UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Adam S. Levy, et al.

v.

Thomas Gutierrez, et al.

Civil No. 14-cv-443-JL
Opinion No. 2017 DNH 086

MEMORANDUM OPINION

This putative securities class action case involves a New Hampshire company's role in trying to manufacture sapphire -- one of the hardest substances known to man -- for potential use by an electronic device manufacturer to make its touch-screens more impervious to ruinous damage.

The plaintiffs[1] allege that various defendants made materially false and misleading statements in connection with the offer and sale of securities issued in 2013 and 2014 by New Hampshire-based GT Advanced Technologies, Inc. ("GTAT"), a now-bankrupt manufacturer of materials for consumer electronics. The plaintiff class consists of individual and institutional entities who acquired GTAT securities between November 5, 2013

[1] This case was originally filed as thirteen separate related class actions; pursuant to this court's Order of February 4, 2015, those cases were consolidated for all purposes. By Order dated May 20, 2105, doc. no. 77, the court appointed Douglas Kurz as lead plaintiff. See 15 U.S.C. §§ 77z-1(a)(3)(B)(I), 78u-4(a)(3)(B)(I). A consolidated Complaint was filed July 20, 2015. Doc. no. 87.

-- the day after GTAT executives announced a purportedly lucrative agreement with Apple, Inc. -- and October 6, 2014, when GTAT filed for Chapter 11 bankruptcy. Broadly speaking, the plaintiffs assert that GTAT executives knew from the start that the Apple agreement was doomed to fail and that those executives reaped substantial profits while investors lost millions of dollars. The defendants in this case are GTAT officers and directors, underwriters of the securities offerings, and Apple. Claims have been asserted under the Securities Act of 1933, 15 U.S.C. § 77a et seq., and the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.[2]

All defendants have moved to dismiss the consolidated class action Complaint, doc. no. 87, arguing that it fails to state any claims for relief against them.[3] Fed. R. Civ. P. 12(b)(6).

[2] Plaintiffs' Complaint asserts eight counts: 1) Exchange Act violations against GTAT officers Gutierrez, Gaynor, Bal and Kim; 2) Exchange Act control person liability against those officers and defendant Squiller; 3) Exchange Act control person liability against Apple; 4) Exchange Act violations against Apple; 5) Securities Act violations against GTAT officer defendants Gaynor, Bal and Gutierrez, director defendants Conaway, Cote, Godshalk, Massengill, Petrovich, Switz, Watson and Wroe; 6) Securities Act violations against underwriters Canaccord Genuity, Inc., Goldman, Sachs & Co. and Morgan Stanley & Co. LLC; 7) Securities Act control person liability against Gutierrez, Gaynor, Kim, Squiller and the director defendants; 8) Securities Act control person liability against Apple.

[3] The court has been informed that the plaintiffs and underwriter defendants had reached a settlement. Those parties requested the court refrain from ruling on the underwriters' motion to

After review of the defendants' motions, plaintiffs' objections, the parties' replies and surreplies and the parties' exhibits, the court denies the defendants' motions in part and grants them in part, as follows: count 1 (Exchange Act violation against officers) is dismissed as to defendant Kim only; count 4 (Exchange Act violation against Apple) is dismissed; count 7 (Securities Act control person liability) is dismissed as to the director defendants only.

I. Background

The court culls the following facts from the complaint, from information contained in documents on which the complaint relies, and from publically filed documents. See Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007) (in determining the sufficiency of the complaint under Rule 12(b)(6), the court may consider "documents central to plaintiffs' claim [and] ... documents sufficiently referred to in the complaint.") (internal quotation omitted).

dismiss, doc no. 105, while the parties engage in due diligence. Accordingly, the court hereby DENIES the underwriters' motion, without prejudice to the underwriters' ability to re-submit the motion if necessary.

A. GTAT and sapphire

Prior to 2010, GTAT -- then known as GT Solar International -- manufactured furnaces and other equipment used to make components for the solar industry. As that industry weakened, GTAT began producing sapphire crystal growth equipment. As one of the hardest substances on Earth, sapphire is generally scratch and chemical resistant, transparent and durable. It is typically used in light-emitting diodes (LEDs), lasers, windows used by defense industries, semiconductors, barcode sensors, and watch displays. Although it is naturally occurring, sapphire can also be synthetically manufactured in "advanced sapphire crystallization furnaces" (ASFs), which heat component compounds to temperatures in excess of 3000 degrees Fahrenheit.

After acquiring other companies with experience in the sapphire industry, GTAT began to design and produce ASFs, which it sold to third parties to produce sapphire.[4] As of the end of 2012, GTAT sapphire involvement was primarily related to selling ASFs, rather than production of sapphire. After an initial increase in revenue from its ASF production, however, GTAT's revenues and income declined sharply in the fiscal years ending December 31, 2012 and 2013. This income decline was reflected

[4] While producing ASF's, GTAT continued its solar industry-related production.

in falling stock prices. GTAT stock was trading at approximately five dollars per share in July 2013, a drop of roughly 11 dollars from its 2008 initial public offering.

In August 2013, defendant Thomas Gutierrez, GTAT's president, chief operating officer and director, informed investors that GTAT was having conversations about opportunities to develop its sapphire business with customers beyond its existing base. In September 2013, Apple confirmed the use of a sapphire fingerprint sensor for its iPhone and applied for a patent that involved using sapphire in the cover screen.

The Apple sapphire announcement was noteworthy because industry observers believed that its strength, transparency and durability made sapphire an ideal material to replace the glass screens used in most smartphones. As of that time, however, sapphire use had been limited to smaller phone components, such as camera lenses, because of the high cost of producing large enough amounts of sapphire of sufficient quality. To produce synthetic sapphire of high quality, various compounds are heated to extreme temperatures in ASFs, which, over a period of weeks, grow large crystal logs of sapphire called "boules." These boules, if of sufficient quality, are fabricated and separated into wafers for use in other products.

In order to lower costs and produce the most affordable high-quality sapphire material, manufacturers attempt to make

the largest boules possible. By mid-2013, the maximum boule size that any manufacturer (in this case, GTAT) had been able to produce was 115 kg. According to GTAT, it took roughly three years (from March 2010 to early 2013) to increase the maximum boule size from 85 kg to 115 kg. However, it was understood that boules larger than 165 kg were necessary to justify widespread use for smartphone display screen production.

On September 19, 2013, in light of an expected increase in the demand for sapphire production, financial analysts upgraded their view of GTAT stock, because GTAT was the primary manufacturer of the ASFs required for sapphire production.

B. The GTAT-Apple agreement

On November 4, 2013 -- the first day of the Class Period in this case -- GTAT announced an agreement with Apple to provide Apple with sapphire. The agreement called for Apple and GTAT to jointly develop a facility in Mesa, Arizona, where GTAT, employing over 700 people and using more than 2000 ASFs, would manufacture sapphire exclusively for Apple. Rather than its past practice of selling the furnaces, GTAT would own and operate them. In addition, Apple was to provide GTAT with a "prepayment" of approximately $578 million, which GTAT was to repay over five years, starting in 2015. According to its press release, GTAT expected the arrangement with Apple to be cash

positive and accretive to earnings starting in 2014. GTAT executives assured investors that its existing cash combined with the prepayment from Apple would be sufficient to fund GTAT's operational requirements for a minimum of the next 12 months. Defendant Gutierrez stated in the November 4, 2013 press release that the work being done for Apple would "leverage[]" the Company to "be well positioned to drive the growth of other sapphire opportunities, including the expansion of our LED and industrial sapphire businesses in partnership with our ASF customers." Complaint at ¶ 57.

While GTAT announced third-quarter 2013 revenue of $40.3 million -- $7.3 million of which was attributable to sapphire -- GTAT executives expected the company's 2014 revenue to reach between $600 million and $800 million, 80% of which would be attributable to its sapphire business. Gutierrez told participants in a November 4, 2013 earnings conference call that he expected 2015 revenues to exceed $1 billion, due in substantial part to the Apple agreement.

At the same time, however, Gutierrez indicated that he could not answer certain questions from analysts because of confidentiality provisions within the Apple agreement. In further response to analysts' queries, Gutierrez assured investors that the agreement's exclusivity provisions would not restrain GTAT's ability to grow its sapphire business. He also

expressed no concerns about GTAT's ability to ramp up its production, pointing investors to the fact that GTAT's "capacity as an equipment provider is well documented" and noting that the Company "does not have much competition technologically." Complaint at ¶ 60.

In its third-quarter 2013 Form 10-Q, filed on November 7, 2013, GTAT stated that it "expect[ed] to commence manufacturing of sapphire material in the near future in Arizona." Copies of the individual contracts comprising the Apple agreements were included, but portions of the documents were redacted pursuant to confidentiality stipulations. Details about the size and specifications of the sapphire boules to be produced for Apple were redacted, as were the target dates for completion, the liquidated damages figures for breaches of the contracts, and certain details concerning the exclusivity provisions. Analysts reacted favorably to the assurances. GTAT's stock price increased from $8.38 per share at the close of business on November 4, 2013, to $10.10 per share 24 hours later.

C. Raising capital

On December 2, 2013, GTAT announced that it would offer convertible senior notes and shares of its common stock to the public and use the proceeds for "working capital and general corporate purposes." The next day, GTAT conducted the two

offerings and raised nearly $300 million to fund its operations. Specifically, GTAT raised $214 million through an offering of 3.00% Convertible Senior Notes due 2020 and $81.6 million through an offering of common stock valued at $8.65 per share. The Offering Materials incorporated by reference statements made in documents GTAT previously filed, including the November 4, 2013 press release and the November 7, 2013 Form 10-Q. In addition, GTAT stated in the prospectuses filed in connection with the Offerings that it "expect[ed] to commence manufacturing of sapphire material in the near future at our leased facility in Arizona," "expect[ed] that our sapphire material operations will constitute a larger portion of our business going forward than in the past as a result of our supply arrangement with Apple," and would "continue to sell our ASF systems to sapphire manufacturers in certain select markets, including the LED industry, subject to certain exclusivity rights that we have granted Apple." Complaint at ¶ 66.

