (ii) headcount reductions and other restructuring changes across GE; (iii) the transition of John Flannery to CEO of GE and his review of GE's businesses; (iv) inadequate reserves for GE Capital's long-term care ("LTC") insurance business, resulting in the deferral of *all* dividends from GE Capital, a $6.2 billion after-tax charge, and an estimated $15 billion in additional reserves; (v) delays in the sale

of the Industrial Solutions division of GE Power; and (vi) operational challenges in GE's Oil & Gas and Renewable segments resulting in $1.5 billion less cash than expected. *See id.* ¶¶ 186-216.

Ultimately, GE struggled to meet its cash goals set for 2017, bringing in $9.7 billion at the end of the year, versus expectations of $12 to $14 billion. *See id.* ¶¶ 149, 211. As a result of these and other developments across its business segments, GE's stock price declined significantly in 2017. *See, e.g.*, 6AC ¶¶ 27-31.

**G. This Litigation**

1. Plaintiffs' remaining claims

In November 2017, shareholders brought securities fraud claims against GE and several of its former directors and officers. After a series of amended complaints, Plaintiffs decided to focus on allegations of (i) "billions of dollars" in liabilities stemming from GE Capital's portfolio of LTC reinsurance contracts, and (ii) "severe cash flow issues" related to GE Power's LTSAs. *See, e.g.*, *id.* ¶¶ 4-6, 30. Through pleading-stage decisions, the Court substantially narrowed Plaintiffs' case, twice dismissing all claims concerning GE's LTC business and all but a narrow set of claims concerning GE Power. *See* Op. (Dkt. 185) at 56; Op. (Dkt. 206) at 32-33.[8] Following these decisions, all that remain are claims against GE and Mr. Bornstein regarding alleged misrepresentations concerning GE Power's LT factoring. *See* Op. (Dkt. 206) at 32-33.

Specifically, Plaintiffs assert three Section 10(b) Exchange Act claims against GE and its former CFO, Mr. Bornstein, arising out of (i) purported violations of Item 303 of Regulation S-K in GE's quarterly and annual financial reports between February 29, 2016 and January 23, 2018

[8] On April 11, 2022, Plaintiffs were permitted to amend their complaint one final time to re-plead allegations concerning Mr. Bornstein's remarks on the January 20, 2017 earnings call, wherein Mr. Bornstein spoke about GE's "working capital" for the year (which included GE Capital's factoring with all other GE segments). Op. (Dkt. 314) at 11; *see* SOF ¶ 162.

(the "Item 303 Claim"), as well as purported misrepresentations (ii) in GE's 2016 Form 10-K (the "2016 10-K Claim") and (iii) during a January 20, 2017 earnings call (the "Earnings Call Claim"). In addition, Plaintiffs seek to hold Mr. Bornstein liable as a "control person" under Section 20(a) of the Exchange Act in connection with the foregoing alleged primary violations.

Plaintiffs do not claim that the "truth" about GE Power's LT factoring was revealed through the disclosure of any information about the allegedly concealed LT factoring practices themselves. Instead, according to Plaintiffs' loss causation expert, Dr. David I. Tabak, Defendants' alleged misrepresentations were "corrected" via announcements: (i) on April 21, 2017 that GE's Industrial CFOA came in $1 billion below its expectations; (ii) on July 21, 2017 that GE was guiding toward the bottom of its 2017 Industrial CFOA[9] guidance (between $12 and $14 billion); and (iii) on October 20, 2017 that GE was reducing its Industrial CFOA guidance for the year from $12 billion to $7 billion[10] (together, the "Alleged Corrective Disclosures"). *See* SOF ¶¶ 186, 197, 204. Although the Alleged Corrective Disclosures made no mention of LT factoring, Plaintiffs contend that they were nevertheless corrective under a "materialization of risk" theory.[11]

2. Fact discovery and expert discovery

In fact discovery, the parties exchanged over one million pages of documents (including

[9] GE's "Industrial CFOA" measure represents only a portion of GE's total cash flows—specifically, Industrial CFOA represents "GE CFOA excluding the effects of dividends from GE Capital." *See* SOF ¶ 15.

[10] On the Alleged Corrective Disclosure dates, GE also disclosed its earnings per share ("EPS") for the quarter. *See* SOF ¶¶ 195, 201, 207.

[11] Although, as explained below, Plaintiffs pursue a "materialization of risk" theory, which requires that they establish that an alleged misstatement concealed a condition or event which then occurred and caused their losses, Dr. Tabak refers to GE's quarterly disclosures of Industrial CFOA in the first three quarters of 2017 as "corrective disclosures," or as revealing "corrective information." *See, e.g.*, Tabak Rep. ¶ 2(a)-(d). For convenience, Defendants adopt Dr. Tabak's terminology.

transcripts of twenty interviews conducted by the SEC) and fifteen fact depositions of current and former GE employees. *See* Denton Decl. ¶ 2. Fact discovery was completed in February 2022.

During expert discovery, Plaintiffs proffered the opinions of two experts: Dr. Tabak (materiality, loss causation, and damages) and Professor S.P. Kothari (materiality). In rebuttal, Defendants proffered the opinions of four experts: Professor Daniel R. Fischel (loss causation and damages), Brad Mroski (accounting), Christopher J. Russo (power industry), and Mark A. Sunshine (factoring in the industry). In response, Plaintiffs chose to stand on their two experts. Notably, Plaintiffs offered no witnesses with expertise in the power industry or factoring.

Plaintiffs' first expert witness, Dr. Tabak, opined that each Alleged Corrective Disclosure partially corrected Defendants' alleged misrepresentations, *see* Ex. 111, Expert Rep. of Dr. David I. Tabak ("Tabak Rep.") ¶ 2; Ex. 113, Supp. Expert Rep. of Dr. David I. Tabak ("Supp. Tabak Rep.") ¶¶ 20-25, and described a multi-step process he followed to arrive at the supposedly fraud-related portions of the stock price declines that followed each Alleged Corrective Disclosure. As part of that process, Dr. Tabak applied several methodologies (including a statistical "ERC" analysis that he claims captures the price impact of earnings surprises) to calculate what he contends are the stock price declines attributable to GE's cash disclosures. *See* Tabak Rep. ¶¶ 29-34, 50-64, 75-78. He then purported to identify, based on internal documents, the amounts by which GE Power fell short of LT factoring forecasts during each of the relevant quarters and used those amounts (which he assumes without any basis are entirely fraud-related) to further apportion the remaining supposedly cash-related portions of the declines. *See id.* ¶¶ 37, 65-70, 77-78.

Dr. Tabak did not provide a standalone damages calculation (or even any independent theory of loss causation) for the misrepresentations alleged in support of each of Plaintiffs' surviving claims. *See generally* Tabak Rep.; Supp. Tabak Rep. Instead, he opined that GE's stock

price was artificially inflated *entirely* as a result of the omissions Plaintiffs alleged in support of their Item 303 Claim, and that the affirmative statements challenged in connection with Plaintiffs' 2016 10-K and Earnings Call Claims merely "maintained"—but did not increase or decrease—the "inflation that previously existed . . . by virtue of the Item 303 Claim." *See* Tabak Rep. ¶ 13; Supp. Tabak Rep. ¶ 3(c)-(d). Notably, Dr. Tabak did not analyze either of those challenged statements to determine how much artificial inflation would have been removed from GE's stock price if they had never been made, or even explain how they could have been "corrected" by the Alleged Corrective Disclosures.

As detailed in the report of Defendants' loss causation expert, Prof. Fischel, Dr. Tabak's loss causation methodology and analysis of artificial inflation are fundamentally flawed and unreliable, including because: (i) Dr. Tabak fails to demonstrate any causal connection between the Alleged Corrective Disclosures and Plaintiffs' remaining claims, *see* Ex. 115, Expert Rep. of Daniel R. Fischel ("Fischel Rep.") ¶¶ 35-39; (ii) Dr. Tabak's principal disaggregation methodology (his ERC analysis) does not reliably predict movements in GE's stock price, *id.* ¶¶ 46-57; and (iii) Dr. Tabak's remaining disaggregation methodologies are similarly incomplete, inconsistent, and/or unsupported, *id.* ¶¶ 58-64. In light of the numerous critical flaws in Dr. Tabak's analysis, Defendants have concurrently filed a motion to exclude Dr. Tabak's testimony.

Plaintiffs' second expert witness, Prof. Kothari, opined that certain information would have been "material" to investors, concluding that: "[f]actoring was a financial, not operational, activity," such that GE improperly reported the amounts factored as CFOA,[12] *see* Ex. 110, Expert

[12] In his reply, Prof. Kothari conceded that cash GE Power received from LT factoring was properly accounted for as CFOA, but nonetheless tried to maintain that he was using the terms "operating" and "financing" not in accordance with their accounting definitions, but rather some undefined "economic" definition that Plaintiffs apparently believe should guide GE's SEC filings. *See* Ex. 118, Reply Expert Rep. of S.P. Kothari ("Kothari Reply Rep.") ¶ 101.

