UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SJUNDE AP-FONDEN and THE CLEVELAND BAKERS AND TEAMSTERS PENSION FUND, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

Case No. 1:17-CV-8457-JMF

Hon. Jesse M. Furman

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Class Representatives Sjunde AP-Fonden and The Cleveland Bakers and Teamsters Pension Fund (collectively, "Plaintiffs") respectfully submit this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Motion" or "DB").

PRELIMINARY STATEMENT

This case concerns Defendants' scheme to misrepresent GE's financial health by concealing significant cash flow problems that existed within its largest industrial business, GE Power. Defendants went to great pains to try to end this case before Plaintiffs and the Court had the opportunity to review and consider the factual record. It is now obvious why.

The evidentiary support for Plaintiffs' claims is overwhelming. The record confirms that Defendant Jeffrey Bornstein and GE's senior executives [redacted] It further demonstrates their knowledge of [redacted] And, at all times, they understood and expressed in candid internal emails [redacted] Then, when an analyst specifically asked Bornstein how much GE relied on factoring for cash, he lied.

Instead of confronting this record, Defendants simply ignore it. In arguing that no genuine factual disputes exist on falsity, materiality, scienter, loss causation and damages, Defendants address only a handful of the several hundred internal GE documents marked at depositions and considered by Plaintiffs' experts. In essence, Defendants ask the Court to turn a blind eye to the factual record, credit their unsupported say-so of innocence, and dismiss Plaintiffs' claims. Further

underscoring the frailty in Defendants' kitchen-sink approach, the little evidence they do cite actually supports Plaintiffs' claims. None of their arguments warrant summary judgment.

On loss causation, Defendants repeatedly sought to have this Court resolve the issue without considering the factual record because, in their view, that factual record was irrelevant to the issue. The Court—and Defendants' own expert—ultimately disagreed. Now, with a fully-developed factual record, Defendants again attempt to sidestep it. Their loss causation and damages arguments rest entirely on the fact-intensive criticisms that their experts, including Mr. Christopher Russo and Mr. Daniel Fischel, level at the assumptions, analyses, factual support, and conclusions offered by Plaintiffs' expert, David I. Tabak, Ph.D. Setting aside that Defendants' quibbles are, themselves, incorrect—and some were offered for the first time through an untimely declaration from Mr. Fischel—none are proper grounds for summary judgment. Rather, they illuminate the significant factual disputes that exist. Dr. Tabak's opinions are reliable, grounded in sound methodologies, supported by the factual record, and should go to the jury.

Defendants' other arguments—that there are no triable issues of fact regarding materiality and falsity, and that not a *single* piece of evidence supports scienter—are make-weight and once again, divorced from the factual record. For example, citing only to their own public disclosures, Defendants claim they could not have committed fraud because GE had rigorous controls around its financial disclosures. But they ignore record evidence demonstrating that, during the Class Period, GE senior executives [redacted] Defendants' only response is to cite the testimony of witnesses who, in perfect harmony, [redacted] their own participation in, or the impetus or justification for, [redacted] This serves only to highlight the fact that summary judgment is not proper here and that a jury should weigh

the credibility of these witnesses. The same is true of Defendants' red-herring argument that all evidence of Bornstein's scienter is negated by [redacted] against the mountain of evidence demonstrating his scienter, including the $30 million plus in compensation Bornstein took home during the Class Period in part because of the long-term ("LT") factoring practices [redacted]

For the reasons set forth herein, Defendants have failed to demonstrate the absence of genuine factual disputes. Their Motion must be denied.

BACKGROUND

I. Massive Deferred Balance Growth Drives Down GE's Cash Flows And Liquidity

In the years leading up to the Class Period, a confluence of factors in Power's business negatively impacted GE's cash collections. [redacted] As a result, Power's cash flows declined, its deferred balance ballooned, and the gap between its revenues and cash flows grew. ¶¶7-9, 15, 25-27, 34-38.

[redacted]

[1] Unless otherwise stated: (i) "¶__" refers to the paragraphs in Plaintiffs' Statement of Additional Material Facts; (ii) "PX __" refers to the exhibits to the Nirmul Declaration filed herewith; and (iii) "Ex." refers to the exhibits to the Denton Declaration (ECF No. 353); and (iv) "SOF" refers to Defendants' Statement of Material Facts (ECF No. 359).

[redacted] This was particularly problematic for GE because, in April of 2015, the Company announced it was exiting most of its GE Capital businesses. ¶¶10-13. Without this important source of funding, GE's ability to generate sustainable Industrial CFOA became central to its [redacted]

II. GE's Leaders Sound The Alarm Internally About Power's Declining Cash Flows

Recognizing that Power's declining cash flows were straining GE's financial condition and a major red flag for investors (¶49), Bornstein, Jeff Immelt (GE's former CEO), and Puneet Mahajan (Bornstein's right-hand man) [redacted] GE set a long-term goal of achieving a 95% cash conversion rate, which it disclosed to investors on May 20, 2015. ¶¶23, 28-30.

[2] [redacted]

[redacted]

III. Unable To Reverse Or Stem GE's Adverse Cash Trends, Defendants Conceal Them

A. Defendants Develop And Implement A "Deferred Monetization" Program

[redacted]

[redacted]

Investors were none the wiser because, unlike short-term factoring, Defendants did not disclose in its 2015 Form 10-K that GE had engaged in, much less relied [redacted]

B. GE Leaders Develop And Approve 2016 Cash Plans That Rely Extensively On Deferred Monetization

Unbeknownst to investors, when GE announced its 2016 Industrial CFOA target of $12-14 billion on December 16, 2015, [redacted]

[3] Unless otherwise noted, emphasis is added and all internal citations and quotations are omitted.

[redacted]

[redacted]

[redacted]

[4] [redacted]

C. GE Uses Deferred Monetization To Hit CFOA Targets And Generate Liquidity Throughout 2016

[redacted]

Nonetheless, Bornstein assured investors during GE's July 24, 2016 earnings call that GE would deliver on its full-year Industrial CFOA guidance. ¶142. Defendants again left investors in the dark about GE's reliance on deferred monetization, without which GE would have reported [redacted] for the first half of 2016. ¶¶143, 202.

[redacted]

[redacted]

But Defendants again failed to disclose the program to investors.

[redacted]

[redacted] Nevertheless, in its 2016 Form 10-K, GE again failed to disclose [redacted]

D. Deferred Monetization Concealed The Numerous, Material Financial Risks GE Faced During The Class Period

The true state of GE's financial condition in 2016 bore little resemblance to its public disclosures throughout 2016 and its 2016 Form 10-K. [redacted]

[redacted]

IV. Defendants Fail to Disclose—And Affirmatively Mislead Investors About—GE's Reliance On Deferred Monetization In 2016

By early 2017, the market was hyper-focused on whether GE's 2016 cash performance was organic or driven by factoring with GE Capital. GE's biggest critic in the analyst community, Steve Tusa of J.P. Morgan, wrote on January 18, 2017 that a "key question [about GE's cash performance] is the impact of factoring receivables to GECS." ¶213. During GE's January 20, 2017 earnings conference call, after Immelt and Bornstein stated that GE had "the biggest cash quarter in our history," and that GE's 4Q16 Industrial CFOA was "up 34% versus last year," Steve Winoker of Sanford Bernstein asked Bornstein that very question: "***[I]s there any factoring this quarter from GE Capital into GE industrial?***" ¶¶213-14. Bornstein responded:

> 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 forward from this 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.***

¶215. At the time, Bornstein knew that factoring with GE Capital had actually "***provided $4.2B of industrial CFOA***" to GE in 2016 and that the largest driver of this "year-over-year" increase (from

$1.7 billion to $4.2 billion) was GE's LT factoring program. ¶¶205-12. [redacted]

V. Defendants Knew Deferred Monetization Was Not A Sustainable Solution To GE's CFOA Woes

[redacted]

[redacted]

[redacted]

VI. As Defendants' Scheme Unravels, The Truth Is Slowly Revealed

On December 14, 2016, GE publicly disclosed a 2017 Industrial CFOA target of $12-14 billion. ¶262. [redacted]

[redacted]

With Power unable to use deferred monetization to hide its cash holes (as it had in 2016), GE's Industrial CFOA cratered. In 1Q17, GE missed its Industrial CFOA target by an astounding $1 billion (despite exceeding its earnings targets). ¶291. This was due, in part, to [redacted] When GE disclosed this Industrial CFOA miss to the market on April 21, 2017 (along with a $1 billion decline in factoring), GE's stock price fell significantly. ¶293. Just days before this April 21 announcement, Bornstein [redacted]

[redacted]

[redacted] on July 21, GE announced that it was revising its Industrial CFOA forecast downward [redacted]—"to the bottom end" of its $12 to $14 billion target. ¶296. When GE disclosed this downward revision to investors on July 21, 2017, its stock price experienced a company-specific decline of $1.20 per share. ¶297.