D. GTAT progress updates

GTAT executives provided investors with an initial update on the progress of the Apple deal on February 24, 2014, in a Form 8-K and accompanying press release in which defendant Gutierrez stated, "Our arrangement to supply sapphire materials to Apple is progressing well and we started to build out the

facility in Arizona and staff the operation during the quarter." He continued, "We are pleased to have Apple as a sapphire customer and to be in a position to leverage our proprietary know-how to enable the supply of this versatile material . . . our aim is to position GT not only as an exceptional sapphire supplier to Apple but also as an unparalleled world-class supplier of sapphire material and equipment to a variety of customers." Gutierrez also indicated that GTAT expected new, non-Apple, sapphire orders by the end of 2014 and reiterated GTAT's revenue projection for 2014 of $600 to $800 million.

On a conference call with investors that day, Gutierrez responded to a question from an analyst concerning the source of the Company's "confidence [that] you can successfully generate a profit in this business of selling sapphire materials," stating: "Our confidence comes from deep understanding of the unique technology that we've developed for these applications. And, as I've indicated before, we've continued to progress on the performance of our ASF furnaces and the cost per millimeter that we expect to achieve, and so we're quite confident in our technology. . . . [W]e generally don't give guidance unless we have a pretty good understanding that we're going to hit it." Complaint at ¶ 70.

Also related to the progress of sapphire production, defendant Gaynor stated that "[w]e expect that the combination

of Apple prepayments received to date, and to be received in the future, will fully fund the capital outlay in Arizona." Complaint at ¶ 71. The Company's Form 10-K for 2013 (filed on March 10, 2014) similarly represented that "[w]e believe that our existing cash, customer deposits and prepayment installment proceeds will be sufficient to satisfy working capital requirements, commitments for capital expenditures and other cash requirements for at least the next twelve months."

GTAT share prices rose nearly 17% and the December 2013 debt securities rose over 10% following the February 24, 2014 announcements. Analysts also reacted favorably. In a February 24, 2014 report defendant underwriter Canaccord Genuity wrote that GTAT's comments provided "further confidence that the Apple ramp is on or ahead of schedule and helps to de-risk investor expectations of poor economics for the deal. Given the size of the expected sapphire revenues this year as well as anticipated revenue growth going forward plus our own checks in Asia, we continue to believe that [GTAT] will be primarily supplying sapphire for an upcoming iPhone." Complaint at ¶ 72. Additionally, on March 7, 2014, Credit Suisse upgraded GTAT's stock to "Outperform" due to "continued progression on the recently-awarded Apple supply agreement." Id. Credit Suisse reported that "GTAT is up over 400% in the last 12 months especially due to the introduction of sapphire into mobile

devices and the Apple supply agreement announced in November 2013." Complaint at ¶ 73.

On May 5, 2014, GTAT issued a press release announcing a "next generation" ASF that could create 165 kg sapphire boules -- 50 kg heavier than its latest marketed technology. GTAT also noted "that it has developed more advanced ASF technology capable of producing boules significantly greater than 165 kg," and that it "intend[ed] to keep this more advanced ASF system captive for some period of time." Id. at ¶ 74. GTAT's announcement was significant because, as noted, technological limitations on boule size made it very expensive to mass produce sapphire. During a conference call held a few days later to discuss GTAT's first quarter results, an analyst asked whether GTAT would use this "captive technology." i.e., the larger-boule technology, for its "sapphire materials business" with Apple. Gutierrez responded affirmatively and stated that the new "captive technology" was "significantly greater" in size than the 165 kg and was "production ready." Complaint at ¶ 75.

On May 7, 2014, GTAT issued a press release filed with a Form 8-K announcing its first quarter results and providing a further update on the Apple project. Defendant Gutierrez stated "[w]ith respect to our Arizona project, we have now received three of the four prepayments from Apple," and that "[w]e continue to expect our sapphire segment to contribute

meaningfully to revenue this year." Complaint at ¶ 76. Defendant Raja Bal – GTAT's chief financial officer from March 7, 2014 forward -- further stated that Apple's prepayments "will fully fund[] our capital outlays related to the Arizona project." GTAT also reiterated that it expected "[r]evenue in the range of $600 to $800 million." Later that day, Defendant Gutierrez told investors that "I remain very enthusiastic about our Sapphires materials and equipment business. While we cannot be specific with respect to the production ramp in Arizona, we continue to expect our Sapphire business to contribute over 80% of our revenue this year." Complaint at ¶ 77.

While GTAT executives would not elaborate on Apple's intended use of the sapphire GTAT was to produce, Gutierrez told analysts that GTAT was "producing Sapphire and that I expect the Sapphire that we produce will be fully utilized." Defendant Gutierrez concluded the May 8, 2014 conference call with a positive outlook, stating that "I just wanted to sort of take the moment to reflect on how incredibly positive I am and my team is about the future of the business." Complaint at ¶ 78. On May 8, 2014, Canaccord Genuity expressed a "very bullish opinion that both GT and Apple are ramping for a major handset launch with sapphire cover glass." Complaint at ¶ 79.

In an August 4, 2014 press release filed with the SEC on a Form 8-K, Defendant Gutierrez stated that the Mesa facility build-out "is nearly complete and we are commencing the transition to volume production." Id. at ¶ 80. In a conference call with analysts the next day, Defendant Gutierrez reiterated the above statements and stated that GTAT had "taken [the Mesa facility] from a shell to a fully operating entity." Id. GTAT executives directly addressed the Company's relationship with Apple in the August 5, 2014 conference call. Defendants Bal and Gutierrez told analysts that GTAT expected to hit Apple's operational targets and thereby receive the final $139 million prepayment by the end of October 2014. Gutierrez added that even if the final payment from Apple was not received in October 2014 it would not curtail GTAT's progress because GTAT had sufficient cash reserves apart from the Apple payment. Finally, Bal stated "[w]e continue to expect more than 80% of the year's revenue to come from our Sapphire segment . . . $600 million to $700 million, reflecting our current view of volumes associated with the Arizona project, as well as our expectations for Sapphire equipment shipments for the second half." Gutierrez echoed the sentiment, stating that GTAT's "revenue target for 2015 remains unchanged." Complaint at ¶¶ 80-83.

Analysts responded positively to the GTAT executives' statements. On August 5, 2014, Canaccord Genuity noted that

"[w]e believe GTAT is positioned to benefit from a move to sapphire cover glass in the handset market" and that "we are cautiously optimistic on the cost structure in order to make this a reality." Id. at ¶ 84. Similarly, on August 6, 2014, Dougherty & Company maintained its "buy" recommendation and its high $29.00 price target for GTAT shares, noting that "[w]e continue to be very positive about GTAT and recommend buying at current undervalued levels." Id. GTAT's stock price increased throughout August, soaring to a near class period-high of $18.60 at the close of the market on August 26, 2014. Overall, in the months following the announcement of the Apple agreement, GTAT's common stock price increased, from $8.38 per share on November 4, 2013 to a class period-high of $19.77 per share on July 2, 2014. The December 2013 notes' value likewise rose more than 83% from the original offering to a class period-high of nearly $1,837 per note on July 2, 2014.

E. Apple unveiling and GTAT's financial collapse

On September 9, 2014, Apple unveiled two new models of its iPhone: the iPhone 6 and the iPhone 6 Plus. During the iPhone 6 launch, Apple announced that both of the new phones would have displays produced from "ion-strengthened" glass, a term associated with "Gorilla Glass," a product manufactured by Corning, a competitor product of GTAT's sapphire material.

Apple's use of an alternative to sapphire glass was perceived by the markets as negative news for GTAT, and its stock price fell from $17.21 per share to $12.78 per share from September 8 to September 10, 2014, on heavy trading volume. Id. at ¶ 88. The price of the debt issued pursuant to the debt offering, which had a face value of $1,000 per note, declined from $1,613 per note on September 8 to $1,279 per note on September 10, 2014. Id. In addition, Canaccord Tenuity lowered its previous price target of $16.00 to $13.00 and questioned whether GTAT could meet its revenue forecast. Id. at ¶ 89. On September 10, 2014, Cowen and Company stated that "the ramp at the Mesa, Arizona facility has been slower than expected." Id. Also on September 10, 2014, research analysts Dougherty & Company changed its "buy" recommendation to "sell" and lowered its price target of GTAT stock from $29.00 to $9.00. Dougherty & Company noted that Apple's use of Gorilla Glass was "extremely negative news for GTAT," that "[p]revious guidance by management for 2014 needs to be cut in half," and that "[w]e have turned negative on the GTAT story." Id. at ¶ 90.

On September 15, 2014, GTAT issued a press release announcing a conference call to be scheduled during the week of September 29, 2014 "to provide a business update." Id. at ¶ 91. Then, on October 2, 2014, GTAT issued another press release postponing the "business update" until the week of October 6,

2014. Id. On October 6, 2014, GTAT announced that it had filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code in the District of New Hampshire. Id. at ¶ 92. The October 6, 2014 announcement reported that, as of September 29, 2014, GTAT had $85 million in cash (as opposed to the $400 million of expected cash reported just two months earlier) and faced approximately $1.3 billion in liabilities as of June 28, 2014. Id. GTAT's bankruptcy announcement significantly diminished the value of the company. On October 6, 2014, the price of GTAT stock fell from $11.06 per share to $0.80 per share on the heaviest trading volume in the history of the company. The price drop wiped out nearly $1.4 billion in market value. The price of the debt issued pursuant to the 2013 offering, which had a face value of $1,000 per note, declined from $1,083 per note to $315 per note. On October 16, 2014, the NASDAQ suspended trading of the Company's common stock, and GTAT was formally delisted effective December 21, 2014. Id. at ¶¶ 93-94.[5]

[5] On November 6, 2014, GTAT disclosed to investors that the SEC sent a letter to GTAT on October 15, 2014, stating that it was investigating "trading activity in the Company's securities, as well as the Company's sapphire business and securities offering going back to January 1, 2013." Complaint at ¶ 95.