Rep. of S.P. Kothari ("Kothari Rep.") ¶¶ 28-29; and GE Power's LT factoring was not "sustainable" because it was considered expensive by GE, depleted the stock of factorable deferred balance faster than GE Power was adding to it, and created a "monetization drag" (*i.e.*, the unsupported assumption that prior factoring created a "drag" on cash flows that could only be filled through more factoring), *id.* ¶¶ 35, 72-111. Prof. Kothari, however, declined to opine on the quantitative materiality of LT factoring to GE's total liquidity or financial condition. *See id.*

In response, Defendants offered the rebuttal expert testimony of three witnesses. *First*, Mr. Mroski opined that, contrary to Prof. Kothari's opinion that GE Power's LT factoring constituted "financing" activity, GAAP required that cash resulting from GE Power's factoring of customer receivables generated through operating activities be classified as CFOA (*i.e.*, cash from "operating" activities). *See* Ex. 116, Expert Rep. of Brad Mroski. *Second*, Mr. Russo—who, unlike Plaintiffs' experts, has extensive experience in the gas power industry—opined that the catastrophic global downturn in the power industry in 2017 was responsible for GE Power's underperformance in that year, not prior-period LT factoring. *See* Ex. 114, Expert Rep. of Christopher J. Russo. More specifically, lower LT factoring in 2017 was not the *cause* of GE's underperformance, but rather an *effect* of fewer customer equipment sales, and therefore fewer opportunities for GE Power to factor LT receivables. *See, e.g.*, *id.* ¶¶ 122-29.[13] *Third*, Mr. Sunshine—who, unlike Plaintiffs' experts, has direct experience running factoring businesses—opined that, contrary to Prof. Kothari's criticisms, GE Power's LT factoring was a prudent and sustainable way to finance customers' purchases, provided extensive benefits to GE Power, and was not indicative of risks to GE Power's business. *See* Ex. 48, Expert Rep. of Mark A. Sunshine

[13] Prof. Kothari concedes that this downturn occurred and that it was at least a partial cause of GE Power's performance in 2017. *See* Kothari Reply Rep. ¶ 41.

("Sunshine Rep."). In light of the numerous flaws in Prof. Kothari's analysis, Defendants have also concurrently filed a motion to exclude his testimony.

## LEGAL STANDARD

"Summary judgment is appropriate where the admissible evidence and pleadings demonstrate no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 477 F. Supp. 3d 88, 99 (S.D.N.Y. 2020) (Furman, J.) (quoting Fed. R. Civ. P. 56), *aff'd*, 2022 WL 151302 (2d Cir. Jan. 18, 2022). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). To defeat a motion for summary judgment, the nonmoving party must advance more than a "scintilla of evidence," *Anderson*, 477 U.S. at 252, and demonstrate more than "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party "cannot defeat the motion by relying on the allegations in [its] pleading . . . or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. Cty. of Orange*, 84 F.3d 511, 518 (2d Cir. 1996).

Plaintiffs assert claims under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5. *See, e.g.*, 6AC ¶¶ 591-603. A claim that Defendants made material misrepresentations or omissions in violation of Section 10(b) and Rule 10b-5 requires that Plaintiffs establish: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the

misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011). A claim for control person liability under Section 20(a) requires that Plaintiffs establish (1) a primary violation, (2) control of the primary violator, and (3) culpable participation in the controlled person's fraud. *See Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014).

## ARGUMENT

### I. PLAINTIFFS CANNOT ESTABLISH LOSS CAUSATION

Defendants are entitled to summary judgment because Plaintiffs cannot establish loss causation. Loss causation is "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Atlantica*, 2022 WL 151302, at *2 (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005)). It exists as a requirement "because private securities fraud actions are available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 510 (2d Cir. 2010) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005)). Loss causation can be established through a "corrective disclosure" theory, or as relevant here, a "materialization of risk" theory, under which a plaintiff must show that "the alleged misstatement[s] conceal[ed] a condition or event which then occur[red] and cause[d] the plaintiff's loss." *Atlantica*, 477 F. Supp. 3d at 110. And, under any theory, a plaintiff must "disaggregate losses caused by disclosures of the truth behind the alleged misstatements from losses caused by other factors." *Id.*

Plaintiffs fail entirely to meet their burden to establish that any portion of the decline in GE's stock price following the Alleged Corrective Disclosures is attributable to information that they allege was concealed in connection with their surviving claims, *i.e.*, information about GE

Power's LT factoring during the Class Period.[14] Because none of the remaining Alleged Corrective Disclosures even mention LT factoring (despite the fact that specific disclosures about LT factoring *were* made on *other* dates during the Class Period),[15] Plaintiffs have no choice but to argue that GE's announcement of its quarterly Industrial CFOA results in the first three quarters of 2017—which reflected cash generated (or used) by all of GE's industrial business segments combined—"corrected" Defendants' alleged omissions regarding LT factoring under a "materialization of risk" theory.[16] In other words, Plaintiffs must establish not only: (i) that it was a foreseeable risk of the LT factoring GE Power conducted during the Class Period (the subject of Defendants' alleged omissions) that GE subsequently would fall short of forecasted Industrial CFOA in 2017, but also (ii) that the Alleged Corrective Disclosures were a materialization of that risk. According to Plaintiffs, the purportedly foreseeable risk of reduced Industrial CFOA results

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[14] Notably, for the first *ten months* of the Class Period (from February 29, 2016 until January 20, 2017, the date of GE's fourth quarter 2016 earnings call), Defendants' only purported misrepresentations were the omissions in GE's periodic SEC filings alleged in support of Plaintiffs' Item 303 Claim. And, as discussed, Dr. Tabak *declined* to perform any independent loss causation analysis as to the purported misstatements alleged in connection with Plaintiffs' other two Section 10(b) claims (*i.e.*, the 2016 10-K or Earnings Call Claims). Accordingly, a failure to withstand summary judgment as to their Item 303 Claim—on loss causation grounds or otherwise—would leave Plaintiffs without any viable loss causation theory and doom their entire case, or at a minimum, require a significant reduction to the Class Period.

[15] GE made specific disclosures concerning the sale of LT receivables by GE Power to GE Capital during the Class Period. *See* SOF ¶¶ 127, 129. But Dr. Tabak was not shown those disclosures, was unaware that they had been made, did nothing to evaluate the market's response, and could not say how they might impact his opinions. *See* Ex. 119, Tabak Dep. Tr. 208:6-212:4.

[16] Under a "corrective disclosure" theory, a purportedly corrective disclosure must "reveal the falsity of the alleged misstatements." *See, e.g.*, *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 552 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 501. Plaintiffs do not appear to advance such a theory, and for good reason—as noted, none of the Alleged Corrective Disclosures mentioned LT factoring. To the extent that Plaintiffs claim the Alleged Corrective Disclosures somehow indirectly revealed the falsity of Defendants' alleged misstatements concerning LT factoring, however, that theory would fail for the same reasons as Plaintiffs' materialization of risk theory. *See, e.g.*, *Atlantica*, 477 F. Supp. 3d at 111.

in 2017 caused GE's stock to be inflated by as much as $1.68 starting on February 29, 2016, the very first day of the Class Period. *See* Tabak Rep., Ex. 9; Fischel Rep. ¶ 33 & n.71.

Plaintiffs provide no basis, however, to establish that GE's Industrial CFOA performance in the first three quarters of 2017 reflected the materialization of any risk related to GE Power's Class Period LT factoring. Instead, Plaintiffs' loss causation expert merely assumed—counterfactually—that alleged shortfalls in LT factoring compared to GE Power's internal LT factoring targets in 2017 (and the purported impact of that lower-than-anticipated LT factoring on Industrial CFOA) resulted from the "unsustainability" of LT factoring conducted in prior periods, and admitted that he did no analysis whatsoever to support that assumption. The undisputed evidence shows, however, that GE Power's failure to meet internal LT factoring targets in 2017 was not a result of allegedly undisclosed prior-period LT factoring, and instead reflected the effects of a massive and unexpected downturn in the global power market. Plaintiffs are thus "akin to homeowners who sue arsonists for setting a fire that was still on the horizon when their home was destroyed by a different cause." *See Atlantica*, 477 F. Supp. 3d at 110-11. Because no jury could find that the allegedly concealed risks of prior-period LT factoring had materialized, summary judgment for Defendants is warranted.

Equally fatal to their claims, Plaintiffs fail to advance a viable method of disaggregating the tangle of confounding factors and new information that adversely impacted GE's stock price following each of the Alleged Corrective Disclosures. Dr. Tabak has proposed dubious methodologies that he defends only as "better than nothing." *See* Ex. 119, Tabak Dep. Tr. 165:5-9. However, Dr. Tabak does not even *attempt* to disaggregate the impact of adverse developments that are completely unrelated to the alleged fraud, such as the global power market downturn, on GE Power's ability to conduct LT factoring in 2017. Moreover, with respect to the confounding

information that Dr. Tabak *did* attempt to disaggregate, he relies primarily on what he calls an ERC analysis, the likes of which unsurprisingly has never been proffered and ruled admissible in a Section 10(b) action. Dr. Tabak's novel methodology does not reliably measure the impact of earnings-related (here, non-fraud-related) information for individual companies, and fails adequately to account for GE-specific information that went beyond earnings (such as headcount reductions and other restructuring changes). Likewise, Dr. Tabak's bungled attempt to disaggregate the impact of GE's LTC-related disclosures is insufficient for multiple reasons.