On October 2, 2017, GE abruptly announced that Immelt was resigning as Chairman of GE's Board of Directors, a position he had been expected to hold through year-end. ¶301. Four days later, on October 6, GE shocked investors by announcing Bornstein's resignation as well. ¶302. Two weeks after that, on October 20, 2017, GE disclosed yet another downward revision to its Industrial CFOA guidance, this time to just $7 billion. ¶303. [redacted] GE's share price experienced a GE-specific decline of $1.85 following its October 20, 2017 disclosures. ¶304. Finally, on January 24, 2018, GE disclosed that the SEC had opened an investigation into its LTSAs. ¶381. Following GE's January 24, 2018 disclosures, its stock experienced an abnormal price decline of $0.66 per share. ¶382.

LEGAL STANDARD

Summary judgment should be denied unless "there is no genuine issue as to any material fact" such that "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Defendants have "the burden of establishing that no genuine issue of material fact exists." *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010). Summary judgment is inappropriate "if there is ***any*** evidence in the record that could reasonably support a jury's verdict for the non-moving party." *In re Celestica Inc. Sec. Litig.*, 2014 WL 4160216, at *4-5 (S.D.N.Y. Aug. 20, 2014). In determining whether a genuine issue exists, the Court "must construe the evidence in the light

most favorable to the non-moving party and draw all inferences in that party's favor." *Id.* The Court's task is not to "weigh the evidence and determine the truth of the matter," *id*., or "to resolve disputed questions of fact." *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 326 (2d Cir. 2011). "Credibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006).

ARGUMENT

I. TRIABLE ISSUES EXIST ON FALSITY AND MATERIALITY

Determining whether a statement or omission is misleading is "generally a question reserved for the trier of fact." *In re Inv. Tech. Grp. Sec. Litig.*, 251 F. Supp. 3d 596, 610 (S.D.N.Y. 2017). This case is no different, as the record before this Court presents "quintessential jury questions" precluding summary judgment. *Lickteig v. Cerberus Cap. Mgmt.*, 2022 WL 671630, at *15 (S.D.N.Y. Mar. 7, 2022).

A. Defendants' Item 303 Violations

Item 303 imposes "a duty to disclose . . . facts[] in a manner that accurately conveyed the seriousness of the problems [the company] faced, so as not to render Defendants' public disclosures inaccurate, incomplete, or misleading." *Christine Asia Co., Ltd. v. Ma*, 718 F. App'x 20, 23 (2d Cir. 2017). Disclosure is required "where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015).

[redacted]

[redacted][7] A jury could find such evidence is "more than sufficient to show that factoring was a trend or event that was 'reasonably likely to result' in a change in GE's liquidity" or financial condition—the same claim the Court sustained at the pleading stage. *Sjunde AP-Fonden v. Gen. Elec. Co.* ("*GE I*"), 417 F. Supp. 3d 379, 409 (S.D.N.Y. 2019). None of Defendants' arguments establish the absence of triable issues on whether they violated Item 303.

First, Defendants incorrectly argue that LT factoring transactions "had no impact on *GE* at the registrant level sufficient to trigger an Item 303 disclosure duty." DB 43-45. This argument is premised on core factual disputes between the parties and their experts. Under Defendants' view, deferred monetization was not material at the registrant level because these were intercompany transactions. DB 42-43. Not only is this view directly contradicted by contemporaneous evidence, [redacted] it flies in the face of the core concerns motivating Item 303's obligations. As the SEC has explained:

> Our rules require companies to provide disclosure in the related categories of liquidity and capital resources. This information is critical to an assessment of a company's prospects for the future and even the likelihood of its survival . . . *the MD&A should focus on the primary drivers of and other material factors necessary to an understanding of the company's cash flows and the indicative value of*

[6] *See, e.g.*, ¶¶6-7, 10-12, 16, 18, 25-41, 48, 103-04, 111-13, 151.

[7] *See, e.g.*, ¶¶55-87, 89-96, 100-02, 108-10, 114, 119-23, 128-30, 132-33, 135, 137-41, 143, 146, 148-68, 205-12, 222, 252, 256-57, 260-61, 263-68, 270, 280-82, 287, 305-31; *see also* ¶¶169-95 (identifying additional enterprise-level material risks and impacts).

> *historical cash flows* . . . . The discussion and analysis of liquidity should focus on material changes in operating, investing, and financing cash flows, as depicted.

In Re Comm'n Guidance Regarding MD&A of Fin. Condition & Results of Operation, Release No. 8350 (Dec. 19, 2003).

Here, disclosure of deferred monetization was necessary for investors to understand the key drivers of GE's Industrial CFOA and the underlying cash flow trends and risks that deferred monetization was designed to offset. *See supra* III.D & V; ¶¶169-95, 217-54. Moreover, the market cared about GE's ability to generate Industrial CFOA, the sources of that cash, and the extent to which it was being generated through intercompany factoring. ¶¶54, 213, 215. At a minimum, this evidence raises triable issues as to whether it was reasonably likely that GE's future cash flows and liquidity would be adversely impacted by its undisclosed reliance on a business practice that temporarily blunted the negative trends impacting GE's cash flows and liquidity, but was not a long-term sustainable solution to those problems.[8]

While the Second Circuit has not yet addressed Item 303 claims at the summary judgment stage, its decisions illustrate its expansive view of disclosure obligations under Item 303. In *Christine Asia*, for example, the Second Circuit held that Alibaba was required to disclose the Chinese government's ultimatum that it must either pay enormous repeating fines or terminate a profitable portion of its business. 718 F. App'x at 23; *see Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 121 (2d Cir. 2012) (known defects in a company's semiconductor chips triggered Item 303 disclosure obligations based on possible impact on future sales and customer relationships); *Stratte-McClure*, 776 F.3d at 104 (company's large subprime exposure

[8] Neither of Plaintiffs' experts "readily admitted" that LT factoring with GE Capital "has no net impact on GE's liquidity." DB 44. Both experts repeatedly testified that Defendants' hypotheticals on this point were flawed and inapplicable, with Professor Kothari explaining that it is not a "wash" based in part on how GE Capital funded purchases of receivables. **PX 237** at 213:17-214:16.

trigged duty to disclose that deterioration of subprime market was likely to impact company's financial condition). These decisions confirm that Defendants' narrow view of Item 303 is wrong.

Second, Defendants argue it is undisputed that they had no actual knowledge of the alleged trends, but they ignore contradictory record evidence. DB 45. [redacted] Thus, "it cannot be said that . . . Defendants were merely in the process of assessing the risk because they actively responded to the trend by implementing internal changes." *In re Nielsen Holdings PLC Sec. Litig.*, 510 F. Supp. 3d 217, 227-28 (S.D.N.Y. 2021) (Furman, J.).

There is more. [redacted][9]

[9] [redacted]

[redacted] From this mere sampling of evidence a jury could find the actual knowledge of Bornstein and senior GE employees, which is imputed to GE. *See, e.g.*, *In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 515-16 (S.D.N.Y. 2009) ("There is no formulaic method or seniority prerequisite for employee scienter to be imputed to the corporation, but scienter by ***management-level employees*** is generally sufficient to attribute scienter to corporate defendants.").[10] None of the testimony Defendants cite "indicates that GE employees did not actually know of any such material trends related to LT factoring." DB 45. Those witnesses (and others) admitted that [redacted] ¶55. Regardless, credibility assessments and the weighing of competing evidence are matters for the jury. *McClellan*, 439 F.3d at 144.

Third, Defendants' restrictive materiality arguments provide no basis for summary judgment. It is well-settled that materiality is an "inherently fact-specific finding," *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir. 2011), and "generally should be presented to a jury." *Veleron Holding, B.V. v. Morgan Stanley*, 117 F. Supp. 3d 404, 430 (S.D.N.Y. 2015). This case is no different. From a quantitative perspective, [redacted]

[10] *See, e.g.*, *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 177-78 (2d Cir. 2015) (imputing corporate scienter from knowledge of managing director involved in underlying scheme); *Richman v. Goldman Sachs Grp.*, 868 F. Supp. 2d 261, 281 n.10 (S.D.N.Y. 2012) (imputing knowledge of Goldman's Mortgage Department head to Goldman).

[redacted] Defendants have not established that this information was "so obviously unimportant" to all reasonable investors. *See Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988) ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.").

The evidence also supports a finding that information about GE's deteriorating cash performance and Industrial CFOA, and GE's use of deferred monetization to conceal those conditions, was qualitatively material. *S.E.C. v. DiMaria*, 207 F. Supp. 3d 343, 353 (S.D.N.Y. 2016) ("Courts are required to consider qualitative factors, which can turn a quantitatively immaterial statement into a material statement[.]"). Media and analysts used their limited access to GE management to raise "key" questions on GE's cash and reliance on factoring. *E.g.*, ¶¶213, 215. Investment analysts regularly questioned GE's cash conversion issues, Industrial CFOA, and GE Capital factoring, and echoed Defendants' statements on these topics. *E.g.*, ¶¶54, 216. Even Defendants recognized internally that [redacted] *United States v. Ferguson*, 553 F. Supp. 2d 145, 153-55 (D. Conn. 2008) (finding that purportedly "quantitatively

insignificant" losses did not warrant entering summary judgment for defendant where misstatements were designed, in part, "to hide its failure to meet analyst expectations").