F. The bankruptcy declaration

The stated rationale for GTAT's bankruptcy filing was to "preserve the value of its business by extracting itself from Apple's control . . . reject certain agreements with Apple and expeditiously wind-down its Apple-related operations . . . ." Squiller Declaration, Doc. no. 116-2 at ¶ 8. In plaintiffs' view, however, the bankruptcy-related declarations of GTAT's chief operating officer Daniel Squiller paint a picture of GTAT during the class period that is diametrically opposed to GTAT's public statements during that time.

According to Squiller's declarations, in mid-2013, GTAT and Apple began negotiations for what would have been GTAT's "largest sale ever: an order for 2,600 sapphire growing furnaces." Complaint at ¶ 101. These negotiations were the likely impetus behind GTAT's pre-class period projections about opportunities in its sapphire business beyond the LED sector. The sale of 2,600 furnaces to Apple never came to fruition. According to Squiller, "after months of extensive negotiations over price and related terms," Apple changed course and "presented GTAT with an onerous and massively one-side deal in the fall of 2013," that he referred to as "a classic bait and switch." Id. at ¶ 102. Instead or purchasing furnaces from GTAT -- an arrangement that would have been consistent with GTAT's previous business model -- the agreement with Apple

"required GTAT to borrow money from Apple to purchase furnace components and assemble furnaces that would be used to grow sapphire for Apple." Id.

While GTAT publicly characterized the $578 million flowing to GTAT as a "prepayment," Squiller's Declarations describe how "unlike most customer-supplier relationships, Apple treat[ed] the payments it ma[de] for GTAT's products as a 'loan' and ha[d] taken liens on assets in GTAT's business to secure repayment of those loans." Id. at ¶ 103. And contrary to GTAT's statements that the $578 million would fully cover its capital outlay for the Mesa facility, the Squiller declarations indicated that the $578 million figure did not include "the costs of more than 1,300 temporary and permanent personnel, utilities, insurance, repairs, and raw materials." Id. at ¶ 104. Thus, by the end of the class period, GTAT spent more than $900 million -- more than twice the $439 million Apple ultimately provided after withholding its final payment -- to get the factory up and running. On the contrary, Apple promised GTAT nothing concrete in return. The Squiller declarations observed that even if Apple eventually purchased sapphire material from GTAT and "the business transaction worked exactly as contemplated in the original agreements [and GTAT did not need to spend an additional half billion dollars to get the factory in workable condition], GTAT would not earn any income at all unless Apple

opted to "buy" sapphire material in excess of [its] loan 'repayment' obligations." Id. at ¶ 105.

Squiller's declaration and other Bankruptcy Court filings also revealed various contractual terms that were redacted from the public disclosure of the Apple agreement. Among these provisions were that Apple could cancel sapphire orders without penalty, while GTAT faced liquidated damages of $320,000 for a late boule delivery or $640,000 for any sapphire sales made to non-Apple parties, thus making any non-Apple business prohibitively expensive for GTAT. In addition, the Apple agreement provided GTAT with roughly six months to construct over 2,000 sapphire furnaces and to invent the technology to create and mass produce high quality sapphire boules weighing at least 262 kg (or 578 pounds) usable for smartphone screens, a size that had never been produced. The publicly-filed versions of the contracts comprising the Apple agreement redacted the size requirements, deadlines and the number of furnaces to be built.

GTAT further disclosed in its June 1, 2015, Form 8-K that when it entered into the Apple agreement in November 2013, it lacked the technology to create even a 165 kg sapphire boule, let alone a 262 kg boule. GTAT further disclosed that it did not even begin its "research and experimentation . . . for technology to produce 262 kg boules for Apple" until October 31,

2013 -- five days before the Apple agreement was announced to investors. Id. at ¶ 121.[6]

G. Former GTAT employees' disclosures

In addition to their reliance on the Squiller bankruptcy declarations, plaintiffs also rely on information provided by GTAT's former sapphire product manager, who served in that capacity from 2010 through January 2014.[7] Plaintiffs allege that the manager said that he resigned in December 2013 over GTAT's entry into the Apple agreement, after warning Gutierrez and others that GTAT would not be able to satisfy the terms. Specifically, throughout the spring and summer of 2013, the sapphire product manager regularly visited Apple headquarters in California in connection with the negotiations between GTAT and Apple. He communicated with defendants Gutierrez, Squiller and

[6] Similarly, a November 2014 report in the Wall Street Journal stated that GTAT's only experience producing a 262 kg sapphire boule prior to the Apple agreement occurred just days before GTAT announced the Apple agreement, and generated an unusable product. Complaint at ¶ 122.

[7] Although the sapphire product manager is unnamed, such use of anonymous sources is permissible. See In re Cabletron Systems, 311 F.3d 11, 31 (1st Cir. 2002) (permitting use of anonymous sources in securities case where "the accumulated amount of detail the sources provide tends to be self-verifying; these are not conclusory allegations of fraud, but specific descriptions of the precise means through which it occurred, provided by persons said to have personal knowledge of them.").

Kim, the GTAT executives who negotiated the Apple deal. His role was to create data models for defendants Gutierrez and Squiller regarding the feasibility of Apple's desire to act quickly and produce massive quantities of sapphire for its next-generation iPhones in a cost-effective manner. Every model he created showed that Apple's goals could not be accomplished, and indeed, the technology and ability to do so was "light years" and not months away. Complaint at ¶ 125.

According to the sapphire product manager, at the time GTAT entered into talks with Apple, it had only successfully created a furnace and technology to create 115 kg sapphire boules. In 2010, the ASF capability was 85 kg boules. It took GTAT a year to raise capability to 100 kg, and another six months to get to 115 kg. By spring 2013, GTAT had experienced multiple failures while trying to create 140 kg and 160 kg boules. Once Apple and GTAT started discussing the production and commercialization of 262 kg boules as the only way to achieve desired economies of scale, he "knew there was no data to support that 262 kg was doable in [GTAT's] furnaces or any furnaces," and that the technology to do so was "light years away." He personally ran models at the direction of defendant Gutierrez, and the "models proved that we could not do it." Complaint at ¶ 127. He communicated this information directly to defendants Gutierrez, Squiller and Kim, sending his models and results to those

individuals via email, and also presented his conclusions during company meetings in California during the negotiations with Apple. He advised defendants Gutierrez and Squiller not to sign with Apple and specifically warned them that the cost models that he created for them showed that the probability of success was too low.

When he was told before the November 4, 2013 press release that the Apple agreement had been signed despite his warnings, and that not only was GTAT required to produce 262 kg boules of sapphire for Apple, but also would have to do so in the matter of months, he was shocked. The sapphire product manager believed that the defendants signed an agreement with unreachable objectives. He resigned from GTAT at the end of 2013.

Another former GTAT sapphire engineer, who worked out of the Mesa facility on the Apple deal from February through October 2014, described how the "timeline [for the production of 262 kg sapphire boules] was completely out of line with reality." Complaint at ¶ 130. This engineer reiterated that no one had ever grown 262 kg usable sapphire boules and that GTAT's commitment to do so was "a shot in the dark." He explained how no one at GTAT knew what they were doing, stating "they had no clue," and there was "no way" GTAT's sapphire business could have contributed 80% of the Company's revenue in 2014. Id.

In addition, GTAT's senior director of quality from October 2013 through October 2014 -- who began his tenure at the Company in 2011 -- believed that GTAT woefully underestimated the technical and operational sophistication necessary for growing sapphire at the scale and volume required by Apple, leading to results which he described as "just absolutely horrible." Id. at ¶ 131. The senior director of quality stated that "no reasonable person could think that was going to be profitable given what was going on" at Mesa once production commenced. Id.

GTAT's production of sapphire materials for Apple faced other start-up problems as well. According to the Squiller bankruptcy declarations, "the first phase of the Mesa Facility was not operational until December 2013 -- which was only 6 months before GTAT was expected to be operating at full capacity in order to meet its minimum supply commitments" to Apple. Delays also resulted from unavailability of and interruptions to power supplies. Id. at ¶ 132.

Upon moving into the Mesa facility, GTAT lacked an established, working recipe for producing high quality 262 kg boules. A production technician at Mesa from February 2014 to October 2014 responsible for monitoring the sapphire furnaces stated that GTAT was conducting experiments with different sapphire recipes in order to grow larger and higher-quality sapphire boules because GTAT could not produce an acceptable

percentage of sapphire that was usable from a given boule. The percentage, known as a yield rate, had to exceed 90%. The Director of Operations for GTAT's Sapphire Fabrication Business Unit at Mesa from January 2014 until December 2014 reported that the GTAT's sapphire yields for its large boules at Mesa were approximately only 30%. GTAT's sapphire production difficulties were confirmed by a global logistics manager at Mesa from March 2014 through the middle of December 2014, who confirmed GTAT's inability to produce acceptable sapphire product. The former senior GTAT sapphire engineer discussed above stated that "[t]here was no way they were going to be able to manufacture the volumes they had committed to." Id. at ¶ 137.

Former GTAT employees explained that it was impossible for GTAT to meet the growth and revenue projections it touted to investors. For example, GTAT's former growth support supervisor of sapphire equipment and materials, who had worked at GTAT since 2013, and before that at a company acquired by GTAT, explained that it was "impossible" for GTAT to achieve the type of growth it was touting because GTAT would have needed at least two to five years to build out the facility and master production processes. Moreover, GTAT did not have an adequately trained staff onsite. Id. at ¶ 138.