Finally, Defendants are entitled to partial summary judgment as to two of Plaintiffs' Section 10(b) claims and two of their Alleged Corrective Disclosures. *First*, as to Plaintiffs' 2016 10-K and Earnings Call Claims, Dr. Tabak declined to quantify any artificial inflation (or corresponding price declines) attributable specifically to Defendants' challenged statements, opining instead that the statements merely "maintained" existing artificial inflation caused by Defendants' alleged Item 303 omissions because they were rendered false by the same information that Defendants supposedly omitted in violation of Item 303. *See* Tabak Rep. ¶ 13; Tabak Supp. Rep. ¶¶ 3(c), 25. But Plaintiffs do not contend that the statements challenged in support of the 2016 10-K and Earnings Call Claims were false merely because they omitted information about LT factoring; they claim those statements were false because they misrepresented different and additional facts about short-term factoring, or about all of the factoring programs GE utilized in its various businesses. *Second*, the Court should grant Defendants partial summary judgment on Plaintiffs' claims to the extent they seek to recover losses attributable to disclosures made after May 5, 2017 (the date that GE issued its first quarter 2017 Form 10-Q disclosing additional information about GE Power's use of LT factoring), or at least after October 20, 2017 (the date of the last alleged corrective disclosure for which Dr. Tabak opines Plaintiffs suffered any damages).

### A. The Alleged Corrective Disclosures Did Not Reflect The Materialization Of Any Risk Concealed By Defendants' Alleged Misrepresentations

Plaintiffs' loss causation theory falls apart at the outset because there is no evidence of a causal link between Defendants' alleged misrepresentations and the supposedly fraud-related losses Plaintiffs claim to have suffered. According to Plaintiffs, the risk that LT factoring was "unsustainable" materialized during the first three quarters of 2017 in the form of shortfalls against GE Power's internal LT factoring forecasts. *See, e.g.*, Tabak Rep. ¶¶ 15-18, 20-24. From that premise, Dr. Tabak uses those LT factoring shortfalls as a proxy for the portion of GE's stock price declines following the Alleged Corrective Disclosures (which merely disclosed GE's Industrial CFOA performance) allegedly attributable to the alleged fraud. *See id.* ¶¶ 37, 65-70, 77-78. But Dr. Tabak's testimony supplies *no* evidence that the shortfalls had anything to do with the prior-period LT factoring Defendants allegedly concealed. He thus fails to substantiate the causal link that Plaintiffs must prove, and undisputed evidence demonstrates there is no such link.

As an initial matter, Dr. Tabak cites no evidence that could support the notion that the Alleged Corrective Disclosures reflected the materialization of some risk related to GE Power's Class Period LT factoring. Rather, Dr. Tabak admitted that he assumed not just that LT factoring was "unsustainable," but also that the resulting risks materialized as shortfalls against forecasted LT factoring during the quarters covered by the Alleged Corrective Disclosures. *See* Ex. 119, Tabak Dep. Tr. 118:4-12, 119:1-13 (admitting that he was told "that ultimately, there would be a miss, and you know, we can – and the fact that it occurred in 2017 is just, you know, when the shortfall in CFOA relative to plan occurred"); *see also* Tabak Rep. ¶ 12.[17] This mere assumption

[17] Prior to that admission, Dr. Tabak had argued in his reply report that: (i) his prior reports had demonstrated that the Alleged Corrective Disclosures revealed to analysts and investors "a shortfall in [LT factoring] approximately equal to the undisclosed amount of previous [LT

does not satisfy Plaintiffs' burden of proving a causal connection between the LT factoring conducted in 2016 and GE's failure to meet its cash targets in 2017. *See, e.g.*, *Atlantica*, 477 F. Supp. 3d at 110-11 (granting summary judgment because, given the lack of "sufficient evidence," "no jury" could find that allegedly concealed risks had materialized); *In re Moody's Corp. Sec. Litig.*, 2013 WL 4516788, at *10-11 (S.D.N.Y. Aug. 23, 2013) (reasoning that plaintiffs had to "proffer some evidence demonstrating that Moody's specific alleged misrepresentations caused the materialization of the risk that Moody's rating practices were unsustainable" and rejecting "conclusory causation argument" of their expert that "[i]f [p]laintiffs establish liability, then the new information disclosed . . . was a partial materialization of the undisclosed risks created by Moody's unsustainable practices").

Indeed, Dr. Tabak's assumptions regarding the purported causal link cannot be squared with the uncontested facts of this case. Neither of Plaintiffs' experts did any analysis into the assumptions underlying GE Power's LT factoring forecasts for 2017, or even attempted to determine why any forecasted LT factoring transactions did not occur (and by extension, why GE

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factoring]," Ex. 117, Reply Expert Rep. of David I. Tabak ("Tabak Reply Rep.") ¶¶ 8-12; and (ii) the purported LT factoring shortfall was "consistent with, if not slightly below, figures found in [other internal] documents" dated from the start of the Class Period, *id.* ¶ 13. Neither argument is supported by any evidence. As to the first, Dr. Tabak's reports did not identify any evidence that the market understood any connection between LT factoring and the Alleged Corrective Disclosures. As to the second, Dr. Tabak fundamentally misunderstands the discovery documents he claims are "consistent" with the LT factoring shortfalls he claims to have identified. *See id.* ¶ 13. The cited portions of those documents discuss a "gap" GE Power expected it needed to bridge in order to reach internal targets it had set for its year-end deferred balance (*i.e.*, the measure of the revenue GE Power recognized in excess of billings), not cash flow. *See, e.g.*, Ex. 92, GE_SDNY00335538 (cited in Tabak Reply Rep. ¶ 13(a)) at -542; *see also, e.g.*, Ex. 119, Tabak Dep. Tr. 42:15-43:19 (confirming, with respect to Ex. 92, GE_SDNY00335538, that the year-end target related to deferred balance). Ultimately, the internal analyses Dr. Tabak cites say nothing about GE Power's cash flow targets or the actual or anticipated impact of its LT factoring practices thereon, and thus do not confirm anything about the causes of the Industrial CFOA performance announced via the Alleged Corrective Disclosures.

Power fell short of its forecasts). *See generally* Tabak Rep.; Kothari Rep.; *see also* Ex. 119, Tabak Dep. Tr. 105:4-14; Ex. 120, Kothari Dep. Tr. 240:5-11. If they had, they would have discovered that it was not due to the effects of any prior-period LT factoring. As the undisputed evidence in the record shows: (i) GE Power's cash targets in 2017 already took into account the effects of prior-period LT factoring, so those effects could not have caused GE Power to underperform against its targets; (ii) the receivables GE Power planned to monetize through LT factoring during 2017 were primarily ones it expected to generate that same year through new work or sales; and (iii) the reason GE Power fell short against internal LT factoring forecasts was that, due to the global power market downturn, GE Power did not make many of those new sales and therefore did not generate the expected level of new receivables that it had planned to factor.

*First*, GE Power took into account the effects of prior-period LT factoring when it set cash targets for 2017. That means, for example, to the extent there was a "drag" on GE Power's 2017 cash flows resulting from prior-period LT factoring, it could *not* have been the cause of GE's 2017 cash shortfalls upon which Dr. Tabak's calculations are based. Rather, at the start of 2017, GE Power was aware of how much of its 2017 billings had already been factored in prior periods, and *incorporated* that data into its cash forecasts for 2017. *See, e.g.*, Ex. 40, GE_SDNY00654382 (cited in Tabak Rep. ¶ 37 n. 26) at -386 (observing impact from billings monetized in prior period); *see also* SOF ¶¶ 82, 97.

*Second*, the evidence shows that the receivables GE Power planned to monetize through LT factoring during 2017 were primarily receivables it expected to generate *that same year*, either through new work performed or the sale of equipment upgrades. *See supra* Background § E. As Dr. Tabak (and Prof. Kothari) had no choice but to admit, there is no way that LT factoring of old receivables generated in prior periods could have impacted GE Power's ability to monetize the

new receivables it anticipated it would generate through new work done to fulfill new customer orders. *See, e.g.*, Ex. 119, Tabak Dep. Tr. 110:11-16; Ex. 120, Kothari Dep. Tr. 189:20-190:15.

*Third*, it is no surprise that Plaintiffs have struggled to proffer any evidence of a causal link: there was an obvious cause of GE Power's inability to engage in LT factoring in 2017 at forecasted levels, and it had nothing to do with the LT factoring GE Power had previously conducted during the Class Period. Specifically, as Dr. Tabak does not and cannot dispute, in 2017, there was a widespread, sudden, unexpected, and severe downturn in the gas power market. Dr. Tabak's reply report states without any support that the downturn would not impact his analysis. *See* Tabak Reply Rep. ¶¶ 71-72. However, Dr. Tabak conceded at his deposition that it "is true" that GE Power's ability to conduct LT factoring in 2017 at levels similar to those in 2016 depended upon its ability to generate new receivables in 2017, and he did not "look[] at" whether the market downturn could have resulted in a decrease in orders (and as a result, fewer new sales and new receivables that GE Power could factor). *See* Ex. 119, Tabak Dep. Tr. 122:2-6, 152:23-153:4. And that is exactly what the record demonstrates happened—*i.e.*, the market downturn caused lower-than-expected customer demand, which limited GE Power's ability to sell upgrades and other services to customers, and that in turn led to fewer receivables GE Power could monetize through LT factoring. *See* SOF ¶¶ 135, 150, 186-216.[18]

[18] At his deposition, Dr. Tabak testified that, rather than pre-2017 LT factoring causing any shortfalls in GE's 2017 forecasts, "the prior [LT factoring] obscured the actual organic cash flow, and then when that dropped, the market had a better view of the actual organic cash flow." Ex. 119, Tabak Dep. Tr. 94:16-95:20. Setting aside that Dr. Tabak never disclosed this "organic cash flow" opinion in either his opening or reply report, let alone articulated any factual basis for such an opinion, it only confirms that Dr. Tabak has no coherent basis for using the 2017 LT factoring shortfalls—which he agrees were *not caused* by the prior-period LT factoring Defendants supposedly concealed—as the centerpiece of his loss causation methodology and damages analysis. Moreover, Dr. Tabak's "organic cash flow" opinion is inconsistent with facts he readily conceded in the remainder of his deposition, including that, in the case of equipment (like AGPs)