Defendants' materiality attacks are based on their view of what the relevant reference points ought to be for the materiality inquiry, but those points are absent from the case law they cite,[11] and the Supreme Court has expressly instructed against imposing such "bright-line" and "categorical" rules. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 40 (2011) (such rules "would artificially exclude information that would otherwise be considered significant to the trading decision of a reasonable investor"). For example, they argue that LT factoring was quantitatively immaterial "in light of the company's total assets" and as "compared to GE's total cash flows." DB 46.[12] This cabined view of materiality goes to the heart of the factual disputes in this case.

Indiana Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85, 96 (2d Cir. 2016) is on point here. There, the defendants argued that an Item 303 disclosure of the loss of a contract was not required because it was "not material in view of the fact that it was a single contract out of SAIC's more than 10,000 ongoing contracts and that it was worth a fraction of SAIC's yearly revenues ($635 million compared to $10 billion)." *Id*. The Second Circuit rejected defendant's materiality argument because, like Defendants' here, it demanded the Court "consider quantitative factors only in the narrowest light in determining the financial impact of losing the CityTime project due to the fraud,

[11] The Second Circuit described the materiality holding in *IBEW Loc. Union No. 58 Pension Trust Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383 (2d Cir. 2015) as "a ruling heavily limited by context," rendering Defendants' blind reliance on it misplaced. *In re Barclays PLC Sec. Litig.*, 756 F. App'x 41, 47 (2d Cir. 2018).

[12] Even accepting Defendants' artificial limitations to the materiality analysis, their own calculations show that LT Factoring in 2016 accounted for nearly 5% of all GE CFOA. DB 46; SEC Staff Accounting Bulletin No. 99, Release No. 99 (Aug. 12, 1999) (there is no basis in the law for registrants to assume that a misstatement or omission of an item that falls under a 5% threshold is presumptively immaterial).

and to otherwise ignore qualitative factors." *Id.*; *see Litwin*, 634 F.3d at 720 ("Even where a misstatement or omission may be quantitatively small compared to a registrant's firm-wide financial results, its significance to a particularly important [business] segment . . . tends to show its materiality.").

Defendants' half-hearted attacks on qualitative immateriality are also without merit. DB 46-47. They are wrong that LT factoring and deferred monetization practices were "well known to investors and specifically disclosed" in GE's SEC filings. DB 7. It is undisputed that prior to 2015, [redacted] the disclosures that Defendants cite make clear that they never made a complete and accurate disclosure during the Class Period. In any event, the market reaction to GE's belated LT factoring disclosures belies Defendants' materiality arguments. ¶384.

B. Bornstein's January 20, 2017 Misrepresentations

Factual disputes preclude summary judgment as to Bornstein's January 20, 2017 misrepresentations. He stated that GE's 2016 cash performance had "actually very little to do with GE Capital factoring," providing only $1.6 billion in Industrial CFOA, but the record indicates GE Capital actually "***provided $4.2B of industrial CFOA***" for GE in 2016, [redacted] The evidence further shows that GE did not have "very good underlying performance" in 2016—the Company engaged in deferred monetization to fill a massive Industrial CFOA hole and meet GE's publicly-disclosed CFOA targets. *Id.*; [redacted]

Defendants foist a fact-intensive, *post hoc* excuse for what Bornstein meant by "very little" and again claim, incorrectly, that Plaintiffs' claims about the actual contribution of factoring to GE's CFOA ($4.2 billion, not the $1.6 billion that Bornstein disclosed) are based on a "misreading

of a GE presentation."[13] But these "quarrel[s] over what the facts show [] and disagree[ments] about how the facts should be interpreted" just confirm that summary judgment is inappropriate. *Pearlstein v. Blackberry Ltd.*, 2022 WL 19792, at *9 (S.D.N.Y. Jan. 3, 2022); *see Schering Corp. v. Home Ins. Co.*, 712 F.2d 4 (2d Cir. 1983) ("Summary judgment cannot be granted where, as here, the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact."). Moreover, the only evidence Defendants cite is Bornstein's testimony in which he purportedly disclaims any wrongdoing. *See* DB 48-50 [redacted] As discussed *infra* at p. 30-32, this "backup data" ***creates*** rather than eliminates factual disputes given Bornstein's receipt of conflicting information that he (like Defendants' brief) chose to ignore. *See Schering*, 712 F.2d at 9; *Lickteig*, 2022 WL 671630, at *13 (factual disputes exist as to accuracy of financial figure where defendants used different figures in the regular course of business). The Court has already acknowledged this reality, rejecting Defendants' argument that the "back-up" document was dispositive of falsity (or scienter) given Bornstein's receipt of contrary data. *See Sjunde AP-Fonden v. Gen. Elec. Co.*, 341 F.R.D. 542, 553 n.7 (S.D.N.Y. 2022) ("*GE II*").

Finally, Bornstein's statement that "there's very good underlying performance here" is neither generalized nor optimistic. DB 49-50. He made a definitive statement in response to a specific analyst question about GE Capital factoring and whether "the cash flow part of the story is improving." *In re Inv. Tech. Grp.*, 251 F. Supp. 3d at 611 (definite statements about a company's business practices may invoke reasonable reliance by investors) (collecting cases). Defendants'

[13] Defendants continue to emphasize Bornstein's use of the term "change" as though it renders his statement accurate. DB 49. It does not. *See* ECF No. 309 at 2 n.3 ("During the Class Period, GE referred to the change in its factored balance from one period to the next as the 'CFOA Impact' of Factoring."). The Court has already reviewed and rejected Defendants' wordplay, and, in any event, this argument does not insulate Bornstein's entire misstatement.

footnoted argument that Bornstein's statements are inactionable opinions (DB 50 n.29)—made without reference to *Omnicare* standards—is waived, *see Tutor Time Learning Ctrs., LLC v. GKO Grp., Inc.*, 2013 WL 5637676, at *1 (S.D.N.Y. Oct. 15, 2013) (Furman, J.) ("[i]ssues not sufficiently argued in the briefs are considered waived") and nonetheless disregards that Bornstein's statements did not "fairly align[] with the information" in his possession.[14]

C. Defendants' 2016 Form 10-K Affirmative Misrepresentation

Fact issues also preclude summary judgment for Defendants' 2016 10-K factoring disclosures. [redacted] Thus, fact issues exist as to whether it was materially misleading to state that GE engaged in factoring of "current receivables" for one purpose without disclosing that it also engaged in other, undisclosed factoring transactions for an entirely different purpose. *GE I*, 417 F. Supp. 3d at 413 ("[A] reasonable investor could read the 2016 Form 10-K and conclude that GE factored LTSA receivables *only* to reduce its credit exposure while, in reality, as Plaintiffs plausibly and specifically allege, GE was also factoring to shore up its dwindling cash flow and mask the growing gap between contract assets and actual cash being generated in the Industrials group, including from LTSAs."); *see In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239-40 (2d Cir. 2016) (collecting cases) ("half-truths that state the truth only so far as it goes, while omitting critical qualifying information, are misleading under Rule 10b-5 by virtue of what they omit to disclose").[15]

[14] *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016); *see Omnicare, Inc. v. Laborers Dist. Council Const. Ind. Pension Fund*, 575 U.S. 175, 176 (2015) ("if the real facts are otherwise, but not provided, the opinion statement will mislead by omission"); *In re Chicago Bridge & Iron Co. N.V. Sec. Litig.*, 2021 WL 3727095, at *5 (S.D.N.Y. Aug. 23, 2021) ("[R]egardless of whether the [] [s]tatements are assessed as a misstatement of fact or opinion, a reasonable jury could find that all but one of them provided inadequate context, with the effect of suggesting facts starkly at odds with much of the record evidence.").