H. Wall Street Journal article

An article published by the Wall Street Journal in November 2014 -- roughly one month after GTA's bankruptcy filing -- further described shortcomings of the production process at the Mesa facility. The article reported that "people familiar with Apple operations said more than half the boules were unusable." Id. at ¶ 139. These unusable boules were a complete loss for GTAT. GTAT's former director of operations for the sapphire fabrication business unit described other manufacturing failures that resulted in the loss of all the sapphire being produced in 20% of all of the operating furnaces.

The Wall Street Journal article described a meeting with Gutierrez and two Apple vice presidents on June 6, 2014 in which Gutierrez explained GTAT's production problems. At that time, Gutierrez provided Apple with a document titled "What Happened" that listed 17 problems at the facility and told Apple that he was there to "fall on his sword." Id. at ¶ 143. From that point on, GTAT stopped even trying to produce the 262 kg sapphire boules required by the Apple agreement. Id. Once GTAT ceased production of 262 kg sapphire boules, overall production at the Mesa facility effectively ceased. A production technician who monitored the operational furnaces at the Mesa plant confirmed that in July 2014, GTAT shut down all of its furnaces and only started a few furnaces back up to experiment

with various recipes from July to October. After the shutdown in the summer of 2014, the facility was never again up to full production or running at capacity.

II. Applicable legal standard

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must state a claim to relief by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Martinez v. Petrenko, 792 F.3d 173, 179 (1st Cir. 2015) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In ruling on such a motion, the court accepts as true all well-pleaded facts set forth in the complaint and draws all reasonable inferences in the plaintiff's favor. See, e.g., Martino v. Forward Air, Inc., 609 F.3d 1, 2 (1st Cir. 2010). The court "may consider not only the complaint but also facts extractable from documentation annexed to or incorporated by reference in the complaint and matters susceptible to judicial notice." Rederford v. U.S. Airways, Inc., 589 F.3d 30, 35 (1st Cir. 2009) (internal quotations omitted). The court first addresses the motions filed by the officers and directors before turning to Apple's motion.

III. Analysis

A. The Exchange Act (counts 1 and 2)

Plaintiffs have asserted fraud claims against GTAT officers Gutierrez, Gaynor, Bal & Kim ("officer defendants") under section 10(b) of the Exchange Act, which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Pursuant to its rule-making authority under section 10(b), the SEC adopted Rule 10b-5(b), which provides, in pertinent part, that "[i]t shall be unlawful for any person, directly or indirectly, ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

For a complaint to state a claim for securities fraud under section 10(b) and Rule 10b-5, it must plead the following elements: (1) a material misrepresentation or omission; (2) scienter, or a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss;

and (6) loss causation. ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008) (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005)).

Moreover, since plaintiffs are asserting claims for securities fraud under the Exchange Act and Rule 10b–5, the court's analysis is also governed by the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u–4(b). The PSLRA establishes specific pleading requirements for fraud claims based on the Exchange Act. Plaintiffs alleging such claims must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement is made on information and belief, the complaint shall state with particularity all facts on which the belief is formed." 15 U.S.C. § 78u-4(b)(1). In addition, the PSLRA requires that a securities fraud claim plead facts with particularity that are sufficient to give rise to a "strong inference" of scienter. 15 U.S.C. § 78u-4(b)(2). Under this standard, "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007).

The PSLRA also establishes a "safe harbor" for certain forward-looking statements. See 15 U.S.C. § 78u-5. Pursuant to the safe harbor provision, the maker of a forward-looking statement will not be liable for securities fraud if the statement:

> (1) includes a disclaimer regarding risks and the possibility that results will differ from projections;
>
> (2) is immaterial; or
>
> (3) the executives of the company had no actual knowledge the statement was false or misleading. The safe harbor applies both to written and oral statements, such as conference calls and SEC filings.

15 U.S.C. § 78u-5 (c)(2)-(3); see In re Stone & Webster. Inc. Sec. Litig., 414 F.3d 187, 211-12 (1st Cir. 2005).

Although the PSLRA's pleading requirements are demanding, they are not insurmountable. The plaintiff is not, for example, "require[d] to plead evidence." In re Cabletron Sys., Inc., 311 F.3d 11, 33 (1st Cir. 2002).

Ultimately, the question before the court is whether the allegations as a whole provide enough supporting detail to warrant a conclusion that its requirements have been satisfied. Id. at 40. The officer defendants argue that the Complaint lacks sufficient allegations of material misrepresentations or omissions, scienter, and loss causation. The court finds that the plaintiffs have satisfied their burden at this stage of the

litigation, with respect to all the officer defendants except Kim.

1. Material misrepresentations or omissions

The allegations in the Complaint can be generally divided into discrete categories defined by the defendant officers' statements: GTAT's ability to meet its contractual obligation to produce 262 kg sapphire boules; GTAT's ability to generate sapphire-based revenue from non-Apple customers; GTAT's progress in meeting its contractual obligations; and the cost of GTAT meeting its obligations, especially with regard to GTAT's financial resources. The parties have gone into great detail parsing scores of statements and sentences within statements and sparring over whether they constitute material misrepresentations or omissions. At this stage of the proceedings, however, the court will not dive as deeply as the parties, as there appear to be statements within each category that satisfy plaintiffs' burden at this stage of the litigation. See City of Brockton Ret. Sys. v. CVS Caremark Corp., 2013 DNH 178, 9 (denying motion to dismiss where at least one statement was actionable) (citing Serabian v. Amoskeag Bank Shares, Inc., 24 F.3d 357, 366 (1st Cir. 1994)).

For example, as previously noted, GTAT issued a press release on May 5, 2014, touting a new ASF capable of producing

165 kg sapphire boules. In Guterriez's conference call a few days later, he said that "165 kilograms is not the top end of what we've been able to accomplish from a technology standpoint" and that larger boules were "production ready." Complaint at ¶ 261. Yet, according to the Complaint, GTAT's sapphire product manager told Gutierrez, Squiller, Kim and others in 2013 that GTA would be unable to meet Apple's production requirements, as data models showed that the ability to meet those requirements was "light years" away. The allegations from other GTAT employees painted a similar picture.

In addition, according to the November 2014 Wall Street Journal article, Gutierrez conceded in early June 2014 that GTAT's boule-production effort had failed, yet in August 2014, Gutierrez and Bal told analysts and investors that GTAT was "commencing the transition to volume production," expected to reach Apple's "operational targets," and that GTAT's 2015 revenue target remained unchanged. Again, as previously noted, the market responded favorably to these announcements, as GTAT stock reached a class period-high price of $18.60 on August 24. And finally, as it relates to boule production, the officer defendants filed documents with the SEC in late February 2014 and conducted a conference call in which they told investors that the "arrangement to supply sapphire materials to Apple was progressing well," even though GTAT had failed to produce a

usable boule for Apple and the January 6, 2014 deadline for doing so had long passed. Complaint at ¶¶ 134, 250.

Also supporting plaintiffs' claims are the Squiller declarations, which, although created after the class period, describe the GTAT-Apple relationship during the class period in terms starkly different than those publicly disclosed. It is therefore not, as defendants allege, an impermissible claim of "fraud by hindsight." See Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1224 (1st Cir. 1996) (rejecting fraud by hindsight claim where Complaint alleged facts that were known to the defendant that were contradicted by later disclosure); Sloman v. Presstek, Inc., 2007 DNH 115, 24-27 (rejecting fraud by hindsight defense where defendant "failed to disclose certain known material information" that it later "essentially admitted" to knowing). Here, the Squiller declarations' descriptions of the Apple negotiations as "bait-and-switch" and the results of those negotiations as an "adhesion contract" under which GTAT would not earn any income at all unless Apple chose to buy sapphire materials in excess of loan repayment obligations are a stark contrast to the public statements regarding revenues in excess of $1 billion. Complaint at ¶ 227.

In addition, while Gutierrez stated publicly in November 2013 that the exclusivity provisions in the Apple agreement did "not really restrain" GTAT from business growth and left it with

"lots of opportunities in the sapphire industry," Id. at ¶ 230, Squiller later indicated that the provisions caused GTAT to be "shut out of the global market" for sapphire material and equipment and that GTAT was "prohibited, for years to come, from conducting any sapphire business with any conceivable Apple competitor or any direct or indirect supplier to an Apple competitor." Id. at ¶232. Accordingly, plaintiffs' allegations sufficiently allege false and misleading statements by defendants Gutierrez, Gaynor and Bal.

The same is not true of defendant Kim, GTAT's general counsel, who argues that the claims against him should be dismissed because he was not the "maker" of any of the allegedly false statements. The court agrees. The plaintiffs claim that Kim signed several GTAT Form 8-Ks which incorporated by reference press releases that contained false and misleading statements. Id. at ¶¶ 219, 243, 260 and 268.[8] These press releases contain statements by other GTAT officers, not Kim himself. As such, Kim cannot be considered the "maker" of those statements. See Janus Capital Grp. v. First Derivative Traders,

[8] Although the Complaint alleges that Kim signed the press releases, the plaintiffs objections rely only on the releases' incorporation by reference into the Form 8-Ks. The court's review of the documents at issue shows, as defendant Kim's motion asserts, that he signed only the Form 8-Ks, and not the press releases.

564 U.S. 135, 142-43 (2011) ("And in the ordinary case, attribution within a statement . . . is strong evidence that a statement was made by—and only by—the party to whom it is attributed."). Accordingly, plaintiffs' Exchange Act case against Kim must be dismissed.