### B. Plaintiffs Have Not Disaggregated Their Alleged Losses

The lack of any causal link between Defendants' alleged misrepresentations and the Alleged Corrective Disclosures is not the only dispositive problem with Plaintiffs' loss causation theory. Plaintiffs also fail entirely to "disaggregate the [relevant stock price] declines or some rough percentage [there]of . . . from losses resulting from other, non-fraud-related events." *Moody's*, 2013 WL 4516788, at *10. Indeed, Dr. Tabak fails entirely to disaggregate the impact of non-fraud-related factors on GE Power's ability to conduct LT factoring in 2017 and offers fatally flawed methodologies to disaggregate non-fraud-related information about GE that was released on each of the Alleged Corrective Disclosure dates. Defendants are thus entitled to summary judgment on disaggregation alone. *See, e.g.*, *Atlantica*, 477 F. Supp. 3d at 112 (concluding that "Plaintiffs' claims also fail[ed] because . . . they fail[ed] to disaggregate losses"); *Gross v. GFI Grp., Inc.*, 310 F. Supp. 3d 384, 398-99 (S.D.N.Y. 2018) (granting summary judgment because "a jury would not be able to disaggregate th[e] portion of the increase in GFI's share price attributable to a correction of [executive chairman]'s statement from that portion of the increase attributable to the other [simultaneously disclosed] information"), *aff'd on other grounds*, 784 F. App'x 27 (2d Cir. 2019); *Moody's*, 2013 WL 4516788, at *12 (granting summary judgment after "neither [loss causation expert's] report nor any other evidence proffered by Plaintiffs establish[ed] that market forces and other factors unrelated to Moody's alleged mismanagement of its conflicts of interest did not play a significant role in Plaintiffs' economic loss").

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that GE Power sold to customers with extended payment terms and then factored, the cash received was no different than the (presumably "organic") cash GE Power would have received had the customer paid 100% of the price upfront. Ex. 119, Tabak Dep. Tr. 92:1-93:3. And even if Dr. Tabak's opinion had any factual basis, it does not follow that (and Dr. Tabak has not explained why) the alleged shortfalls in LT factoring in 2017 would represent the right measure of supposed price inflation—*as of the beginning of the Class Period in February 2016*—due to allegedly obscured "organic cash flow" in prior periods.

1. Plaintiffs ignore non-fraud-related causes of LT factoring shortfalls

Dr. Tabak makes no effort to disaggregate the impact of non-fraud-related causes of the 2017 LT factoring shortfalls at the center of his loss causation analysis. Indeed, he conceded that GE Power's ability to conduct LT factoring transactions in 2017 depended on its ability to generate new receivables to factor. *See* Ex. 119, Tabak Dep. Tr. 122:2-6. But numerous developments impacted GE Power's ability to generate new receivables—such as, for example, the massive power market downturn that severely limited its ability to sell upgrades and other equipment. *See* SOF ¶¶ 135, 150, 186-216. Accordingly, the impact of developments unrelated to the alleged fraud on GE Power's ability to execute LT factoring transactions (and by extension, the resulting impact on GE's Industrial CFOA) must be disaggregated. *See, e.g.*, *Omnicom*, 541 F. Supp. 2d at 554 ("Because the law requires the disaggregation of confounding factors, disaggregating only *some* of them cannot suffice to establish that the alleged misrepresentations actually caused Plaintiffs' loss." (emphasis in original)). Yet, Dr. Tabak assumed (without any basis) that GE Power's 2017 LT factoring shortfalls were attributable *entirely* to Defendants' alleged fraud. *See, e.g.*, Tabak Rep. ¶¶ 37, 65-70, 77-78; *see also* Tabak Reply Rep. ¶ 12. Dr. Tabak has thus failed to "establish that market forces and other factors unrelated to" GE Power's prior-period LT factoring "did not play a significant role in Plaintiffs' economic loss," *e.g.*, by hindering GE Power's ability to engage in LT factoring in 2017 at forecasted levels. *See Moody's*, 2013 WL 4516788, at *12; *see also Atlantica*, 477 F. Supp. 3d at 111 (no disaggregation after plaintiffs' expert had "not even attempt[ed] to identify or calculate losses from other causes").

2. Plaintiffs did not disaggregate other contemporaneous, non-fraud-related information

Dr. Tabak also failed to articulate any viable method of disaggregating even a rough percentage of the myriad non-fraud-related information that was disclosed contemporaneously

with the Alleged Corrective Disclosures. Given GE's enormous size and the varied nature of its many businesses, the information disclosed during its quarterly earnings announcements included a multitude of company-specific facts concerning GE and its overall performance that invariably affected the stock price and were entirely unrelated to Plaintiffs' remaining claims. For example, on the Alleged Corrective Disclosure dates, GE disclosed: (i) its EPS for the prior quarter; (ii) various other information about its business segments (including updates on orders, sales, and delivery trends across not just GE Power but also other segments, as well as updates on other corporate developments like possible delays in the sale of one of GE's subsidiaries); and (iii) adverse claims experience in GE's LTC portfolio. *See supra* Background §§ F, G. Although Dr. Tabak appears to recognize that he must disaggregate the stock price declines associated with such confounding information, he fails to provide a principled or coherent methodology for doing so. Indeed, other than GE's EPS announcements and LTC disclosures, Dr. Tabak did not individually analyze or attempt to disaggregate the impact of *any* confounding information released on the Alleged Corrective Disclosure dates, assuming instead that it would be captured elsewhere in his analysis. As explained below, Dr. Tabak's assumption is unfounded, and he has failed to disaggregate the impact of the foregoing categories of confounding information.

Earnings Announcements. On each of the Alleged Corrective Disclosure dates, GE reported its EPS. *See supra* note 10. In an effort to disaggregate the impact of GE's EPS announcements, Dr. Tabak uses his ERC analysis, but that analysis is demonstrably unreliable. For example, when GE's expert derived an ERC equation for each of the 23 observations in Dr. Tabak's sample—using the same methodology as Dr. Tabak employed—the equation's predicted abnormal return in GE's stock price was directionally wrong *more than 50% of the time*. *See* Ex. 123, Fischel Decl., Ex. A. Moreover, none of the ERCs that Dr. Tabak calculates is

statistically significant, meaning his ERC model fails to accurately and reliably measure the actual relationship between GE's earnings surprises and stock price movements. *See* Fischel Rep. ¶ 52 & n. 104; Ex. 121, Fischel Dep. Tr. 185:11-186:5; Tabak Rep. ¶ 31 & Exs. 5b, 6a, 8a; Tabak Supp. Rep., Ex. 5b. Dr. Tabak acknowledged the high error rate of his ERC analysis and attempted to explain it away by suggesting that "[a]t least in theory," it is "better than nothing." *See* Ex. 119, Tabak Dep. Tr. 165:4-13. Even the academic literature on which Dr. Tabak relies in support of his ERC analysis confirms that it "is not a reliable indicator of market reaction to earnings announcements of a single firm" (as opposed to across multiple firms). Ex. 90, GE_Tabak_0032036 at -039 (Kinney article); *see also* Ex. 119, Tabak Dep. Tr. 167:16-168:1. Given its unreliability, Dr. Tabak's ERC analysis could not supply a reasonable juror with a basis to disaggregate, even roughly, the impact of earnings information disclosed contemporaneously with the Alleged Corrective Disclosures. *See, e.g.*, *Moody's*, 2013 WL 4516788, at *12.

Unaddressed Confounding Information. On each of the Alleged Corrective Disclosure dates, GE also reported a wealth of additional information that went beyond its overall earnings in the prior quarter. That information included updates on various aspects of GE's individual businesses, such as GE Power's sales progress for the year in terms of equipment orders (*e.g.*, for the AGP upgrades it sold), GE Aviation's progress in terms of aircraft engine deliveries, and headwinds GE Oil & Gas and Renewables were facing. *See supra* Background § F. This information also included updates on various other corporate developments, such as possible delays in the sale of GE's Industrial Solutions business, headcount reductions, and other restructuring measures. *See id.*

Dr. Tabak did not independently analyze the impact of any such information on GE's stock price or specifically attribute to such information any portion of any stock price declines. Instead,

Dr. Tabak has suggested this information may have nevertheless been captured by his ERC analysis because that analysis took into account changes in analysts' forecasts of GE's annual earnings. *See, e.g.*, Ex. 119, Tabak Dep. Tr. 153:23-155:2, 177:13-179:7. That suggestion is inconsistent with other opinions Dr. Tabak has expressed,[19] and Dr. Tabak has not explained why there is any reason to assume, for example, that negative information regarding possible delays in the sale of GE Industrial Solutions would be captured by an assessment of changes in analysts' earnings forecasts when this information does not flow to the earnings statement. *See* Fischel Rep. ¶ 59. But even if Dr. Tabak were right that, as a general matter, *all* of this information disclosed about GE's businesses would be reflected in earnings forecasts, he provides no explanation as to how his ERC analysis could have captured information released on the dates of the Alleged Corrective Disclosures that would impact GE's earnings *beyond* 2017. That is because his ERC analysis only incorporates analyst forecasts *for that year*. *See, e.g.*, Tabak Reply Rep. ¶ 64; Ex. 119, Tabak Dep. Tr. 153:16-156:8. For example, if information concerning trends in orders for GE Power's products disclosed on the Alleged Corrective Disclosure dates was indicative, at least in part, of challenges GE would face in 2018 or beyond, there is no reason to assume the effect of those challenges would be accurately or reliably reflected in an analyst's estimate for 2017 earnings, including because analysts could have expected the effect to be bigger or smaller in 2018 than they expected it would be in the remainder of 2017. Accordingly, Dr. Tabak's analysis fundamentally fails to appropriately disaggregate large categories of information that may

[19] As Dr. Tabak explained at his deposition, for instance, trends in orders are "in and of themselves . . . not earnings." Ex. 119, Tabak Dep. Tr. 149:24-150:4, 177:13-178:13. That was his reasoning for why, in his supplemental report, Dr. Tabak cited "order trends being soft" as a potential explanation of negative movement in GE's stock price on the date of Mr. Bornstein's January 20, 2017 alleged misstatement that had *not* been captured in or explained by his ERC analysis. *See* Supp. Tabak Rep. ¶ 19; Ex. 119, Tabak Dep. Tr. 149:13-150:4.

well have impacted GE's stock price.