[15] Defendants' reliance on *In re Xerox Corp. Sec. Litig.*, 935 F. Supp. 2d 448 (D. Conn. 2013) and *Carlin Equities Corp. v. Offman*, 2008 WL 4387328 (S.D.N.Y. Sept. 24, 2008) misses the mark because

Defendants attempt to decouple their fraud from this statement by arguing that the use of "current receivables" means it is "not tied in any way to the alleged fraud regarding LT factoring." DB at 48. But this repackaged argument is not supported by their evidence, ignores Plaintiffs' claim that this disclosure was misleadingly incomplete, and disregards that [redacted] Taken at face value, Defendants' argument merely confirms that GE never disclosed its reliance on LT factoring during the Class Period, [redacted]

II. TRIABLE ISSUES EXIST ON SCIENTER

Plaintiffs can prove scienter with circumstantial evidence of conscious misbehavior or recklessness, or evidence of Defendants motive and opportunity. *See Gruber v. Gilbertson*, 2021 WL 2482109, at *12 (S.D.N.Y. June 17, 2021). To defeat summary judgment, Plaintiffs "need only offer evidence from which a jury could ***infer*** scienter." *Abu Dhabi Com. Bank v. Morgan Stanley & Co. Inc*., 888 F. Supp. 2d 431, 458–59 (S.D.N.Y. 2012).[16] Evidence that Defendants "knew facts or had access to information suggesting that their public statements were not accurate" is sufficient to raise triable issues of scienter. *Celestica*, 2014 WL 4160216, at *10. The "Second Circuit has left no doubt that scienter issues are seldom appropriate for resolution at the summary judgment stage." *S.E.C. v. Cole*, 2015 WL 5737275, at *5 (S.D.N.Y. Sept. 19, 2015) (collecting

Defendants chose to speak about the nature and extent of factoring with GE Capital. *See In re Inv. Tech. Grp.,* 251 F. Supp. 3d at 611; *Meyer v. Jinkosolar Holdings Co., Ltd.*, 761 F.3d 245, 250-51 (2d Cir. 2014) ("Even when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth.").

[16] This is a different than the standard at the pleading stage, which requires allegations that give rise to a ***strong*** inference of scienter. *Costello v. Grundon*, 651 F.3d 614, 636 (7th Cir. 2011) ("Neither the PSLRA nor *Tellabs* changed the well-established summary judgment standard.").

cases); *see Celestica*, 2014 WL 4160216, at *10 ("The fact-intensive nature of a scienter inquiry often militates against granting judgment as a matter of law."). It is not appropriate here.

Here, Defendants contend that "Plaintiffs cannot point to a single document or witness" that supports scienter. DB 2. They are wrong. There is evidence that Defendants "knew facts . . . suggesting that GE's financial disclosures would be misleading without disclosure of its widespread use of factoring . . . amounting to at least a reckless disregard of a known or obvious duty to disclose." *GE I*, 417 F. Supp. 3d at 409; *see supra, e.g.*, pp. 20-21 & nn.6-7, 9. And that Bornstein knew facts contrary to his statements on January 20. ¶¶205-12. This evidence precludes summary judgment. *See Celestica*, 2014 WL 4160216, at *11 (denying summary judgment where individual defendant "ordered and executed" action at the heart of the fraud, which concerned "a subject about which investors and analysts inquired," and "received reports as to its progress"); *Gruber*, 2021 WL 2482109, at *12 (summary judgment denied based on "evidence detailing specific information available to the defendants contradicting a statement at the time it was made"). Defendants cannot win summary judgment by ignoring it or "contest[ing] nearly all of the conclusions [p]laintiffs draw from the evidence and proffer." *Pearlstein*, 2022 WL 19792, at *9. Defendants' scienter challenges fail for the following reasons.

First, Defendants' bare assertion that GE had "internal controls and processes" relating to GE's disclosures in its SEC filings, DB 39, does not "undermine[]," and cannot negate, Plaintiffs' scienter evidence. *See McClellan*, 439 F.3d at 144 ("[W]eighing of evidence [is a] matter[] for the jury, not for the court on a motion for summary judgment."). Especially here, where the limited evidence Defendants cite about the "disclosure process"[17] raises triable issues, including as to

[17] Defendants claim they relied on a disclosure committee and process that "consisted of legal . . . experts," "personnel with legal expertise" and "legal functions." DB 7, 39; SOF 106. This evidence should be stricken because it violates Federal Rule of Evidence 403 and is a blatant violation of Defendants' sworn

whether Bornstein was reckless to rely on information he knew was incomplete or inaccurate. *Gebhart v. S.E.C.*, 595 F.3d 1034, 1044 (9th Cir. 2010) (summary judgment denied where defendants "based [] statements on representations by [others] and conducted no meaningful independent investigation to confirm the truth of their representations"). Further, there is no evidence that the materially misleading statements in GE's 2015 Form 10-K and subsequent 2016 Form 10-Qs—or Bornstein's misstatements on the January 20, 2017 earnings call—were even subject to this purportedly "robust" and "rigorous" process. SOF ¶¶104-17.[18] Nor is there evidence that the Disclosure Committee was provided and considered all material facts about GE's deferred monetization practices, or that it determined GE's MD&A disclosures aligned with those material facts. Indeed, Defendants concede that the Disclosure Committee did not even consider altering GE's factoring disclosures until ***after*** Bornstein's January 20, 2017 misrepresentations. DB 8 (claiming GE's disclosures concerning factoring "evolved over time . . . including, notably in response to questions about cash from investors in 2017" during the January 20 earnings call).

[redacted]; *see S.E.C. v. Syron*, 2013 WL 1285572, at *634 (S.D.N.Y. Mar.

representation that they were not relying on the advice of counsel, explicitly or implicitly, in defending against Plaintiffs' claims. *See* Plaintiffs' Response to Defendants' SOF at No. 106.

[18] Defendants contend the disclosure process was "buttressed by oversight from other groups within and without GE" (DB 7-8), but there is no evidence of any such groups involvement in GE's Item 303 disclosures and omissions.

28, 2013) (rejecting argument that purportedly "truthful disclosures of negative information" negate scienter where, as here, there are "mutually reinforcing allegations and evidence that Defendants knew specific facts contradicting . . . their own statements."). Bornstein has admitted that he approved these changes to the language of GE's intercompany factoring disclosure. ¶327.[19]

In an attempt to cleanse their exposed cover-up, Defendants once more improperly demand that the Court credit their say-so of innocence over Plaintiffs' evidence. DB 39-41 (claiming that "the undisputed evidence shows that any changes to the 2016 10-K . . . were made for legitimate reasons"). But the Court cannot. *See Pearlstein*, 2022 WL 19792, at *9. That aside, the evidence Defendants cite does not establish the absence of triable issues: they cite only to: (i) boilerplate statements about GE's 2016 Form 10-K preparation process; and (ii) testimony from select witnesses involved in the disclosure process, like Mahajan, who could not recall even the most basic details about the misstatements at issue, the disclosure process around those misstatements, the reasons for the abrupt changes in the 2016 Form 10-K, or his role in arriving at or implementing them. ¶¶327-57.[20] At most, this evidence creates factual disputes by "call[ing] into question" GE's disclosure process and suggesting that Defendants knew of GE's duty to disclose the impact of its factoring practices with GE Capital and chose not to do so. Summary judgment is therefore

[19] Defendants claim that the Disclosure Committee "determined to supplement GE's disclosure" because of "GE Capital's continuing role in helping to structure the financing for customers' equipment purchases." SOF ¶¶128-29. But Defendants never explain why no "supplement" was undertaken at any point during 2016, when Power factored billions in LT receivables to GE Capital. *E.g.*, ¶¶159-61, 209. Defendants' argument also relies on the incorrect assertion that LT factoring was predominately related to financing of equipment sales—a fact that finds no support in the evidence and is disputed by their own expert, Sunshine. Ex. 48 at ¶42.

[20] No witness denied engaging in a cover up, but even if they had, scienter does not require admissions of guilt: "it is the rare defendant who admits to having had fraudulent intent." *Abu Dhabi*, 888 F. Supp. 2d at 458–59 (denying summary judgment where witnesses testified alleged misstatements "reflected their honestly-held beliefs" because court "cannot assess the credibility of witnesses").

inappropriate. *Gruber*, 2021 WL 2482109, at *13 (summary judgment denied where defendants "cannot credibly claim that they did not know of" contrary facts).

Second, Defendants next try to resuscitate their previously-rejected argument that a single slide, conspicuously titled "*External* factoring reporting," insulates Bornstein from liability for his January 20 statements. DB 40-41, n.20 (SOF ¶¶152-60, 62) (claiming Bornstein's disclosed factoring metrics on January 20 accurately relayed information "from documents prepared and given to him by his subordinates").[21] This slide, however, creates factual disputes on its face, as it indicates that the external factoring disclosure of $1.6 billion that Bornstein made was based on a 2016 "factored balance" of [redacted], which improperly assigned a [redacted] balance to one of GE's factoring programs, known as GEAR.[22]

Moreover, at the time Bornstein spoke, he had already reviewed [redacted] Bornstein also knew that the largest driver of this year-over-year change (from $1.7 billion to $4.2 billion) was the significant expansion of GE's LT factoring program, [redacted] The "stark

[21] Defendants do not address, and thus waive, argument as to Bornstein's scienter for his statements that GE's cash performance in 2016 had "actually very little to do with GE Capital factoring" and that there was "very good underlying performance here." *See Tutor Time*, 2013 WL 5637676, at *1 ("Issues not sufficiently argued in the briefs are considered waived.").