2. Scienter

As noted above, plaintiffs are required to plead scienter, that is, "a mental state embracing intent to deceive, manipulate, or defraud," Tellabs, 551 U.S. at 319, that "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent," id. at 314. The Court of Appeals has found this requirement satisfied "where the complaint 'contains clear allegations of admissions, internal records or witnessed discussions suggesting that at the time they made the statements claimed to be misleading, the defendant officers were aware that they were withholding vital information or at least were warned by others that this was so.'" In re Ariad Pharms., Inc. Sec. Litig., 842 F.3d 744, 751 (1st Cir. 2016) (quoting In re Boston Sci. Corp. Sec. Litig, 686 F.3d 21, 31 (1st Cir. 2012)). The court finds that the Complaint sufficiently alleges such awareness on the part of officer defendants Gutierrez, Gaynor

and Bal that is "at least as compelling as any opposing inference." Tellabs, 551 U.S. at 314.

First, Squiller's bankruptcy declarations indicate that the information contained therein was based on, inter alia, Squiller's conversations with "GTAT's senior management." Complaint at ¶¶ 36, 99. The court has already noted that the contents of Squiller's declarations could constitute evidence of GTAT's leadership's understanding at the time GTAT was entering into the Apple agreement, and how those views contradicted GTAT's public statements. That evidence suggests the officer defendants' awareness of vital information later withheld. More specifically, Gutierrez stated in the November 4, 2013, press release that "exclusivity . . . does not really restrain us from growing the business," while Squiller acknowledged that GTAT was "shut out of the global market . . . and was prohibited, for years to come from conducting any sapphire business with any conceivable Apple competitor" or a competitor's supplier. Complaint at ¶¶ 230 and 232. While defendants argue that the scienter claim makes no sense because GTAT would not have invested significant resources into an effort they knew was doomed to failure, "securities laws prohibit foolish frauds along with clever ones." Asher v. Baxter Int'l, Inc., 377 F.3d 727, 728 (7th Cir. 2004).

Also supporting defendants' scienter were the details provided by GTAT's former sapphire product manager, who, according to the Complaint, implored GTAT officers not to enter into the Apple agreement because data models, which he shared with the officer defendants, showed that GTAT could not feasibly perform its obligations. Complaint at ¶¶ 127-28. Defendants' retort -- that this was just the opinion of a single employee -- misses the mark. The sapphire product manager provided data models at Gutierrez's request and was privy to the Apple negotiations, also at the officers' request. In addition, the sapphire product manager's view was corroborated, to some extent, by the senior director of quality, whose view was that "no reasonable person could think [the agreement] would be profitable." Complaint at ¶¶ 19, 131. This situation stands in contrast to the scenarios described in some of defendants' cited cases, including Fire & Police Pension Ass'n of Colo. v. Abiomed, 778 F.3d 228 (1st Cir. 2015), in which the Court of Appeals rejected confidential witnesses who were "not described with sufficient particularity . . . appeare[ed] to have little contact with senior management . . . and would not have had firsthand knowledge" of management's state of mind. Id. at 245.

Later events also point toward defendants' scienter. For example, as set forth in the Squiller declaration, GTAT had yet to produce a usable boule by February 14, 2014, even though the

terms of the Apple agreement -- which were redacted from public view -- required a 262 kg boule by January 6, 2014. Complaint at ¶ 134. Nevertheless, in February GTAT filed SEC forms and told investors that the "arrangement to supply sapphire materials to Apple is progressing well." Id. at ¶¶ 243-50. Also, GTAT's May 8, 2014, conference call told investors that GTAT could grow boules larger than 165 kg when, according to the sapphire fabrication director at the Mesa facility, such production was impossible. Id. at ¶ 138.

Finally, the court finds that GTAT stock sales made during the class period by Gutierrez, Squiller and Gaynor also support a strong inference of scienter. While insider trading, standing alone, is an insufficient basis on which to ground a finding of scienter, it can suffice in combination with other evidence. Greebel v. FTP Software, Inc. 194 F.3d 185, 198-98 (1999); see also Tellabs, 551 U.S. at 325 (noting that "personal financial gain may weigh heavily in favor of a scienter inference"). Here, plaintiffs allege that Gutierrez, Squiller and Gaynor sold 50, 12 and 36 per cent of their GTAT holdings, respectively, while having sold none of their shares during the preceding 11 month "control period." See City of Bristol Pension Fund v. Vertex Pharms. Inc., 12 F. Supp. 3d 225, 240 (D. Mass. 2014) (observing that "[t]o determine whether defendants' sales were unusual or suspicious, and thus probative of scienter,

plaintiffs typically compare the trading activities of insiders during the class period to the their trading histories during an earlier, similar time period.") See In re Apple Computer Sec. Litig., 886 F.2d 1109, 1117-18 (9th Cir 1989) (comparing the 10 months preceding the 10-month class period to determine whether the alleged insider trading was consistent with the prior pattern of sales); cf. City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Waters Corp., 632 F.3d 751, 761 (1st Cir. 2011) (rejecting insider trading-based scienter claim because plaintiff failed to allege facts showing "unusual" sales).

Defendants assert several arguments in response. None, however, defeat the inference of scienter raised in the Complaint. First, they argue that their sale were not "unusual," because they had sold stock several years before the class period. As previously noted, using the length of the class period as a benchmark is an acceptable method of alleging scienter. While the defendants' look further back in time might have probative value at trial, it is not sufficient to dismiss plaintiffs' Complaint because plaintiffs have sufficiently alleged unusual sales.

Next, the officer defendants argue that they incurred losses on shares of stock that they did not sell. But they have cited no law that requires a defendant to sell all his stock to defeat an allegation of scienter. See In re Cardinal Health

Inc. Sec. Litig., 426 F. Supp. 2d 688, 731 (S.D. Ohio 2006) (noting that "an insider may not always trade all his shares in the company for which he possesses the inside information"). This argument is therefore unavailing.

Defendants also argue that the inference of scienter is defeated because they actually increased their holdings during the class period, via vesting stock options. Defendants are correct that the Court of Appeals has ruled that "it is appropriate to consider not only the shares of stock that [defendants] held prior to their sales, but also the shares that they could have sold through the exercise of options." City of Dearborn Heights, 632 F.3d at 760-61. Nevertheless, the stark contrast between their pre-class dormancy and their class period activity remains grist for the scienter mill at the Rule 12(b) stage.

Finally, defendants argue that their sales could not, as a matter of law, be probative of scienter because the vast majority were made pursuant to a written trading plan, allowable under Rule 10b5-1. At first blush, this is a correct statement of the law. See In re Level 3 Commc'ns Inc. Sec. Litig., 667 F.3d 1331, 1346-47 (10th Cir. 2012) (noting that such automatic transactions are not suggestive of scienter). However, all but one of the trading plans were adopted during the class period. Defendants do not contest this assertion, and the court finds

this sufficient at this stage of the litigation to prevent the trading plans from entirely undercutting the inference of scienter. See In re Biogen Idec, Inc. Sec. Litig., Civ. No. 05-10400-WGY, 2007 WL 9602250, at *14 ("The attempt to use such trading plans as a non-suspicious explanation is undermined, however, when such plans are entered into during the Class Period."); Freudenberg v. E*Trade Fin. Grp., 712 F. Supp. 2d, 171, 201 (S.D. N.Y. 2010) ("Trading plans are not a cognizable defense to scienter allegations on a motion to dismiss where, as here, they were adopted during the Class Period.") (and cases cited therein).

Accordingly, the court finds that the plaintiffs have adequately alleged that the defendants acted with the requisite degree of scienter.

3. Safe harbor

Defendants also argue that they are shielded from liability for many -- but not all -- of their challenged statements by PSLRA's "safe harbor" provision, 15 U.S.C. § 78u-5, under which, as previously noted, the maker of a forward-looking statement will not be liable for securities fraud if the statement:

> (1) includes a disclaimer regarding risks and the possibility that results will differ from projections;
>
> (2) is immaterial; or

> (3) the executives of the company had no actual knowledge the statement was false or misleading. The safe harbor applies both to written and oral statements, such as conference calls and SEC filings.

15 U.S.C. § 78u-5 (c)(2)-(3). At this stage of the litigation, the court finds that the safe harbor does not shelter the officer defendants to the extent that dismissal of the Complaint is warranted.

The Court of Appeals has instructed that when a court considers whether a statement is covered by the safe harbor provisions, it "must examine which aspects of the statement are alleged to be false." In re Stone & Webster, 414 F.3d at 213. When the statement in question blends forward-looking representations with representations concerning present circumstances, the mere reference to future projections is not sufficient to invoke the safe harbor "if the allegation of falsehood relates to [the] non-forward-looking aspects of the statement." Id. The safe harbor grants no protection for "a statement whose falsity consists of a lie about a present fact." Id.

Plaintiffs first contend that many of the allegedly actionable statements are not forward-looking in their entirety and that their claims relate to representations of then-present circumstances. The court agrees. For example, during the November 4, 2013, conference call, Gutierrez stated that "[w]e

have lots of opportunities in the sapphire industry" and that "exclusivity . . . does not really restrain us from continuing to grow the business." Complaint at ¶ 230. Plaintiffs also identify statements during other portions of the class period that the court finds to be non-forward-looking. See Plaintiffs' Omnibus Memorandum, doc. no. 116, at 53. One such statement, in a February 24, 2014, press release said, inter alia, that GTAT's "arrangement to supply sapphire materials is progressing well." Complaint at ¶ 244. In a related conference call, Gutierrez said "we've continued to progress on the performance of our ASF furnaces" and "we're confident, we generally don't give guidance unless we have a good understanding that we're going to hit it." Id. at ¶ 245. These, too, are statements of then-present facts.

Statements in May 2014 included present-tense references to 165 kg boules not being "the top end of what we've been able to accomplish," and that technology to produce boules significantly greater" than 165 kg was "production ready." Id. at ¶261. Also, an August 2014 press release stated that GTAT "remain[ed] confident about the long-term potential of the sapphire materials business for GT." Id. at ¶ 269. And in a later conference call, Gutierrez stated GTAT was "very confident, given the progress that we're making, that we will achieve the [production and payment] milestone in [the fourth quarter]." Id. at ¶ 275.