LTC Insurance Charge. On the date of the second Alleged Corrective Disclosure, GE informed investors of "adverse claims experience" in its LTC portfolio that required an assessment of its reserves, and on the date of the third Alleged Corrective Disclosure, GE disclosed that it had "deferred the decision to pay GE Capital dividends to GE" "[u]ntil that review has been completed." SOF ¶ 208. Those disclosures undoubtedly had a negative impact on GE's stock price—as Plaintiffs have previously alleged, *see, e.g.*, 6AC ¶¶ 457, 461-63, 470-74—but are totally unrelated to Plaintiffs' surviving claims. Dr. Tabak purports to calculate and disaggregate the impact of GE's announcements regarding adverse claims experience in GE Capital's LTC portfolio based on an average of analysts' estimates of the amount of a potential reserve charge, but concedes that "[n]either GE nor the analysts covering the company publicly quantified the impact of the adverse claims experience in GE's Insurance division after the 2Q17 earnings announcement," and that "each of the analyst reports" used in his calculations was issued *after* both the second and third Alleged Corrective Disclosures. *See* Tabak Rep. ¶¶ 57, 64; *see also id.* ¶¶ 58-63 & nn.54-61. Dr. Tabak thus relies on analyst reactions to new information that was disclosed *after* the relevant Alleged Corrective Disclosures, and as a result, is unable to provide a coherent explanation of when (as between the second and third Alleged Corrective Disclosures) the impact of such information was absorbed by the market. *See* Tabak Rep. ¶¶ 57-64 & nn.55-61 (providing alternative estimates depending on whether the factfinder assumes that the market absorbed LTC-related information in July or October of 2017); Fischel Rep. ¶ 64; Tabak Reply Rep. ¶ 61 (stating that it should be up to the factfinder, but that, if he had to provide an opinion, the LTC-related information would be "more appropriately considered" absorbed in October).

### C. Plaintiffs Have Not Established Loss Causation As To Their Claims Concerning GE's 2016 Form 10-K And January 20, 2017 Earnings Call

Defendants are also entitled to summary judgment as to Plaintiffs' 2016 10-K and Earnings Call Claims because Dr. Tabak has failed to articulate a viable loss causation theory in support of either. Plaintiffs bear the burden of demonstrating loss causation as to *each* of their Section 10(b) claims. *See supra* Argument § I. Dr. Tabak did not, however, independently quantify any losses attributable specifically to the misrepresentations alleged in support of the 2016 10-K or Earnings Call Claims. Rather, Dr. Tabak opined that Defendants' alleged misstatements "did not add any inflation to GE's stock price," but instead "maintained" inflation that previously existed "by virtue of the Item 303 Claim." *See* Tabak Rep. ¶ 13; Tabak Supp. Rep. ¶¶ 3(c), 25.

In support of his inflation-maintenance opinions, Dr. Tabak asserts that "the information that Plaintiffs contend Defendants omitted for purposes of the 2016 10-K Claim is information that Plaintiffs also contend GE omitted for purposes of the Item 303 Claim," Tabak Rep. ¶ 13, and that Mr. Bornstein's earnings call remarks "provided information that was reasonably consistent with market expectations," *see, e.g.*, Tabak Supp. Rep. ¶ 25; *see also id.* ¶ 20. But none of Defendants' challenged statements concerned the specific LT factoring practices that Defendants allegedly omitted in violation of Item 303, or even specifically addressed GE Power. Mr. Bornstein's earnings-call remarks (and the question to which he was responding) concerned *all* of GE's factoring transactions with GE Capital (*i.e.*, not just those involving GE Power and not just those involving LT receivables). *See* SOF ¶ 162. Likewise, the challenged disclosures in GE's 2016 Form 10-K discussed the sale of "current" (*i.e.*, short-term) receivables, and did not address the LT factoring at issue here. *See id.* ¶ 121.

Indeed, at least according to their pleadings, Plaintiffs do not assert that Mr. Bornstein's remarks or GE's 2016 Form 10-K disclosures were false or misleading merely because they

continued to conceal GE Power's use of LT factoring. As to the former, Plaintiffs allege, for example, that Mr. Bornstein misrepresented facts about GE's overall use of factoring with GE Capital across all of its businesses. *See, e.g.*, 6AC ¶¶ 580(a) (alleging Mr. Bornstein misspoke because factoring with GE Capital was a significant contributor to GE's cash flows), 580(b) (alleging Mr. Bornstein's statement was materially false or misleading as a result of the overall CFOA contributions of GE Capital factoring across all of GE's businesses), 582 (same). And as to the latter, Plaintiffs allege, for example, that GE's statements that short-term factoring was used to manage credit exposure were false or misleading because GE concealed the other purposes for which it used factoring generally, such as in order to manage short-term liquidity. *See id.* ¶ 428.

But Plaintiffs cannot have it both ways. Dr. Tabak's assumption that Defendants' challenged statements merely maintained alleged inflation that had already been created by Defendants' supposed omission of facts concerning LT factoring makes no sense if Plaintiffs intend to argue that it was the concealment of separate, additional facts—such as, for example, the volume of GE's overall factoring with GE Capital, *see, e.g.*, *id.* ¶ 580(b), or the purposes that GE sold current, rather than LT, receivables, *see, e.g.*, *id.* ¶ 428—that rendered those statements false or misleading. Courts continue to grapple with whether, and under precisely what circumstances, a plaintiff can demonstrate loss causation in a Section 10(b) case through the so-called "inflation-maintenance" theory. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1959 n. 1 (2021) (noting that the Supreme Court "has expressed no view on [the inflation-maintenance theory's] validity or its contours"). What is clear, however, is that (as Dr. Tabak seems to acknowledge, *see, e.g.*, Tabak Rep. ¶ 13) an inflation-maintenance theory is only appropriate if a defendant's alleged misrepresentations concealed the *same* facts as the earlier misrepresentations that created the inflation in the first place. *Cf. In re Pfizer Inc. Sec. Litig.*, 819

F.3d 642, 659-61 (2d Cir. 2016) (reasoning that district court abused its discretion by excluding testimony of plaintiffs' expert and concluding that expert did not need to individually "disaggregate the stock price inflation caused or maintained" by individual alleged misrepresentations because plaintiffs' theory was that the alleged misrepresentations had each "concealed the same information"). Because Plaintiffs allege the opposite, claiming that Defendants' statements did *not* merely conceal the same facts as Defendants allegedly omitted in violation of Item 303, they cannot rely on an inflation-maintenance theory to carry their loss causation burden as to the 2016 10-K and Earnings Call Claims.

### D. Plaintiffs Have Not Established Loss Causation As To Disclosures Dr. Tabak Did Not Address Or As To The Second Two Alleged Corrective Disclosures

Defendants are also entitled to partial summary judgment for any losses attributable to disclosures for which Dr. Tabak has not quantified any damages, as well as those attributable to the second two Alleged Corrective Disclosures (*i.e.*, those made on July 21 and October 20, 2017).

As an initial matter, the last alleged corrective disclosure for which Dr. Tabak makes any attempt to quantify stock price declines related to Plaintiffs' surviving claims is October 20, 2017. *See* Tabak Rep. ¶ 2(e)-(g). As Dr. Tabak admits, he is unable to quantify and/or disaggregate the fraud-related portions of the stock price declines on the November 13, 2017, and January 24, 2018 alleged corrective disclosure dates (and has previously conceded that the January 16, 2018 corrective disclosure is unrelated to Plaintiffs' surviving claims). *Id.* Accordingly, Defendants are entitled to summary judgment on loss causation grounds to the extent Plaintiffs seek to recover for losses attributable to alleged corrective disclosures after October 20, 2017. *See GFI*, 310 F. Supp. 3d at 398-99 (granting summary judgment after plaintiffs' expert did "not attempt to attribute any portion of the [change] in [the company's] share price to a corrective disclosure as opposed to other simultaneously released information").

Moreover, Plaintiffs' claims must be limited further. In GE's Form 10-Q for the first quarter of 2017 (filed May 5, 2017, between the first and second Alleged Corrective Disclosures), GE added a new narrative disclosure that informed investors about GE Power's LT factoring transactions, including the amount of LT receivables held by GE Capital after they were purchased from GE Power. *See* SOF ¶¶ 127, 129; *see also* Ex. 120, Kothari Dep. Tr. 252:9-254:1. Shockingly, Dr. Tabak had not previously reviewed or considered this new disclosure before issuing his loss causation opinion. *See* Ex. 119, Tabak Dep. Tr. 206:22-209:11. Defendants are entitled to partial summary judgment as to the last two Alleged Corrective Disclosures, which could not have corrected Defendants' alleged misrepresentations concerning LT factoring because the very information Plaintiffs claim was hidden from the market was fully disclosed by May 5, 2017. *See, e.g.*, *Omnicom*, 597 F.3d at 511 (alleged corrective disclosures could not have revealed facts already "known to the market"); *In re Xerox Corp. Sec. Litig.*, 935 F. Supp. 2d 448, 495 (D. Conn. 2013), (press release could not have revealed previously disclosed facts), *aff'd sub nom. Dalberth v. Xerox Corp*., 766 F.3d 172 (2d Cir. 2014).