[22] Weverman's testimony confirms that GE's true factored balance at year-end 2016 was [redacted] He did not testify—and the cited testimony does not support—Defendants' assertion that the "external figures referred to financial metrics reported in GE's SEC filings." DB at 41 n.23.

difference between the content of the [challenged] [s]tatements and the potentially contradictory record facts would permit a reasonable jury" to find scienter. *Chicago Bridge*, 2021 WL 3727095, at *9. This is the same evidence from which the Court held that Plaintiffs' allegations raised a ***strong*** inference of scienter. *See GE II*, 341 F.R.D. at 552 (rejecting argument that "Bornstein's statement was not fraudulent because Bornstein was relying on numbers given to him by GE employees prior to the call"). At best, this alleged back-up slide creates factual disputes by demonstrating that Bornstein knew GE prepared one set of factoring data for external reporting purposes and another (very different) set for internal purposes.

Again dodging these facts, Defendants argue that GE's factored volumes and balances are irrelevant because Bornstein's statements concerned the cash flow impact of factoring. DB 41, n.23. As their own backup slide indicates, however, [redacted]

Thus, when Bornstein falsely stated that there was a $1.6 billion "change" in factoring in 2016, he was representing that factoring had a $1.6 billion impact on GE's 2016 CFOA despite being aware of documents indicating that this CFOA impact was actually $4.2 billion. *See Nagelberg v. Meli*, 2022 WL 2078010, at *4 (S.D.N.Y. June 9, 2022) ("[A] jury may draw inferences from the factual evidence of . . . the transactions which he touted to investors, that it is more likely than not that he had scienter, the knowledge of what was going on.").[23]

Third, Defendants' motive arguments are meritless. Motive is not required to establish scienter. *Gruber*, 2021 WL 2482109, at *13 (rejecting defendants' reliance on *In re N. Telecom*

[23] Because the analyst's question to Bornstein was not limited to LT factoring with GE Capital, nor did Bornstein testify that is how he understood the question, Defendants are wrong to suggest that he was free to arbitrarily leave out GEAR. DB 41 n.23; [redacted]

Ltd. Sec. Litig., 116 F. Supp. 2d 446 (S.D.N.Y. 2000), listing factors that can show recklessness, and holding "[w]hile these factors include a concrete benefit, such a benefit is not required.") (emphasis in original). Nevertheless, there is evidence of concrete financial benefits flowing to Bornstein and his executives [redacted] Bornstein took home over ***$30 million*** in compensation from 2015 through 2017, and [redacted][24]

Defendants argue that it is implausible that "anyone at GE would risk their integrity and accomplished careers," but "this argument confuses expected with realized benefits." *Indiana Pub. Ret. Sys.*, 818 F.3d at 97 (quoting *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008)). Defendants' stock ownership arguments also do not negate all plausible inferences of scienter—stacked up against evidence of Bornstein's scienter, Defendants merely create triable issues. Regardless, whether Bornstein's *de minimis* Class Period purchases were consistent with meeting his minimum holding requirement, and whether he held stock "well in excess of [his] requirement," as he contends, and how that bears on his intent, is for the jury to decide. *Celestica*, 2014 WL 4160216, at *10.

Fourth, Defendants' continued focused on the Complaint's former-employee allegations is both puzzling and inappropriate. DB 2, 38. The information provided by these witnesses has been

[24] This evidence establishes far more than "the mere existence of GE's bonus compensation plan," rending Defendants' cases inapplicable. DB at 42 (citing *In re N. Telecom*, 116 F. Supp. 2d at 463 n.7, where plaintiffs failed to provide evidence of concrete benefits to the defendants or from which a reasonable juror could conclude defendants acted recklessly); *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009)). *Frankfurt-Tr. Inv. Luxemburg AG v. United Techs. Corp.*, 336 F. Supp. 3d 196, 219 (S.D.N.Y. 2018) and *Tyler v. Liz Claiborne, Inc.*, 814 F. Supp. 2d 323, 334 (S.D.N.Y. 2011) are pleading stage decisions.

fully corroborated (and more) by GE's internal records and witness testimony. Recognizing this, Defendants asked Plaintiffs to stipulate to forego FE discovery "to avoid the inconvenience, burden and ***unnecessary*** costs of further discovery of [FEs]." Ex. 109 (agreeing that "in dispositive motion practice, at trial, or otherwise," they would not "***make argument concerning[] a FE***"). Lacking viable scienter arguments, Defendants have now willingly violated that agreement.

Finally, as discussed above, Bornstein's scienter and the knowledge and participation of Mahajan, Calpeter, Carfi, Immelt, Bolze, and Green is imputed to GE. *See, e.g.*, *Moody's*, 599 F. Supp. 2d at 515-16; *Patel v. L-3 Commc'ns Holdings Inc.*, 2016 WL 1629325, at *14 (S.D.N.Y. Apr. 21, 2016). So too is the knowledge of junior executives at GE, including Donovan, [redacted] *See* pp. 20-21 (collecting cases).

III. TRIABLE ISSUES EXIST ON LOSS CAUSATION AND DAMAGES

Plaintiffs' theory of causation is simple and straightforward. By the start of the Class Period, GE recognized that [redacted] When GE's ability to rely on deferred monetization waned in 2017, its true (dwindling) cash flow position was revealed, it fell short of its cash flow targets, and its artificially propped up stock price collapsed.

While Defendants claim that Plaintiffs have "fail[ed] entirely" to demonstrate loss causation, their Motion concedes nearly every one of the above facts. DB 20. It does not dispute that GE's disclosure of unexpected reductions in Industrial cash flows caused at least a portion of

its share price decline on each corrective disclosure date. It acknowledges that GE's disclosure of poor cash flows was caused in part by "GE Power's inability to engage in LT factoring in 2017 at forecasted levels." DB 26. It admits that the impact of deferred monetization on Industrial CFOA declined by over a billion dollars from 2016 to 2017, and that this decline occurred because Power had "fewer receivables" to monetize in 2017 than it did in 2016. DB 27, SOF ¶¶101, 103. And Defendants do not dispute that future cash flow declines were a foreseeable consequence of Defendants' undisclosed reliance on deferred monetization to meet its cash flow targets.

On the basis of these concessions alone, a jury could "reasonably infer from the available evidence that some portion of plaintiffs' losses were caused by defendants' fraud." *Abu Dhabi*, 888 F. Supp. at 472. Indeed, even their own expert, Mr. Fischel, ***refused*** to opine that no portion of Plaintiffs' losses was attributable to the alleged fraud. **PX 219** at 154:3-9 ("I wouldn't say that nothing had -- none of the disclosures had anything to do with factoring.").

Faced with these facts, Defendants resort to misdirection, arguing that Plaintiffs have failed to show that the deferred monetization transactions GE executed in 2016 created the cash holes that were revealed in 2017. This sleight of hand ignores Plaintiffs' claims and record evidence demonstrating that [redacted] Where an alleged fraud "concealed something from the market that, when disclosed, negatively affected the value of the security," loss causation

exists. *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005); *see also Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 477 F. Supp. 3d 88, 110 (S.D.N.Y. 2020) (loss causation shown where misstatements and omissions "conceal[ed] a condition or event which then occurs and causes the plaintiff's losses").

With their remaining arguments, Defendants attempt to obscure the evidentiary record, including through their contentions that: (i) Power's deferred monetization shortfalls were the result of a market downturn (DB 22-27); (ii) "the receivables GE Power planned to monetize through LT factoring during 2017 were primarily receivables it expected to generate that same year" (*id.* at 26); (iii) Plaintiffs fail to disaggregate the stock price declines attributable to non-fraud-related events (*id.* at 28-33); and (iv) there is no factual overlap between Plaintiffs' Item 303 claims and the alleged affirmative misrepresentations. These fact-intensive arguments are contradicted by the record but at best raise factual disputes that preclude summary judgment.

At bottom, Defendants' loss causation arguments expose their tortured attempt to shoehorn the facts of this case into this Court's *Atlantica* decision. But this case is not *Atlantica*. In *Atlantica*, the plaintiffs' loss causation expert did not conduct any disaggregation analysis; here, Dr. Tabak not only performed such an analysis, he attributes ***more than half*** of GE's total stock price declines to factors unrelated to the alleged fraud. In *Atlantica*, the plaintiffs' entire theory of loss causation was premised on the undisclosed risks ***created*** by the S-K Deposit, which could not possibly have materialized until 2024; here, Plaintiffs' claims concern the ***existing*** conditions and risks ***concealed*** by Defendants' undisclosed reliance on deferred monetization. Thus, while the plaintiffs in *Atlantica* may have been "akin to homeowners who sue arsonists for setting a fire that was still on the horizon when their home was destroyed by a different fire," Plaintiffs are suing Defendants for concealing a fire that was ***already*** destroying their house—a fire that, in Bornstein's

own words, had [redacted] [25] For these reasons, discussed below, Defendants' arguments fail.