Given the presence of these and other non-forward looking statements[9] -- i.e., those that are not within the ambit of the safe harbor -- that the court has already determined are sufficiently pled, "this court sees little utility in performing a statement-by-statement analysis of the complaint's" other allegations with respect to the safe harbor provision. City of Brockton Ret. Syst., 2013 DNH 178, 12-13; see also In re Tyco Int'l., Ltd., 2004 DNH 154, 41 (declining to consider merits of safe-harbor arguments because they would not produce dismissal of charges even if valid) (Barbadoro, J.).

4. Loss causation

The final Exchange Act element that the officer defendants challenge is loss causation, that is, a "causal connection between the material misrepresentation and the loss." Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342 (2005). Loss causation can be established by:

> (1) identifying a "corrective disclosure" (a release of information that reveals to the market the pertinent truth that was previously concealed or obscured by the company's fraud);
>
> (2) showing that the stock price dropped soon after the corrective disclosure; and
>
> (3) eliminating other possible explanations for this price drop, so that the factfinder can infer that it

[9] Defendants do not claim that every challenged statement is forward-looking within the meaning of the PSLRA.

> is more probable than not that it was the corrective disclosure—as opposed to other possible depressive factors—that caused at least a "substantial" amount of the price drop.

Mass. Ret. Sys. v. CVS Caremark Corp., 716 F.3d 229, 237-38 (1st Cir. 2013). Loss causation is generally a question of fact, left to the jury to resolve. Wortley v. Camplin, 333 F.3d 284, 295 (1st Cir. 2003). Although the Court of Appeals has yet to rule on the issue,[10] other courts in this circuit and this district have held that, unlike the fraud and scienter elements of an Exchange Act claim, loss causation is subject only to the ordinary pleading standards of Fed. R. Civ. P. 8, and the court will apply that standard here. See Hoff v. Popular, Inc., 727 F. Supp. 2d. 77, 94 (D.P.R. 2010); In re Tyco Intern., Ltd., 236 F.R.D. 62, 71 (D.N.H. 2006); Brumbaugh v. Wave Sys. Corp., 416 F. Supp. 2d 239, 256 (D. Mass. 2006). Accordingly, the Complaint "need only provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." In re Tyco, 236 F.R.D. at 71 (citing Dura Pharms., 544 U.S. at 347 ("[W]e assume, at least for argument's sake, that

[10] The Court of Appeals has only stated that it is unclear whether a plaintiff has to plead loss causation under Rule 8(a) or 9(b). See Mass. Ret. Sys. v. CVS Caremark Corp., 716 F.3d 229, 239 n. 6 (1st Cir. 2013). Other circuits have taken varying positions on the issue. See Oregon Pub. Emp. Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 604-05 (9th Cir. 2014) (collecting cases).

neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss.")); but see Coyne v. Metabolix, Inc. 943 F. Supp. 2d 259, 273 (D. Mass. 2013) (applying Rule 9(b) to loss causation, while acknowledging circuit split and other cases within district declining to do so). Against this legal backdrop, the court finds that plaintiffs have adequately alleged loss causation.

The court first notes that defendants seem to imply that the plaintiffs must match corrective disclosures to particular statements. The Court of Appeals does not so require. See CVS Caremark, 716 F.3d at 240 (noting that a corrective disclosure need not be a direct admission that a previous statement is untrue).

In support of loss causation, plaintiffs point to the combination of GTAT's series of false statements relating to its ability to fulfill its obligations, and the declines in stock price on September 9, 2014, (when Apple announced it would not use GTAT's sapphire in its next smart phone) and October 6, when GTAT filed for bankruptcy protection. Complaint at ¶¶ 286-87. These allegations satisfy plaintiffs' obligation to plead "that their claimed losses were caused by corrective disclosures." In re Tyco, 236 F.R.D. at 71.

Based on the foregoing, the court finds that plaintiffs have adequately alleged that officer defendants Gutierrez, Gaynor and Bal violated section 10(b). The 10(b) claim against defendant Kim, however, is dismissed. See, supra, Part III A. The court next turns to plaintiffs' "control person" claims against the officer defendants under section 20(a) of the Exchange Act.

5. Control person liability

In addition to their section 10(b) claims, plaintiffs have also brought "control person liability" claims against Gaynor, Bal, Gutierrez, Kim and Squiller, pursuant to section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).[11] In order to succeed on such claims, plaintiffs must prove: (i) an underlying violation by the controlled person or entity, and (ii) defendant's control of the primary violator. In re Stone & Webster, 414 F.3d at 194. "Control person liability, unlike primary liability, does

[11] Section 20(a) provides:

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

not require that individuals have issued the false or misleading statements, but merely that the individuals have controlled the entity that issued the statements." In re Allaire Corp. Sec. Litig., 224 F. Supp. 2d 319, 341 (D. Mass. 2002). Finally, "[c]ontrol is a question of fact that will not ordinarily be resolved summarily at the pleading stage," as "[t]he issue raises a number of complexities that should not be resolved on such an underdeveloped record." In re Cabletron Sys., 311 F.3d at 41 (1st Cir. 2002) (internal quotations omitted).

The court has already found that plaintiffs have sufficiently alleged an underlying Exchange Act violation by several of the GTAT officer defendants. As explained below, the court also finds that the allegations of control person liability are, at this stage of the litigation, barely sufficient to withstand defendants' motion.

The officer defendants argue that plaintiffs have done little more than cite their respective titles in support of their control person claim. If true, this would be insufficient to survive a motion to dismiss. See, e.g., In re Tyco Intern., Ltd., 2007 DNH 073, 21-23 ("the mere assertion that a person was a member of the corporation's board of directors, without any allegation that the person individually exerted control or influence over the day-to-day operations of the company, does not suffice to support an allegation that the person is a

control person.") (internal quotation marks omitted). The Complaint here alleges more, and therefore does enough to withstand the officers' motion to dismiss.

With respect to Gaynor, Gutierrez and Bal, the court notes that their joint memorandum of law and subsequent reply brief, doc. nos. 111-1 and 131, devote only a few sentences to this issue. While they incorporate by reference the joint brief of defendants Kim and Squiller, that document does not mention the former group in what is necessarily a fact-based inquiry. Although the court could consider their argument on this point waived, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), the court nevertheless addresses the sufficiency of the Complaint.

As previously noted, plaintiffs have alleged sufficient facts to proceed on their section 10(b) claims against these three officers. Where, as here, the control person defendants were in a position to make the allegedly false and material statements at issue, the control person claims may proceed. See Chalverous v. Pegasystems, Inc. 59 F. Supp. 2d 226, 236-37 (D. Mass. 1999) ("[A] court should deny a motion to dismiss a [control person liability] claim when the defendants themselves made the allegedly false and misleading statements."); In re Lernout & Hauspie Sec. Litig., 208 F. Supp. 2d 74, 90 (D. Mass. 2002) (declining to dismiss control person claim where

defendants allegedly made false and misleading statements and signed relevant SEC filing). Accordingly, defendants Gaynor, Bal, and Gutierrez's motion to dismiss is denied with respect to plaintiffs' control person liability claim.

While defendants' Kim and Squiller's brief is more substantial, it is similarly unpersuasive. The Complaint alleges that Squiller, who was GTAT's chief operating officer, had supervisory responsibilities over GTAT's sapphire operation, was familiar with the GTAT-Apple relationship, and reviewed the GTAT SEC filings, including some of the challenged statements. Complaint at ¶¶ 17-18, 36, 68, 124 and 128. Also, after helping negotiate the Apple agreement, Squiller moved to Mesa to oversee sapphire production there, held regular meetings with GTAT and Apple staff and reported directly to defendant Gutierrez. This is sufficient to sustain plaintiffs' burden at this stage of the litigation with respect to the control person claim against Squiller.

The allegations against Kim -- whose motion to dismiss was successful as to the section 10(b) claim -- are thinner. Plaintiffs rely on the fact that Kim was a signer and lead negotiator of the Apple agreement. Complaint at ¶¶ 35, 124, 180-81, 185, 195, 219, 243, 260 and 268. Given the central role the Apple agreement plays in this litigation, this fact is significant. While a close call, the court falls back on the

Court of Appeals' rubric that control is not "ordinarily [] resolved at the pleading stage." Cabletron Sys., 311 F.3d at 41. Accordingly, the court denies the motion to dismiss the control person liability claim against Kim.

B. The Securities Act (counts 5 and 7)

Plaintiffs Palisade Strategic Master Fund (Cayman) Limited ("Palisade") and Highmark Limited, in respect of its Segregated Account Highmark Fixed Income 2 ("Highmark"), have asserted claims under Section 11 of the Securities Act, 15 U.S.C. § 77k, against officer defendants Gutierrez and Gaynor, as well as GTAT directors J. Michael Conaway, Kathleen A. Cote, Ernest L. Godshalk, Matthew E. Massengill, Mary Petrovich, Robert E. Switz, Noel G. Watson and Thomas Wroe ("director defendants"). Palisade and Highmark have also asserted control person liability claims against these defendants, as well as officer defendants Kim and Squiller, under section 15 of the Securities Act, 15 U.S.C. § 77o. These claims are made in connection with GTAT's December 5, 2013, combined equity and debt offering.

1. Securities Act violations

Section 11 of the Securities Act creates a cause of action empowering purchasers of securities offered under a false or misleading registration statement to sue certain enumerated parties. Specifically, the statute "impos[es] a stringent

standard of liability on the parties who play a direct role in a registered offering." Herman & MacLean v. Huddleston, 459 U.S. 375, 381–82 (1983). Section 11 creates two ways to hold issuers liable for the contents of a registration statement -- one focusing on what the statement says and the other on what it leaves out. Unlike in Exchange Act claims, "the buyer need not prove . . . that the defendant acted with any intent to deceive or defraud." Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015) (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 381–382, (1983)).