## II. PLAINTIFFS CANNOT ESTABLISH SCIENTER

Plaintiffs' inability to establish "scienter" is a separate and additional basis for summary judgment. Plaintiffs have adduced no evidence demonstrating that Defendants knew or recklessly disregarded anything that rendered GE's disclosures false or misleading. *Strougo v. Barclays PLC*, 334 F. Supp. 3d 591, 596 (S.D.N.Y. 2018) (at summary judgment, plaintiffs must show that "the evidence, taken as a whole, could support a finding by a reasonable juror that defendants acted with the intent to deceive, manipulate, or defraud investors"); *GFI*, 310 F. Supp. 3d at 395-96 (granting summary judgment where "Plaintiffs' claim of scienter under the conscious misbehavior or recklessness test fail[ed]"). For their claims to survive, Plaintiffs must (but cannot) demonstrate more than "some metaphysical doubt as to the material facts," especially where the claim about

scienter is one that simply makes no economic sense—in such a case, a plaintiff "must come forward with more persuasive evidence to support their claim." *See Matsushita*, 475 U.S. at 587.

At the pleading stage, when the Court had to accept Plaintiffs' allegations as true and draw reasonable inferences in Plaintiffs' favor, the Court credited the alleged statements of former GE employees cited in Plaintiffs' complaints in determining that Plaintiffs raised a "strong inference" of scienter. *See* Op. (Dkt. 206) at 26-27, 30; *see also Amorosa v. Gen. Elec. Co*., 2022 WL 3577838, at *4 (S.D.N.Y. Aug. 19, 2022) (Furman, J.) ("[T]he statements of the former employees alleged in the [complaint] were critical to the Court's rulings. . . ."). Since then, however, Plaintiffs have stipulated that they will not rely on this evidence for either summary judgment or trial. *See* Ex. 109, Jan. 17, 2022 Stip. But none of the dozens of deponents in both this matter and the SEC investigation corroborated the complaints' conjured theories. Faced with this seemingly insurmountable problem, and having failed to uncover any evidence that could substantiate their theory of fraud, Plaintiffs concocted a new story: claiming that Mr. Bornstein not only lied on GE's earnings call, but also that GE employees then engaged in a cover-up by modifying language that would appear in GE's subsequent Form 10-K. *See, e.g.*, 6AC ¶¶ 521-90.

This story is a complete fabrication and not substantiated by even a shred of evidence—even though Plaintiffs conducted fifteen depositions of GE witnesses (of which thirteen are former GE employees), had access to twenty transcripts of SEC interviews of GE witnesses (which also found no evidence to support scienter-based claims, *see* Ex. 105, Dec. 9, 2020 SEC Ord.), and received over one million pages of documents. Rather, the evidence shows that Defendants adhered to rigorous internal controls surrounding investor communications and SEC filings, and GE, Mr. Bornstein, and other executives originally named in this action all acted inconsistently with any fraudulent intent by *increasing* their holdings in GE stock during the Class Period.

*First*, Plaintiffs have adduced no evidence that calls into question the robust internal controls and processes that GE had in place throughout the Class Period—including the Disclosure Committee, which consisted of legal and financial experts and did not include Mr. Bornstein. GE maintained multiple levels of thorough review of its public disclosures and supporting data, including by (i) GE's Board of Directors, (ii) GE's Audit Committee, (iii) GE's Disclosure Committee (with input from each of GE's segments and individuals from across the organization), (iv) controllership for both GE and GE Power, (v) internal audit staff, and (vi) GE's external auditor, KPMG. *See* SOF ¶¶ 104-11, 163-70. The existence of this robust process itself undermines finding scienter against Defendants—especially where Plaintiffs have not advanced a plausible theory of why anyone at GE would risk their integrity and accomplished careers to modify GE's disclosures so as to disseminate material misstatements or omissions. *See In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 465 (S.D.N.Y. 2000) (granting summary judgment where evidence showed company was "performing a regular assessment which they had every incentive to make accurate," even if in "hindsight" other information could have been disclosed).

For example, leading up to the issuance of the 2016 Form 10-K, GE adhered to its usual extensive review process, and GE employees carried out their responsibilities consistent with GE's controls and prior practices. On December 8, 2016, the GE Audit Committee met to discuss work for 2017, including oversight of the Disclosure Committee generally and review of GE's disclosures specifically. SOF ¶ 163. On January 17, 2017, each segment submitted "representation letters" to GE's controllership to confirm important information for GE's external auditor. *Id.* ¶ 164. On January 31, 2017, the Disclosure Committee met to discuss the Form 10-K (including potential changes to its language), the representation letter process, SEC guidance in Staff Accounting Bulletin No. 99, and Sarbanes-Oxley controls. *Id.* ¶ 165. On February 9, the

Audit Committee met to discuss, *inter alia*, GE controllership's review of the Form 10-K, the Disclosure Committee's review of the Form 10-K, and the external audit of GE's 2016 financial statements. *Id.* ¶ 166. The next day, the Board of Directors and Audit Committee met to, *inter alia*, review and approve the Form 10-K. *Id.* ¶ 167. On February 24, 2017, the 2016 Form 10-K was published. *Id.* ¶ 168.

There is not a scintilla of evidence that the 2016 10-K (or any other GE disclosure) was altered during this process to match any perceived inconsistencies with Mr. Bornstein's statements on GE's January 20, 2017 earnings call.[20] *Contra* 6AC ¶¶ 584-90. Instead, the undisputed evidence shows that any changes to the 2016 10-K, including as to language concerning GE's factoring specifically, were made for legitimate reasons and approved by the Disclosure Committee. *See* SOF ¶¶ 118-22.[21] Notably, this included the *Disclosure Committee's* view that LT factoring was distinct from GE's short-term factoring, because the LT factoring was predominantly related to financing of equipment sales. *See id.* ¶ 119. The same conscientiousness motivated GE to consider and ultimately disclose more information about LT factoring, including its effect on GE CFOA, beginning in GE's SEC filings for the first quarter of 2017. *See id.* ¶¶ 123-26, 128. Indeed, Plaintiffs have still never explained how the Class Period can extend beyond the

[20] On this January 20, 2017 call, Mr. Bornstein relayed accurate numbers concerning GE's working capital (of which *all* GE Capital factoring was a component) from documents prepared and given to him by his subordinates. *See* SOF ¶¶ 155-62.

[21] Plaintiffs' conspiracy is implausible on its face and was rejected by all witnesses that Plaintiffs asked about this theory. *Compare, e.g.*, 6AC ¶¶ 584-90 (citing communications between Mahajan, Vitanza, Mascola, and Weverman), *with* Ex. 16, Mahajan Dep. Tr. 72:21-73:9; Ex. 57, Vitanza Dep. Tr. 109:19-111:18; Ex. 21, Mascola Dep. Tr. 183:8-184:25. Notably, the email that Plaintiffs claim shows that "GE employees internally signaled concern over the accuracy of" Mr. Bornstein's statement, *see* 6AC ¶ 584, says no such thing, *see* Ex. 32, Weverman Dep. Tr. 187:8-21, 189:10-190:6 (discussing Ex. 98, GE_SDNY00774556 (stating that individuals should discuss GE's disclosures)).

first quarter of 2017 given the addition of specific narrative disclosures solely about LT factoring. These extensive and continual deliberations—and Plaintiffs' complete lack of contrary evidence—negate the possibility of establishing scienter before a jury.[22]

Moreover, in allowing the January 20, 2017 earnings call claim to proceed, the Court relied upon Plaintiffs' allegations that Mr. Bornstein was aware of, and recklessly disregarded, factoring metrics that purportedly were inconsistent with the figures from his earnings binder that he disclosed on the call. Op. (Dkt. 314) at 14-15. But Plaintiffs' allegations of a purported inconsistency are premised upon documents that depict overall factored *volumes* (*i.e.*, total amounts of factored receivables) or *balances* (*i.e.*, total amounts of factored receivables outstanding on the balance sheet). *See* Dkt. 296-1, at 4, 10; Dkt. 311-4, at 12. As Mr. Bornstein testified, overall factored volumes and balances are entirely different metrics from the net year-over-year change in cash flow contribution from factoring that he discussed on the earnings call. Ex. 37, Bornstein Dep. Tr. 221:1-233:20. There is simply no evidence that Mr. Bornstein sought to deceive investors by accurately relaying, in response to a question about "cash flow," the year-over-year change in cash flows related to factoring that he had been provided.[23]

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[22] Even if Plaintiffs could establish that *someone* at GE was aware of information suggesting that Defendants' challenged statements were false or misleading, the various lower-level employees at GE's segments whose documents and testimony Plaintiffs appear to have fixated upon were not sufficiently senior in GE's management to serve as a "prox[y]" for the Company, and lack the requisite "control" over the fraud because they are not "management level employees" of GE. *Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 301-02 (S.D.N.Y. 2019).