A. Legal Standard

Loss causation is "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *In re Vivendi*, 838 F.3d at 260. It exists where the alleged misstatements and omissions "conceal[ed] a condition or event which then occurs and causes the plaintiff's losses." *Atlantica*, 477 F. Supp. 3d at 110; *see also Lentell*, 396 F.3d at 173 (loss causation requires showing that "the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security"). Under the "materialization of risk" theory, loss causation exists if the corrective disclosures were foreseeable consequences of the alleged fraud and revealed information that had been concealed by the alleged fraud. *In re Vivendi, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 563 (S.D.N.Y. 2011) (citing *Lentell*, 396 F.3d at 173); *Atlantica*, 477 F. Supp. 3d at 110. To prevail at summary judgment on loss causation, Defendants must demonstrate that "a jury could not reasonably infer from the available evidence that some portion of plaintiffs' losses were caused by defendants' fraud." *Abu Dhabi*, 888 F. Supp. at 473.

B. Triable Issues Of Fact Exist As To Whether The Corrective Disclosures Represented The Materialization Of Risks Concealed By Defendants' Fraud

1. A Causal Link Exists Between The Alleged Fraud And The Alleged Corrective Disclosures

Defendants contend that Plaintiffs cannot prove loss causation because the poor cash flows announced on the corrective disclosure dates were "not due to the effects of any prior-period LT factoring." DB 26. But this argument relies on a mischaracterization of Plaintiffs' claims.

[25] The only similarity between this case and *Atlantica* is that Defendants have attempted to remedy deficient expert testimony with an untimely supplemental report. 477 F. Supp. 3d at 110-11.

Plaintiffs' claims are based on the cash holes that deferred monetization ***concealed*** from investors, not simply the cash holes it created.[26] As this Court has recognized, Plaintiffs claim that GE's undisclosed reliance on deferred monetization ***concealed*** GE's dwindling organic cash flows and "***mask[ed]*** the growing gap" between GE's revenues and cash flows. *See* ECF No. 185 at 52. Thus, loss causation exists if Plaintiffs can show that these previously-concealed conditions materialized on the corrective disclosure dates. *Lentell*, 396 F.3d at 173; *Atlantica*, 477 F. Supp. 3d at 110.

Plaintiffs can do so here. In 2016, Power used deferred monetization to conceal [redacted] Plaintiffs can further show (and Defendants concede) that in 2017, GE's supply of factorable long-term receivables was not large enough to continue concealing these undisclosed conditions from investors. DB 26; ¶¶244, 277. [redacted] and its cash flows declined as a result. Ex. 117, ¶65. In other words, [redacted] led to a cash flow miss. Moreover, on at least one of the corrective disclosure dates, analysts ***specifically*** linked GE's disappointing cash flows to the "normaliz[ation]" of its factoring activities. *Id.* ¶40.

At a minimum, this evidence raises genuine disputes as to whether the conditions and risks concealed by GE's undisclosed use of deferred monetization in 2016—its "dwindling cash flow," the "growing gap" between revenues and cash flows, and the risk of future cash flow declines—materialized on the corrective disclosure dates. Given the existence of record evidence supporting Plaintiffs' contention that "the alleged misstatement[s and omissions] conceal[ed] a condition

[26] Even Defendants' misplaced arguments create factual disputes that preclude summary judgment. Their evidence does not suggest that the "drag" created by deferred monetization was incorporated into Power's 2017 cash flow ***targets***. Rather, it simply demonstrates that Power incorporated "drag" into its internal cash flow ***forecasts*** (which consistently fell short of Power's 2017 cash flow target, in part because of monetization drag).

which then occur[ed] and cause[d] the plaintiff's losses," *Atlantica*, 474 F. Supp. 3d at 110, summary judgment is inappropriate and Defendants' motion should be denied.

Defendants are wrong to say that Dr. Tabak "cites no evidence that could support" loss causation. DB 24. He cites myriad internal documents substantiating his opinions, including ones showing that GE used deferred monetization to hide [redacted] in 2016 and that GE [redacted] on the corrective disclosure dates. *See, e.g.*, Ex. 111, ¶¶22-24, 35-37, 66, 77; Ex. 117, ¶13.[27] Dr. Tabak also supports Plaintiffs' claim that deferred monetization was not a sustainable source of Industrial CFOA. Ex. 117, ¶¶68-73.

Finally, Defendants' "causal link" arguments fail because they are contradicted by the opinions offered by their own experts. Defendants' industry expert, [redacted] Ex. 214 at 275:2-22. Similarly, Fischel acknowledged at the outset of discovery that loss causation could exist if Plaintiffs were able to demonstrate (as they now have) that some portion of GE's cash flow shortfalls on the corrective disclosure dates was "due to an inability to factor further." **PX 219** at 160:10-161:9 (testifying that if Plaintiffs could show that a portion of GE's cash flow miss was "due to an inability to factor further," disclosure of that miss "could potentially be a corrective disclosure").

2. Defendants' Unsupported "Market Downturn" Argument Fails

Defendants next contend that Plaintiffs cannot show loss causation because "the undisputed evidence in the record shows . . . the reason GE Power fell short against internal LT factoring

[27] To the extent Defendants are suggesting that Dr. Tabak is the only vehicle through which Plaintiffs can introduce evidence of a causal link, they are wrong. At trial, Plaintiffs will introduce much of the evidence underlying Dr. Tabak's loss causation opinion through percipient fact witnesses, including evidence demonstrating that GE used deferred monetization to conceal existing cash holes, that GE ran out of receivables to monetize in 2017, and that GE's deferred monetization shortfalls in 2017 contributed to its Industrial CFOA misses.

forecasts was that, due to the global power market downturn, GE Power did not make many [] new sales and therefore did not generate the expected level of new receivables that it had planned to factor." DB 26. This argument fails for multiple reasons.

First, the record on this issue is not "undisputed." While Defendants' expert, Christopher Russo, opines that a market downturn caused GE's CFOA and deferred monetization shortfalls (Ex. 114, ¶93), he has not conducted any quantitative analysis to determine whether, or to what extent, this was actually the case. *See, e.g.*, Ex. 214 at 170:23-171:22. Instead, his opinions—like Defendants' arguments—are premised entirely on the speculative assertion that a market downturn [redacted] *Id*. at 150:6-13, 256:22-257:2.[28]

Moreover, the record undermines these conclusory assertions. For example, Defendants claim that GE's cash flow and deferred monetization shortfalls in the first quarter of 2017 were caused by a power market downturn, but Power's revenues and profits ***exceeded*** its internal targets for that quarter, and on the April corrective disclosure date, Bornstein told investors that "Power had a good quarter" and he reaffirmed Power's full-year 2017 financial targets. **PX 178** at 6.[29] [redacted]

[28] Mr. Russo's speculative and unreliable opinions in this regard are inadmissible for the reasons discussed in the Plaintiffs' Motion to Exclude the Testimony of Christopher J. Russo.

[29] In fact, Defendants' own expert, Mr. Fischel, acknowledged that ***none*** of GE's disclosures on the April corrective disclosure date revealed weakness in the power market. **PX 244** at ¶39.

[redacted]

[redacted] Whether a loss is caused by fraud or an intervening event "is a matter of proof at trial." *Emergent Cap. Inv. Mgmt. LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2013) (*In re ProNetLink Sec. Litig.*, 403 F. Supp. 2d 330, 336 (S.D.N.Y. 2005) (same).

Second, even if Defendants could show that a market downturn negatively impacted Power's performance in 2017, they cannot disprove loss causation simply by pointing out that, if market conditions had been different, they could have continued defrauding investors. Internally, Defendants referred to deferred monetization as a [redacted] (¶225), and GE's Industrial CFOA misses in 2017 revealed what its true cash flows looked like when it could no longer lean on that [redacted] Even if a market downturn accelerated the timing of ***when*** that truth was revealed, the fact remains that it was the ***same*** truth concealed by the fraud. *Atlantica*, 477 F. Supp. 3d at 109.

Third, Defendants' own brief demonstrates that any impact attributable to this alleged downturn is related to the alleged fraud. They argue that while GE boosted its cash flows in 2016 by factoring "old receivables generated in prior periods" (DB 26), its deferred monetization plan for 2017 was largely limited to "new receivables it anticipated it would generate" during the year. *Id.* at 27. Putting aside the factual disputes this argument raises,[30] it fully supports Plaintiffs' claim that GE's 2016 deferred monetization activities were ***unsustainable*** because, by 2017, [redacted] **PX 140**. Thus, even if Defendants are correct, factual

[30] The record shows that Power ***never*** expected to achieve its 2017 monetization targets solely with new receivables, [redacted]

disputes remain as to whether GE's deferred monetization shortfalls in 2017 were caused by the unsustainability of Defendants' scheme, which relates to Plaintiffs' claims. *See LLBW Luxembourg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 520-21 (S.D.N.Y. 2014) (rejecting market downturn argument where "market collapse . . . is not fully an external factor but is intimately connected to the type of fraud that Plaintiff has alleged"); *Gould v. Winstar Commc'ns, Inc.*, 692 F.3d 148, 162 (2d Cir. 2012) (market-wide trends "hardly foreclose the reasonable inference that some part of the decline was substantially caused by the disclosures about the fraud itself"). These triable issues of fact foreclose summary judgment.