To state a claim under section 11, the plaintiff must allege that:

> (1) [it] purchased a registered security, either directly from the issuer or in the aftermarket following the offering; (2) the defendant participated in the offering in a manner sufficient to give rise to liability under section 11; and (3) the registration statement contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

In re Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 358–59 (2d Cir. 2010) (internal quotation omitted). The statute "imposes strict liability on issuers" and does not contain a scienter or reliance element. See Silverstrand Invs. v. AMAG Pharm., Inc., 707 F.3d 95, 102 (1st Cir. 2013).

The Securities Act plaintiffs focus their claims on several SEC filings and associated statements made in connection with

GTAT's December 5, 2013, debt and equity offering. First, they point to GTAT's November 4, 2013, Form 8-K and accompanying press releases that were incorporated by reference, as containing misstatements and omissions regarding the impact of the Apple agreement on GTAT's revenues and business. Gutierrez was quoted as saying that "GTAT expects 2014 revenue to be in the range of $600 to $800 million with its sapphire segment comprising up to 80% of the year's total revenue," that "we expect revenues in 2015 . . . to exceed $1 billion," and "taking all factors into account, we expect to deliver substantial year-over-year earnings growth over the next three years." Complaint ¶¶ 360-65. Also, GTAT's Form 10-Q, filed November 7, 2013, stated that its "sapphire operations will grow due to our supply arrangements with Apple and we expect that sapphire material sales will account for a larger percentage of our revenue than in the past." Id. at ¶ 366.

The defendant directors first argue that these statements are not false or misleading because they disclosed risks related to the Apple agreement. However, recent Supreme Court guidance counsels against dismissal, based on what was not disclosed. In Omnicare, the Court observed that "Congress adopted § 11 to ensure that issuers 'tell[ ] the whole truth' to investors." 135 S. Ct. at 1331 (quoting H.R.Rep. No. 85, 73d Cong., 1st Sess., 2 (1933) (quoting President Roosevelt's message to

Congress)). Thus, "literal accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another." Id. Moreover, "magic words" such as "we think" or "we believe" do not insulate a defendant from a claim that a statement is false or misleading because such words "can preface nearly any conclusion, and the resulting statements . . . remain perfectly capable of misleading investors." Id. The proscription on misleading omissions extends to opinions, the Court concluded:

> The decision Congress made, for the reasons we have indicated, was to extend § 11 liability to all statements rendered misleading by omission. In doing so, Congress no doubt made § 11 less cut-and-dry than a law prohibiting only false factual statements. Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation she would expect an issuer to have before making the statement.

Id. at 1331-32.

Ultimately, "[t]he investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." Id. The court finds that plaintiffs have adequately pled such allegations.

Here, while the offering materials contained a plethora of disclosures regarding the impact of the Apple agreement, the plaintiffs correctly point out that the disclosures did not adequately convey the technological challenge facing GTAT in trying to produce 262 kg boules, a challenge highlighted by GTAT's sapphire product manager, who warned Gutierrez, prior to the agreement's execution, that GTAT would never be able to satisfy their production obligations.

Plaintiffs also attack misstatements and omissions regarding the Apple agreement's exclusivity provisions. The court finds these allegations sufficient to survive dismissal. As previously discussed in connection with the Exchange Act claims, the Apple agreement severely restricted GTAT's ability to compete. As Squiller stated in his bankruptcy declaration, GTAT was "shut out of the global market for its highly valuable sapphire material and equipment" and the agreement prevented GTAT from sustaining its non-Apple sapphire business. Complaint at ¶¶ 369-70. While, as defendants argue, GTAT investors were informed of the exclusivity provisions, those warnings fell short of the "shut out" language Squiller used, warning that "we will not sell our ASF systems to customers . . . for use in certain products . . . ." Director Defendants' Memo. Of Law, Doc. no. 108-1, at 10.

In light of these allegations, the court finds that the plaintiffs have met their obligation to "identify particular . . . facts . . . whose omission makes the opinion statement at issue misleading to a reasonable investor reading the statement fairly and in context." Omnicare, 135 S. Ct. at 1332. The court also finds that the statements are not protected by the relevant safe harbor provision, 15 U.S.C. § 77z-2. As discussed in connection the Exchange Act claims, the combination of the omitted information in the cautionary statements, and the content of the Squiller declarations supports the inference that the statements were made with actual knowledge that they were false or misleading. See 15 U.S.C. § 77z-2(c)(1)(A) and (B).

2. Control person liability

As the officer defendants argued with respect to the Exchange Act, the Securities Act defendants argue that control person liability claims against them, see 15 U.S.C. § 77o, must be dismissed because the plaintiffs failed to adequately plead either an underlying Securities Act violation or that the director defendants were controlling persons. The court, having already resolved the first issue in plaintiffs' favor, turns to the second, and finds that while the Complaint is sufficient to survive the officers' motion, the Securities Act control person claim against the directors must be dismissed.

As to the directors, the Complaint alleges that the directors controlled the contents and dissemination of the offering materials. Complaint at ¶ 406. Beyond that, however, the Complaint states only that the director defendants had the "requisite power to . . . control or influence [GTAT's] decision-making." Id. These conclusory allegations, lacking any indicia as to how they exercised control, are insufficient to establish control person liability against the director defendants. See In re Tyco, 2007 DNH 073, 21-23 (finding allegations against director insufficient to state control person claim where Complaint failed to allege how the director "exercised control over the company.")

With respect to the officers, however, the court, as it did in connection with the Exchange Act claims, finds the allegations of control person liability sufficient at this stage of the litigation. See, supra, p. 49.

3. Standing

Defendants' final argument is that the Securities Act plaintiffs lack standing to pursue their claims arising out of GTAT's equity offering because they only made purchases in the debt offering. While this may ultimately bear on matters of proof and loss, it does not defeat standing, as purchasers of one type of security have standing to assert claims on behalf of

purchasers of different security instruments, as long as the purchases stem from the same registration statement. In re Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 779 (S.D.N.Y. 2012) (and cases cited therein). As the Court of Appeals has noted, class action plaintiffs "regularly litigate not only their own claims but also claims of other class members based on transactions in which the named plaintiffs played no part." Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 769 (1st Cir. 2011). While the court in Nomura found that several plaintiffs lacked standing, it did so for reasons not present here. First, Nomura involved mortgaged-backed securities, which the court acknowledged were a distinct subset of securities-fraud cases. Id. at 770-71. Ultimately, the court concluded, the touchstone for standing is that the

> claims of the named plaintiffs necessarily give them . . . essentially the same incentive to litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members. The matter is one of identity of issues not in the abstract but at a ground floor level.

Id. at 770.

Here, given that the equity and debt offerings were issued pursuant to the same registration statement and the respective prospectuses contain identical language, the court finds that the Complaint adequately alleges that the named plaintiffs are

"within the class of persons who were concretely affected" by "injurious conduct" by the defendant such that plaintiff has the "necessary stake in litigating" the case. Blum v. Yaretsky, 457 U.S. 991, 999 (1982). The Securities Act plaintiffs' claims do "not implicate a significantly different set of concerns" from the claims of the rest of the class. Gratz v. Bollinger, 539 U.S. 244, 265 (2003). Accordingly, the court finds that they have standing to proceed.

C. Claims against Apple

Plaintiffs assert three claims against Apple. Two of those claims allege control person liability against Apple under Section 20(a) of the Exchange Act and Section 15 of the Securities Act. Plaintiffs' third claim alleges that Apple violated Section 10(b) Exchange Act and SEC Rule 10b-5 by engaging in a fraudulent scheme to deceive the investing public. Apple moves to dismiss plaintiffs' claims against it, arguing that they "represent an unprecedented, unwarranted and unsupportable expansion of liability under the federal securities laws." Apple's Mem. in Supp. of Mot. to Dismiss, doc. no. 109, at 1. Apple's motion is granted in part, and denied in part.

1. Exchange Act violation (count 4)

Plaintiffs' direct claim against Apple is based on alleged violations of SEC Rules 10b-5(a) and (c). As noted in the discussion relative to the GTAT officers, supra, Part II B, to state a claim under those provisions, "plaintiffs must allege that '(1) they were injured; (2) in connection with the purchase or sale of securities; (3) by relying on a market for securities; (4) controlled or artificially affected by defendants' deceptive or manipulative conduct; and (5) the defendants engaged in the manipulative conduct with scienter.'" Swack v. Credit Suisse First Boston, 383 F. Supp. 2d 223, 238 (D. Mass. 2004) (quoting In re Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 385 (S.D.N.Y. 2003)).

Because scheme liability claims sound in fraud, plaintiffs must satisfy Rule 9(b)'s pleading requirements by "'specify[ing] what deceptive or manipulative acts were performed, which defendants performed them, when the acts were performed, and what effect the scheme had on investors in the securities at issue." Kerrigan v. Visalus, Inc., No. 14-CV-12693, 2016 WL 892804, at *15 (E.D. Mich. Mar. 9, 2016) (quoting In re Parmalat Sec. Litig., 376 F. Supp. 2d 472, 492 (S.D.N.Y. 2005)). "Finally, in order to state a viable scheme liability claim, a plaintiff must identify an allegedly 'deceptive or manipulative act' by the defendant beyond making a misstatement or omission

(which is prohibited under Rule 10b5-(b))." Id. (citing Benzon v. Morgan Stanley Distribs., 420 F.3d 598, 610 (6th Cir. 2005)) (emphasis in original).