[23] Further, to the extent the Court relied upon Plaintiffs' allegations that the numbers cited by Mr. Bornstein improperly excluded "GEAR," that again supports no inference of scienter. Op. (Dkt. 314) at 15. As the evidence establishes, GEAR was a "current receivables securitization" facility that was "restructured" at the end of 2016 and "appropriately taken off the balance sheet"—pursuant to plans made months earlier—and fully disclosed in the 2016 Form 10-K. *E.g.*, Ex. 38, Gill SEC Dep. Tr. 224:10-17; Ex. 2, GE 2016 Form 10-K at 85, 197. Plaintiffs' additional suggestion that there were two divergent sets of books at GE, Op. (Dkt. 314) at 15, is also refuted by clear testimony that "external" figures referred to financial metrics reported in GE's SEC filings

*Second*, Plaintiffs' theory of fraud is incoherent, because there is no financial motive to commit securities fraud—particularly as there is no evidence of opportunistic insider sales and the only individual Defendant left in the case (Mr. Bornstein) substantially increased his GE holdings during the same time in which he supposedly knew the stock price was fraudulently inflated.[24] *See* SOF ¶¶ 217-20; *In re N. Telecom*, 116 F. Supp. 2d at 462-63 (granting summary judgment where "the evidence shows unequivocally that defendants lacked any" motive to commit fraud, including where individual defendants "held or increased their holdings and lost $27.8 million collectively"); *see also Frankfurt-Trust Inv. Luxemburg AG v. United Techs. Corp.*, 336 F. Supp. 3d 196, 225 (S.D.N.Y. 2018) ("[S]ubstantial share repurchases tend to negate a finding of scienter because it would make no economic sense for a company to buy back its stock at a price it knows to be inflated."); *Tyler v. Liz Claiborne, Inc.*, 814 F. Supp. 2d 323, 337-38 (S.D.N.Y. 2011) (same).[25] Plaintiffs have never explained this contrary evidence.[26]

## III. PLAINTIFFS CANNOT ESTABLISH THE ELEMENTS OF AN ITEM 303 CLAIM OR A MATERIAL MISREPRESENTATION

Plaintiffs also have not adduced evidence from which a jury could find a material misstatement or omission. As to the Item 303 Claim, because GE Power's LT factoring transactions were conducted between segments of GE, they could not have had a material impact

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after any necessary intercompany reconciliations and accounting adjustments. Ex. 32, Weverman Dep Tr. 181:9-182:8, 210:11-212:4.

[24] Mr. Bornstein was required, since he became a Senior Vice President in 2005, to hold GE stock equal to four times his base salary. SOF ¶ 222. Mr. Bornstein held GE stock well in excess of this requirement. *See id.* ¶ 223.

[25] GE itself also incurred substantial losses from holding GE stock. *See* SOF ¶ 217.

[26] Plaintiffs cannot establish motive for their alleged fraud through the mere existence of GE's bonus compensation plan because that motive is "possessed by virtually all corporate insiders" and therefore inactionable. *See In re N. Telecom*, 116 F. Supp. 2d at 463 n.7; *see also ECA & Loc. 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009).

on the consolidated "liquidity" of the "*registrant*," which is GE. As to the 2016 10-K and Earnings Call Claims, the record confirms beyond any genuine dispute of material fact that Defendants' challenged statements were both literally true and not misleading.

### A. Plaintiffs Cannot Demonstrate That GE Violated Item 303

Item 303 requires the disclosure of trends or uncertainties only if they are reasonably likely to have a material impact on certain aspects of a registrant's business, including "revenues," "income," and "liquidity," *see* 17 C.F.R. § 229.303 (2017), and only if the registrant "actually" knows of that fact, *see Axar Master Fund, Ltd. v. Bedford*, 308 F. Sup. 3d 743, 758 n.90 (S.D.N.Y. 2018). "[A] violation of Item 303's disclosure requirements can only sustain a claim under Section 10(b) and Rule 10b-5 if the allegedly omitted information satisfies *Basic*[*, Inc. v. Levinson*]'s test for materiality," along with the other requirements imposed by the Exchange Act. *See Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 103 (2d Cir. 2015). Defendants are entitled to summary judgment on Plaintiffs' Item 303 Claim because (i) GE Power's LT factoring had no impact on *GE* at the registrant level sufficient to trigger an Item 303 disclosure duty, (ii) Defendants did not have actual knowledge of any trends concerning LT factoring that Item 303 required GE to disclose, and (iii) GE Power's LT factoring was qualitatively and quantitatively immaterial.[27]

#### 1. LT factoring had no impact on GE's revenues or liquidity, let alone a "material" one

An Item 303 duty to disclose arises only if a given trend, event, or uncertainty is likely to have a material impact on a "*registrant*" (not merely as to its subsidiary). *See, e.g.*, 17 C.F.R. § 229.303(a) (2017); *see Shetty v. Trivago N.V.*, 796 F. App'x 31, 33-34 (2d Cir. 2019) (affirming dismissal where plaintiffs did not establish "any negative financial impact at all, let alone a material

[27] If Plaintiffs' Item 303 Claim fails, their other Section 10(b) claims would also necessarily fail for lack of loss causation. *See supra* note 14; Tabak Rep. ¶ 13; Tabak Supp. Rep. ¶ 3(c).

impact"); *Constr. Laborers Pension Trust for S. Cal. v. CBS Corp.*, 433 F. Supp. 3d 515, 541-42 (S.D.N.Y. 2020) (dismissing Item 303 claim as "too tenuous" because only "disclosure of issues with a direct impact on a company's financial condition" is required). Plaintiffs' Item 303 Claim alleges that LT factoring would have a material impact on GE's future revenues, Op. (Dkt. 185) at 45, but, in actuality, factoring accelerates the receipt of cash payments corresponding to revenue GE has *already recognized*. *See, e.g.*, 6AC ¶ 321 (factoring is "selling [GE Power's] revenues for cash"); SOF ¶¶ 54, 63, 74, 93. It is thus undisputed that GE Power's LT factoring transactions had no impact on GE's current or future revenues, and therefore the Item 303 theory espoused in the complaint and relied upon by the Court at the pleading stage cannot withstand summary judgment. *See* Ex. 119, Tabak Dep. Tr. 24:10-16 (conceding that LT factoring has no impact on revenue).

Recognizing that the Item 303 theory they pled has no merit, Plaintiffs now pivot and appear to claim that GE Power's LT factoring actually impacted GE's "liquidity," by accelerating GE Power's receipt of cash, thus impacting Industrial CFOA, a non-GAAP (and non-registrant-level) metric. *See, e.g.*, Tabak Rep. ¶ 12. However, because the LT factoring transactions were intercompany transactions (*i.e.*, involving sales of LT receivables by GE Power to GE Capital), they have no net impact on the consolidated liquidity of GE. Transferring an asset in the form of receivables from one intercompany entity to another, and transferring cash of equal value back to the selling intercompany entity, has no net impact on GE's liquidity—a fact that Dr. Tabak readily admitted at his deposition. *See* Ex. 119, Tabak Dep. Tr. 24:10-26:17, 28:11-19, 53:25-54:13; *see also* Ex. 120, Kothari Dep. Tr. 193:6-22, 258:24-259:21.[28]

Accordingly, because it is undisputed that the allegedly undisclosed LT factoring engaged

[28] Dr. Tabak also admitted the same lack of impact from GE Power's LT factoring on GE's sales and income. *See* Ex. 119, Tabak Dep. Tr at 24:10-16, 25:17-23.

in by GE Power (i) had no impact on GE's revenue, and (ii) no impact on GE's liquidity, Plaintiffs' Item 303 claim necessarily fails.

2. There is no evidence of a known trend

Item 303 applies only to "*known* trends." *Martin v. Quartermain*, 732 F. App'x 37, 42 n.3 (2d Cir. 2018) (emphasis in original) (allegations of recklessness or negligence, even taken as true, "are insufficient"). Plaintiffs therefore must demonstrate that Defendants actually knew that there were purportedly concealed LT factoring trends or uncertainties, which were both "reasonably likely to occur" and "reasonably likely" to have a "material effect on [GE]'s financial condition or results of operations." *See, e.g.*, *In re BHP Billiton Ltd. Sec. Litig.*, 276 F. Supp. 3d 65, 87-88 (S.D.N.Y. 2017). There is insufficient evidence to meet that high bar. In addition to the contrary facts articulated *supra* Argument § II, deposition testimony lends no support for Plaintiffs' theory, which indicates that GE employees did not actually know of any such material trends related to LT factoring. *See* SOF ¶¶ 95, 136.

3. GE Power's LT factoring was quantitatively and qualitatively immaterial

Plaintiffs' Item 303 Claim also fails because GE Power's Class Period LT factoring was immaterial as to GE's reported financial results. *See, e.g.*, *Bristol Cty. Ret. Sys. v. Adient PLC*, 2022 WL 2824260, at *2 (2d Cir. July 20, 2022) (affirming dismissal where alleged omissions were immaterial); *In re Barclays Bank PLC Sec. Litig.*, 2017 WL 4082305, at *14 (S.D.N.Y. Sept. 13, 2017) (concluding that "[e]ven if Barclays breached Item 303's disclosure duty, the omissions [we]re still not actionable" because they were immaterial). Materiality is determined through "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 811 (S.D.N.Y. 2018). Courts consider "both quantitative and qualitative factors" in assessing an item's materiality. *ECA & Loc. 134 IBEW*, 553 F.3d at 197.