C. Plaintiffs Have Disaggregated Their Alleged Losses

While Plaintiffs must disaggregate their fraud-related losses from losses resulting from non-fraud-related events, they need not identify "the precise loss attributable" to Defendants' fraud. *In re Vivendi*, 765 F. Supp. 2d at 562 (citing *Lentell*, 396 F.3d at 177). Instead, they must only "ascribe ***some rough proportion*** of the whole loss" to the fraud. *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007).

Here, Defendants contend that Plaintiffs and Dr. Tabak "fail entirely to 'disaggregate the [relevant stock price] declines or some rough percentage [there]of . . . from losses resulting from other, non-fraud-related events.'" DB 28. This argument is frivolous. Dr. Tabak not only conducted a disaggregation analysis for the April, July, and October disclosure dates, he attributed ***most*** of GE's total stock price decline on those dates to factors unrelated to the alleged fraud. *See* Ex. 111, ¶¶35-37, 50-71, 75-78. Moreover, where Dr. Tabak was unable to conduct a reliable disaggregation analysis—as is the case for GE's November 2017 and January 2018 disclosures—he ***did not*** attribute any artificial inflation to those disclosures. Thus Dr. Tabak's expert analysis is nothing like the one this Court considered in *Atlantica*, 477 F. Supp. 3d at 111, which "did not

even attempt to identify or calculate losses from other causes." It is equally distinguishable from Defendants' other cases.[31]

With their remaining arguments, Defendants dispute the precision of Dr. Tabak's disaggregation analysis. These fact arguments—based on the opinions of their rebuttal experts—must go to the jury. *See Lentell*, 396 F.3d at 177 (plaintiffs not required to identify "precise loss attributable" to fraud); *Celestica*, 2014 WL 4160216, at *13 n.16 ("the general rule is that courts should not grant summary judgment when the parties produce competing expert analyses"); *see also Chefs Diet Acquisition Corp. v. Lean Chefs, LLC*, 2016 WL 5416498, at *10 (S.D.N.Y. Sept. 28, 2016) (where parties submit competing expert reports, "it should be left to the jury to decide which expert engaged in the proper analysis"). In any event, they fail.

***April Corrective Disclosure*.** Defendants do not claim that Dr. Tabak failed to consider a single piece of confounding news disclosed to investors on the April corrective disclosure date. Nor could they. Defendants and their expert concede that on the April corrective disclosure date: (i) GE announced earnings that exceeded market expectations; (ii) GE did not disclose any negative information about weakness in the power market; and (iii) GE's Industrial CFOA disclosure was the only piece of negative news disclosed on that date. *See* ECF No. 235 at 3 (chart of purported confounding news); **PX 244** at ¶¶39, 42-45; *see also* Ex. 111, ¶35 (analysts attributing stock price decline to Industrial CFOA disclosure). Given that Dr. Tabak has plainly disaggregated the non-fraud-related factors that contributed to GE's Industrial CFOA miss, Ex. 111, ¶¶35-37, Defendants' disaggregation arguments simply do not apply to the April corrective disclosure.

[31] *See Gross v. GFI Grp., Inc.*, 310 F. Supp. 3d 384, 398 (S.D.N.Y. 2018) (expert "does not attempt to attribute any portion of" stock price decline "to a corrective disclosure as opposed to other simultaneously released information"); *In re Moody's Corp. Sec. Litig.*, 2013 WL 4516788, at *12 (S.D.N.Y. Aug. 23, 2013) (rejecting causation analysis that attributed 99.8% of stock price decline to fraud without "establish[ing] that market forces and other factors unrelated to Moody's alleged mismanagement . . . did not play a significant role in Plaintiffs' economic loss").

***Market Downturn*.** Equally meritless is Defendants' criticism of Dr. Tabak for allegedly failing to disaggregate the purported impact of a power market downturn on GE's ability to generate new receivables. DB 29. As discussed above: (i) factual disputes exist as to whether a market downturn caused GE to miss its Industrial CFOA and deferred monetization targets in 2017; and (ii) even if Defendants could make such a showing, the market downturn is related to the alleged fraud and need not be disaggregated. *See supra* p.41. Moreover, Defendants do not (and cannot) dispute that: (i) Dr. Tabak's event study disaggregates the impact of market- and industry-wide factors like market downturns, and (ii) Dr. Tabak's ERC analysis (discussed below) disaggregates any impact that a market downturn had on GE's sales and earnings in 2017.

ERC Analysis*.** Defendants do not dispute the manner in which Dr. Tabak constructed his ERC model—a regression model that measures the impact of GE's earnings surprises on its stock price—or the inputs to that model. Instead, they challenge his ERC analysis because the stock price return it predicts is "directionally wrong" half of the time. DB 30. This argument fails. For one, it relies on the untimely and inadmissible Fischel Declaration, which Plaintiffs have moved to strike. It also ignores Dr. Tabak's explanation that these results are to be expected because analysts regularly underestimated GE's earnings. *See* Ex. 119, ¶¶48-52 & n.7.[32] But more importantly, the fact that GE's stock price moved in the "wrong" direction is not indicative of a flaw in Dr. Tabak's methodology. Instead, it simply demonstrates that GE's earnings announcements ***were not driving its stock price movements. Far from being unreliable, Dr. Tabak's findings in this regard are fully supported by the record, as both analysts and GE

[32] Dr. Tabak has explained that investors in an efficient market would recognize analysts' underestimation of GE's earnings "and would effectively adjust down their price responses" to avoid creating "an exploitable profit opportunity." Ex. 119, ¶49. As a result, "small earnings surprises will yield negative expected abnormal returns." *Id.* ¶47.

executives acknowledged that GE's cash flow—not earnings—was the most important financial metric for investors. ¶54.

Defendants are likewise wrong to suggest that the absence of statistical significance means Dr. Tabak's "ERC model fails to accurately predict and reliably measure the actual relationship between earnings surprises and stock price movements." DB 31. Again, statistical significance says nothing about the reliability of Dr. Tabak's analysis. It is, at best, a measure of the strength of the relationship between GE's earnings and its stock price movements, and it does not change the fact that Dr. Tabak's analysis provides the statistical "best estimate" of the impact of GE's earnings surprises. Rubinfeld, D., *303. Reference Guide on Multiple Regression*, at 343 (2011).[33]

Finally, while Defendants appear to believe that the "actual relationship between earnings and stock price movements" differs from what Dr. Tabak's model has measured, they have not come forward with any record evidence or any competing expert analysis from Fischel or anyone else to support that speculation. Their arguments should therefore be rejected.

***LTC Insurance*.** Defendants cannot dispute that Dr. Tabak has, in fact, quantified the stock price impact of GE's LTC insurance disclosures. *See* Ex. 111, ¶¶56-64, 78. Dr. Tabak analyzed GE's LTC disclosures and determined that, in the aggregate, they caused GE's stock price to decline by $0.28 across the July and October corrective disclosures. But, as Defendants acknowledge, factual disputes remain as to when that decline was reflected GE's stock price. While GE first disclosed the potential charge on the July corrective disclosure date, neither it nor any market participant quantified the size of it until after the October corrective disclosure. In fact,

[33] If anything, the lack of statistical significance could suggest that Plaintiffs do not need to disaggregate GE's earnings announcements—a result that would cause total inflation to ***increase***. Tabak Tr. at 166:7-18 (noting that many economists "would feel comfortable saying, if there is no statistically significant relationship," no disaggregation is required). It is in this context that Dr. Tabak described his decision to use the results of his ERC model to reduce overall inflation as "better than nothing"—i.e., better for GE than if no earnings-related adjustments were made.

only one analyst even mentioned the potential insurance charge after the July corrective disclosure, indicating that the market largely brushed off GE's vague and non-specific disclosure in July.

Thus, Dr. Tabak could have opined that GE's potential LTC charge impacted GE's stock price in October and not July. That is what Plaintiffs intend to argue at trial. But to allow the jury to calculate damages regardless of how they resolve this issue, Dr. Tabak provides two damages scenarios—one assuming the jury concludes that the charge impacted GE's stock price in July, and another assuming the jury finds that it impacted GE's stock price in October. ¶64. There is nothing improper or "[in]coherent" about providing jurors with the tools they need to calculate damages under multiple scenarios. Rather, it simply acknowledges the reality that the jury is the finder of fact —not Dr. Tabak or Defendants. *See Gruber v. Gilbertson*, 2022 WL 4232834, at *3-4 (S.D.N.Y. Sept. 14, 2022) (plaintiff properly presented alternative damage scenarios to the jury).