Quantitative Materiality. In assessing quantitative materiality, courts rely on the SEC's Staff Accounting Bulletin ("SAB") No. 99, which "provides that a misstatement related to less than 5% of a financial statement carries the preliminary assumption of immateriality." *See IBEW Loc. Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 390-91 (2d Cir. 2015). Assessments of quantitative materiality must be "placed in context," *i.e.*, in light of a company's "total assets." *ECA & Loc. 134 IBEW*, 553 F.3d at 204. As such, quantitative materiality must be assessed at the registrant level. *See Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (instructing that the "anticipated magnitude" of an event should be assessed "in light of the *totality of the company activity*").

Tellingly, Prof. Kothari failed to assess how the CFOA impact from LT factoring during the Class Period compared to GE's total cash flows. *See* Kothari Rep. If he had, he would have found that LT factoring was quantitatively immaterial as to GE:

| Metric | 2015 | 2016 | 2017 |
|---|---|---|---|
| **Net CFOA Impact from LT Factoring** *See* Ex. 50, GE_SDNY00241579. | $0.109 billion | $1.377 billion | $0.054 billion |
| **GE CFOA** (*Net CFOA Impact as Percentage*) *See* Ex. 1, GE 2017 Form 10-K at 18. | $16.4 billion (***0.67%***) | $30.0 billion (***4.59%***) | $11.0 billion (***0.49%***) |

Qualitative Materiality. Courts also consider whether allegedly concealed information, even if quantitatively immaterial, would nevertheless alter the "total mix" of information available to a reasonable investor. *See ECA & Loc. 134 IBEW*, 553 F.3d at 204 (citing SAB No. 99). Quantitatively insignificant items may be material "based on particularly egregious qualitative factors" like "self-dealing or misappropriation by senior management," or other similarly significant factors. *Menora Mivtachim Ins. Ltd. v. Int'l Flavors & Fragrances Inc.*, 2021 WL

1199035, at *20 (S.D.N.Y. Mar. 30, 2021). The presumption of immateriality controls where a plaintiff cannot establish such factors. *See Janbay v. Canadian Solar, Inc.*, 2012 WL 1080306, at *7 (S.D.N.Y. Mar. 30, 2012) (dismissing claim after rejecting alleged qualitative factors).

In the face of the vast "total mix" of information about GE, Plaintiffs cannot identify any significant factors that would make GE Power's LT factoring qualitatively material to investors. Indeed, Prof. Kothari even failed to consider whether all of GE Power's LT factoring at issue is categorically the same, or whether meaningful differences existed between the different kinds of LT factoring that GE Power conducted during the Class Period, such that different kinds of LT factoring must be considered separately. *See, e.g.*, Kothari Rep. ¶¶ 54-55. Notably, GE Power's LT factoring was predominantly related to facilitating the sale of upgrades or new hardware by providing customers with a financing option. *See* Sunshine Rep. ¶ 42 (Table 2). This is critical because the nature of such factoring—which was a form of financing to enable customers' equipment purchases—is such that investors could not view such transactions as subject to the (incorrect) criticisms that Prof. Kothari makes about LT factoring being unsustainable and harming future cash generation. As established by the undisputed evidence, GE believed that these LT factoring transactions enabled sales to GE Power customers that would not otherwise have occurred, which is entirely inconsistent with Plaintiffs' theory that LT factoring pulled forward cash that would have been received in future periods if factoring had not occurred. *See* SOF ¶ 92.

### B. Plaintiffs Cannot Demonstrate That Defendants' Affirmative Statements Were False Or Misleading

Plaintiffs' other two Section 10(b) claims, which challenge disclosures in GE's 2016 Form 10-K, as well as remarks by Mr. Bornstein on GE's January 20, 2017 earnings call, fail because the challenged statements were neither false nor materially misleading by omission.

1. GE's 2016 Form 10-K factoring disclosures were true and not misleading

Plaintiffs are wrong that the statements in the 2016 10-K that "[i]n order to manage credit exposure, GE s[old] current receivables to GE Capital and other third parties in part to fund the growth of [its] industrial businesses" were false and/or misleading because GE "also used factoring in order to manage short-term liquidity." 6AC ¶¶ 426-28. *First*, the challenged disclosures are not tied in any way to the alleged fraud regarding LT factoring. They concern the factoring of "current receivables," which are due in less than one year, and not the LT receivables due in more than one year that Plaintiffs challenge in this case. *See, e.g.*, *id.* ¶¶ 587-88. *Second*, these statements were not misleading because they are truthful in context. GE's 2016 Form 10-K included a generalized discussion of why GE's seven industrial businesses collectively engage in factoring, and correctly stated that this cash is used in part to "fund the growth of [GE's] industrial businesses." SOF ¶ 121. *Third*, to the extent Plaintiffs quibble with this disclosure and would have liked for GE to list more reasons that the industrial businesses engage in factoring, such a "tell me more" disclosure is not required by the securities laws and, in any event, such additional reasons can be found throughout GE's other Class Period disclosures. *See, e.g.*, *Xerox*, 766 F.3d at 183 (affirming summary judgment and observing that corporations are "not required to disclose a fact merely because a reasonable investor would very much like to know that fact"); *Carlin Equities Corp. v. Offman*, 2008 WL 4387328, at *9 (S.D.N.Y. Sept. 24, 2008); *see also* SOF ¶¶ 127, 129.

2. Mr. Bornstein's January 20, 2017 remarks were true and not misleading

Plaintiffs challenge Mr. Bornstein's response to an analyst's question concerning GE's total cash flows on a January 20, 2017 earnings call. *See* 6AC ¶¶ 577-78; *see supra* Background § E. None of Plaintiffs' various arguments about why portions of Mr. Bornstein's response were materially false or misleading have any basis in the evidentiary record. *First*, Plaintiffs complain

that the phrase "very little to do with GE Capital factoring" was misleading because of the extent of LT factoring in 2016, *see* 6AC ¶ 580(a), ignoring that Mr. Bornstein was speaking about $5.2 billion in GE's entire "working capital," *see* SOF ¶ 162. Of that $5.2 billion, only $0.5 billion concerned the "accounts receivable" category which included *all* of GE's factoring with GE Capital. *Id.* It is obvious that $0.5 billion is "very little" of $5.2 billion. *Second*, Plaintiffs insist that the figures "$1.6 billion" and "$1.7 billion" were false because "factoring had actually contributed" more to GE's CFOA in 2016 and 2015. *See* 6AC ¶ 580(b) (claiming, *e.g.*, a $4.2 billion contribution). This ignores that Mr. Bornstein explicitly stated that these figures related to the year-over-year "change" in factoring with GE Capital and did not make any statement about the absolute annual contribution of factoring to GE's CFOA, *see* SOF ¶ 162, and relies on a misreading of a GE presentation, *see* 6AC ¶ 568 (quoting Ex. 97, GE_SDNY00979605 at -607 (describing contribution to CFOA from *all* activities by GE Capital's Working Capital Solutions division during 2016)). *Third*, Plaintiffs argue that Mr. Bornstein's phrase "[s]o [sic] there's very good underlying performance here" concealed GE's reliance on LT factoring and its associated costs. *See* 6AC ¶ 580(c). Mr. Bornstein's generalized and optimistic statement is not actionable as a matter of law, *see, e.g.*, *GFI*, 784 F. App'x at 29 (affirming summary judgment and observing that "some statements [were] inactionable as a matter of law because they are too general to cause a reasonable investor to rely upon them"); *Steamfitters' Indus. Pension Fund v. Endo Int'l PLC*, 771 F. App'x 494, 497 (2d Cir. 2019) ("[V]ague and optimistic statements [] are too general to cause a reasonable investor to rely upon them. . . ."), and Mr. Bornstein was speaking about GE's working capital as a *whole*—of which only a small portion concerned *all* the factoring done with

GE Capital by all of GE's industrial segments, *see* SOF ¶ 162.[29]

## IV. PLAINTIFFS CANNOT ESTABLISH CONTROL PERSON LIABILITY

Plaintiffs also seek to hold Mr. Bornstein derivatively liable as a "control person" under Section 20(a). *See* 6AC ¶¶ 598-603. That requires (i) a primary violation by someone Mr. Bornstein controlled, and (ii) that Mr. Bornstein "was, in some meaningful sense, a culpable participant in the controlled person's fraud." *See* Op. (Dkt. 185) at 55 (quoting *Carpenters Pension Trust*, 750 F.3d at 236). *First*, Plaintiffs cannot prove any primary violations, so their Section 20(a) claim fails. *See, e.g.*, Op. (Dkt. 185) at 55. *Second*, Plaintiffs are unable to establish Mr. Bornstein's culpable participation in any fraud, which would require a showing "at least approximating recklessness in the section 10(b) context." *Friedman v. JP Morgan Chase & Co.*, 2016 WL 2903273, at *10, *12 (S.D.N.Y. May 18, 2016). At all times, Mr. Bornstein relied on the information provided to him by his subordinates through rigorous and well-established internal processes; he did not culpably participate in any fraud. *See* SOF ¶ 111; *see supra* Argument § II.

## CONCLUSION

The Court should grant Defendants' Motion for Summary Judgment.

[29] In addition, Mr. Bornstein's statements that there was "very good underlying performance" and that "it's actually very little to do with GE Capital factoring" were opinions, subject to the heightened standard set forth in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 185-86 (2015). Mr. Bornstein's opinions are not actionable under that standard for the reasons articulated herein and because Plaintiffs cannot credibly dispute that Mr. Bornstein believed what he said. *See* Ex. 37, Bornstein Dep. Tr. 223:19-233:7; *see also Martin*, 732 F. App'x at 41 (affirming dismissal for failure to show speaker disbelieved his statements).

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Respectfully submitted,

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