"Unaddressed Confounding Information". Defendants offer the blunderbuss claim that Dr. Tabak failed to consider "a wealth of additional information" about GE's business. DB 31. For example, Defendants claim that Dr. Tabak "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." DB 32. But Defendants do not argue that Dr. Tabak failed to disaggregate any ***specific*** disclosures[34], nor do they offer any evidence or competing expert analysis indicating that the market interpreted those disclosures in a way that would not be captured by Dr. Tabak's analysis or they would have impacted GE's stock price.

[34] Defendants cite over 30 disclosures in support of this argument, but they never specify which of them Dr. Tabak purportedly failed to consider or Defendants' basis for believing that they would have caused a stock price reaction. GE's stock price. Some of cited paragraphs describe: (i) the alleged corrective disclosures themselves (*see* SOF ¶¶186, 197, 204); (ii) disclosures of poor earnings, LTC insurance risks, and other causes of GE's Industrial CFOA misses, which Dr. Tabak has plainly disaggregated (*id.*, ¶¶193-94, 199, 201, 208); and (iii) numerous earnings-related disclosures that are captured by Dr. Tabak's ERC analysis (*see id.*, ¶¶198, 205, 209-10).

Instead, Defendants' argument is based entirely on a hypothetical, which asks this Court to ***assume***, in the absence of any supporting evidence or analysis, that: (i) GE disclosed information about "trends in orders for GE Power's products" that extended beyond 2017; (ii) the market interpreted this hypothetical disclosure as being "indicative, at least in part, of challenges GE would face in 2018 or beyond"; (iii) the market's hypothetical views about the long-term impact of this hypothetical disclosure impacted GE's stock price; and (iv) this hypothetical stock price impact may not have been captured by Dr. Tabak's ERC analysis. DB 32.

Dr. Tabak's loss causation analysis reliably addresses the market's *actual* reactions to GE's *actual* disclosures. Defendants' conjecture about how the market *might* have reacted to reacted to information GE *might* have disclosed and whether Dr. Tabak's disaggregation analysis *might* have perfectly accounted for those reactions, comes nowhere close to meeting the high bar for summary judgment. Even if it did, factual disputes exist because Fischel has taken the position that Dr. Tabak's ERC analysis would, in fact, capture the stock price impact of such disclosures. *See, e.g.*, Ex. 115, ¶55 (suggesting that impact of "soft" order trends "should have already been captured by [Dr. Tabak's] ERC analysis"). In addition, when these disclosures caused analysts to change their estimates for future earnings, those changes are incorporated into Dr. Tabak's ERC analysis.

D. Loss Causation Exists For Defendants' Affirmative Misrepresentations

Defendants are wrong to claim that Dr. Tabak has failed to "independently" analyze and opine on loss causation in connection with Plaintiffs' claims based on Defendants' false statements made on January 20, 2017 and in GE's 2016 Form 10-K. Plaintiffs can demonstrate Defendants' affirmative misstatements ***concealed the same underlying conditions*** as their Item 303 omission—including GE's use of deferred monetization to conceal its dwindling organic cash flows. *See* Ex. 111, ¶13; Ex. 113, ¶20. Thus, Dr. Tabak has shown that the corrective disclosures

revealed the truth concealed by the Item 303 omissions and the affirmative misstatements, and he has quantified the damages flowing from those claims. *See* Ex. 111, ¶13; Ex. 113, ¶¶20-24.[35]

Defendants claim that no factual overlap exists because "none of Defendants' [misstatements] concerned the specific LT factoring practices that Defendants allegedly omitted in violation of Item 303." DB 34. Their argument misses the point. What matters for purposes of loss causation is the underlying "condition or event" that the alleged misrepresentations ***concealed***, *Atlantica*, 477 F. Supp. 3d at 110, and here Defendants' misstatements concealed the same conditions as their Item 303 omissions. *See* 6AC ¶579; *see also* ECF No. 185 at 52.

Defendants next argue that even if some factual overlap exists, it is not complete because Plaintiffs also intend to argue "that it was the concealment of separate additional facts"—like "the volume of GE's overall factoring with GE Capital"[36] or "the purposes that GE sold current, rather than LT, receivables"—that rendered their affirmative misstatements false. DB 35. But the primary driver of GE's increased factoring was its undisclosed deferred monetization program, and Plaintiffs contend that it was misleading for GE to describe the purpose of factoring current receivables ***without also disclosing*** its use of LT factoring transactions for a different purpose. Defendants' arguments fail because, yet again, all roads lead back to deferred monetization.

[35] If, for instance, the jury were to find that Defendants did not violate Item 303 but that Bornstein's January 20, 2017 misstatement was materially false, that would not impact the alleged concealed truth or the quantum of inflation—it would only impact when that inflation becomes ***recoverable*** under the federal securities laws. In this example, it would mean that the inflation in GE's stock price becomes actionable on January 20, 2017, not on February 29, 2016. Dr. Tabak provided the same reasoning following the Court's issuance of its class certification order. *See* Ex. 113, ¶7.

[36] Defendants persist in their efforts to "misrepresent[]" Plaintiffs' claims as concerning GE's total volume of factoring when, as this Court has recognized, Plaintiffs' claims concern "the change in factoring between 2015 and 2016, not the total amount of factoring" in 2016. ECF No. 314 at 13.

E. Loss Causation Exists For The July And October Corrective Disclosures

Defendants inject a backdoor "truth-on-the-market" defense into their loss causation challenge, arguing that "the very information Plaintiffs claim was hidden from the market was fully disclosed by May 5, 2017." DB 37. But "[t]he truth-on-the-market defense is intensely fact-specific" and requires that the truth be conveyed "with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000). Defendants cannot make that showing here. The May 5, 2017 disclosure that they contend "informed investors about GE Power's LT factoring transactions" (DB 37), did not mention "receivables sales" or "LT factoring" or "deferred monetization" at all, nor did it state that GE had [redacted] Instead, the disclosures reference "long-term financing arrangements" between GE Capital and ***GE's customers***.

Defendants have cited no evidence indicating that the market understood this vague disclosure to reveal GE's use of deferred factoring to generate CFOA. In fact, it did not. Analyst reports published after May 5, 2017 raised the ***possibility*** that GE "could look" for ways to monetize its long-term LTSA cash flows ***in the future***—a clear indication that they did not know GE had been doing so for years. *See* **PX 245-46**; Ex. 111, ¶¶43-44. Moreover, when GE altered its disclosures in 2018 (after the risks concealed by Defendants' fraud materialized) to disclose its practice of "sell[ing] long-term receivables to GE Capital" (¶384), analysts did not brush it off as old news. Instead, they stated that GE's "***enhanced disclosure*** around 'long term receivables' factoring" indicated that factoring "***inflated cash in 2016 even more than we had previously expected***." **PX 235**. This evidence undermines Defendants' claim and creates triable issues of fact.

F. Plaintiffs Can Show Loss Causation For The January Disclosure

Defendants argue that Plaintiffs cannot prove loss causation because Dr. Tabak has not disaggregated the impact of GE's disclosure of another SEC investigation into its LTC insurance exposures on the same day. DB 36. Plaintiffs respectfully submit that no such disaggregation should be required given the circumstances of this case. The SEC has expressed concern over the practice of "information bundling"—i.e., "releasing confounding news along with bad news" to "obfuscate[] what portion of the stock drop resulted from news related to its potential SEC violations versus other significant issues." *See* Statement Regarding Information Bundling and Corporate Penalties, *available at* https://www.sec.gov/news/public-statement/crewnshaw-information-bundling-2021-09-03. Here, GE became aware of the SEC investigation into GE Power in November 2017 (**PX 243**), and despite speaking to investors on multiple occasions in December 2017 and January 2018, it waited until January 24, 2018 to disclose it—allowing it to bundle this disclosure with the LTC investigation. Plaintiffs submit that under these circumstances, Class Members should be permitted to recover the full GE-specific stock price decline on January 24, 2018, which Dr. Tabak has quantified. *See* Ex. 108 at Exhibit 4.

IV. THERE ARE TRIABLE ISSUES ON PLAINTIFFS' 20(a) CLAIMS

Section 20(a) requires a primary violation and a defendant's control of the primary violator. *Sjunde AP-Fonden v. Gen. Elec. Co.*, 2021 WL 311003, at *13 (S.D.N.Y. Jan. 29, 2021). Bornstein concedes his "control" throughout the Class Period (DB 50), and genuine disputes exist regarding Bornstein's culpable participation—and his alleged reliance on information provided to him by others—for the reasons set forth above concerning Bornstein's actual knowledge and scienter.

CONCLUSION

For all of the reasons set forth above, the Court should deny Defendants' Motion.

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Respectfully submitted,

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