In support of their claim, plaintiffs argue that Apple engaged in a "fraudulent scheme to misrepresent and conceal the problems with GTAT's business that artificially inflated the price of [GTAT's] securities." Pls.' Mem. in Supp. of Opp. to Mot. to Dismiss, doc no. 115, at 19. According to plaintiffs, "Apple leveraged its control over GTAT to convert the Company into a vehicle through which Apple perpetrated its own fraud." Id. Plaintiffs argue that Apple "engaged in deceptive acts through its control over GTAT's business, operations and statements." Id. at 20. In support of that claim, plaintiffs point to Apple's alleged control over certain aspects of GTAT's sapphire business, including Apple's ownership of the Mesa Facility and GTAT's contractual obligations to keep Apple informed regarding its financial condition. Pursuant to that scheme, plaintiffs say, Apple "forced" GTAT to enter into the Apple agreements "because Apple thought its investment would be protected in the face of failure"; and, through its confidentiality agreements with GTAT, Apple "forced" GTAT to conceal problems relating to GTAT's ability to comply with the

terms of the Apple agreements so "to ensure that the launch of Apple's new iPhone . . . would be a success."[12] Id. at 19.

As best the court can determine, plaintiffs' theory seems to be that, through Apple's purported control over GTAT, Apple was engaging in a scheme to misrepresent and conceal problems with GTAT's business. As a result of these misrepresentations and concealments, the price of GTAT's securities was artificially inflated. In furtherance of that scheme, plaintiffs say, Apple "forced" GTAT to enter into the agreements and, through various confidentiality provisions associated with the agreements, "forced GTAT to conceal" problems. Id. at 19. As alleged, plaintiffs' claim cannot withstand Apple's motion to dismiss.

[12] Specifically, plaintiffs allege that Apple employed manipulative or deceptive devices and/or schemes in an effort to deceive plaintiffs as to the success of GTAT's business by concealing: (1) that GTAT's agreements with Apple were "onerous" and "massively one-sided in favor of Apple"; (2) that GTAT was required to mass-produce sapphire boules at a size never before produced for commercial use; (3) that GTAT was in violation of the Apple agreements; (4) that GTAT was expending significant amounts of cash in excess of Apple's prepayments under the contract; (5) that GTAT was unable to produce sapphire as required by its contract with Apple; (6) that GTAT was incurring "staggering" losses as a result of production and operational issues at the Mesa Facility; (7) that Apple was providing the prepayments to GTAT notwithstanding GTAT's failure to produce sufficient sapphire production; and (8) that Apple intended to withhold its final payment to GTAT. Complaint at ¶ 320.

First, as defendants correctly point out, plaintiffs fail to sufficiently allege that Apple actually took any affirmative steps to conceal -- or to cause GTAT to conceal -- facts regarding GTAT's financial situation and performance under the agreements. Instead, plaintiffs allege:

> Given [the] strict confidentiality requirements and the level of authority that Apple had over Defendants' statements, it is reasonable to infer that Apple actively pressured GTAT and the Insider Defendants to conceal any problems relating to the Mesa Facility or sapphire production process if revealing the problems could potentially leak details about the Apple agreement that were confidential.

Complaint at ¶ 197 (emphasis added). Plaintiffs argue that such an inference is reasonable because "Apple is one of the most notoriously secretive companies in the world and is extremely punitive to those that dare violate the company's rules." Id. at ¶ 198. And, plaintiffs allege, because, on September 9, "the public expected that Apple would announce that its signature product [the iPhone 6] would contain a sapphire screen, any disclosure regarding problems that GTAT was having producing the necessary sapphire for those screens would be extremely deleterious." Id. at ¶ 201. Therefore, they say, "it is reasonable to infer that Apple did not want GTAT to reveal that it was not making sapphire glass for Apple's iPhone prior to Apple's own September 9, 2014 announcement on the subject." Id. at ¶ 202 (emphasis added).

Plaintiffs' allegations fall short of satisfying Rule 9(b)'s particularity requirements. That is because plaintiffs' complaint lacks any specific allegations regarding how (or, for that matter, if) the confidentiality provisions at issue -- the confidentiality provisions that they contend Apple utilized to perpetrate fraud -- were enforced by Apple. For example, plaintiffs fail to identify any Apple employees who enforced the confidentiality provisions, when anyone at Apple purportedly enforced those provisions, or how Apple specifically enforced the confidentiality provisions in a manner that prevented GTAT from complying with its disclosure obligations under the securities laws.[13] Indeed, plaintiffs fail to even allege that GTAT did, in fact, provide Apple with any of its prospective statements to investors; that Apple reviewed in advance any of GTAT's public statements at issue in this suit; or that anyone at Apple actually enforced those confidentiality provisions at any point in time in a way that prevented GTAT from complying with its disclosure obligations under governing securities law.

[13] And, as Apple points out, the confidentiality agreements provide that GTAT could make any disclosure "required by law," including the securities laws. See, e.g., Document no. 109-9 at 2 ("Recipient may disclose Confidential Information to the extent required by law, provided Recipient makes reasonable efforts to give Discloser notice of such requirement prior to any such disclosure and takes reasonable steps to obtain protective treatment of the Confidential Information.").

Instead, plaintiffs allege that it is "reasonable to infer" that Apple took such actions (Complaint at ¶ 197), and, as a result of those actions, "forced" GTAT to conceal information from investors.[14] But, as set forth above, circumstances of fraud must be stated with particularity. Greebel, 194 F.3d at 193; see also Driscoll v. Landmark Bank for Sav., 758 F. Supp. 48, 51 (D. Mass. 1991) ("Allegations in the form of mere conclusions, accusations, or speculation are not sufficient to meet Rule 9(b)'s particularity requirement without supporting facts surrounding the scheme to defraud or a basis for believing such a scheme existed.") "[T]his holds true even when the fraud relates to matters peculiarly within the knowledge of the opposing party." Greebel, 194 F.3d at 193. Plaintiffs'

[14] The court notes that, as alleged by plaintiffs, the primary purpose and effect of Apple's purported scheme was ostensibly concealment. See, e.g., Complaint at ¶ 320 ("Apple employed manipulative or deceptive devices . . . in an effort to deceive Plaintiffs and Class members as to the success and viability of GTAT's business by, in particular, concealing . . .")(emphasis added). The court questions whether plaintiffs are attempting to bypass the elements necessary to impose "misstatement" or "omission" liability under Rule 10b-5(b) by labeling the purported misconduct a scheme under Rule 10b-5(a) and (c). See S.E.C. v. Kelly, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) ("Courts have not allowed subsections (a) and (c) of Rule 10b-5 to be used as a 'back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5.'") (quoting In re Parmalat Sec. Litig., 376 F. Supp. 2d at 503). But, having determined that plaintiffs' Section 10(b) claim against Apple fails for other reasons, the court declines to wade deeper into that particular analysis, beyond noting the issue.

allegations -- lacking identification of time, place or manner -- fall short of that mark.

Moreover, as previously stated, to state a claim under Rule 10b-5(a) and (c), a plaintiff must allege that the defendant committed a deceptive or manipulative act. Even assuming that plaintiffs had sufficiently set forth allegations relating to Apple's enforcement of the confidentiality provisions with particularity, there is nothing inherently manipulative or deceptive about Apple enforcing its bargained-for contractual rights.[15] Nor is there anything inherently deceptive about negotiating and entering into a purportedly advantageous contract. See, e.g., Kalnit v. Eichler, 264 F.3d 131, 141 (2d Cir. 2001) ("In this situation, however, any intent to defraud Comcast cannot be conflated with an intent to defraud the shareholders.")

But, plaintiffs argue, Apple took those actions and directed GTAT to conceal certain facts "in an effort to deceive Plaintiffs and Class members as to the success and viability of GTAT's business." Complaint at ¶ 320. Plaintiffs' argument in that regard fails, however, because they have not sufficiently alleged scienter.

[15] As previously mentioned, the confidentiality agreements provide that GTAT could make any disclosure "required by law." See, e.g., Decl. of Sarah E. Diamond, Exh. 7 (document no. 109-9) at 2.

As already described in connection with the claims against the GTAT defendants, "the PSLRA requires plaintiffs to 'state with particularity facts giving rise to a strong inference that the defendant acted with' scienter." Ariad Pharms., 842 F.3d at 751 (quoting 15 U.S.C. § 78u-4(b)(2)(A)) (emphasis supplied)). As the Court of Appeals recently instructed, "[a]n inference of scienter is 'strong' if 'a reasonable person would deem [it] cogent and at least as compelling as any opposing inference one could draw from the facts alleged.'" Fire & Police Pension Ass'n of Colo. v. Abiomed, Inc., 778 F.3d 228, 240-41 (1st Cir. 2015) (quoting Tellabs, 551 U.S. at 324).

Plaintiffs' scienter allegations suffer from the same lack of specificity as plaintiffs' allegations relating to Apple's purported acts in furtherance of the alleged scheme. Even putting that problem aside, however, plaintiffs fail to adequately explain how Apple's purported knowledge that GTAT was not able to comply with the terms of the Apple agreements translates to Apple "acting recklessly."

A failure to disclose particular information "can only constitute recklessness if there was an obvious duty to disclose that information." In re GeoPharma, Inc., 411 F. Supp. 2d 434, 446 (S.D.N.Y. 2006) (citing Kalnit, 264 F.3d at 143-44). And, "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. . . . [A] duty

to disclose under § 10(b) does not arise from the mere possession of nonpublic market information." Chiarella v. U.S., 445 U.S. 222, 235 (1980); see also S.E.C. v. Tambone, 597 F.3d 436, 448 (1st Cir. 2010) ("[Chiarella] instructs that a party's nondisclosure of information to another is actionable under Rule 10b-5 only when there is an independent duty to disclose the information arising from a fiduciary or other similar relation of trust and confidence between the parties.") (internal quotations omitted) (emphasis in original). "Even if information is material, there is no liability under Rule 10b-5 unless there was a duty to disclose it." Roeder v. Alpha Industries, Inc., 814 F.2d 22, 26 (1st Cir. 1987). The obligation to disclose arises "from a relationship of trust and confidence between parties to a transaction." Chiarella, 445 U.S. at 230.

The purported misstatements and omissions to the investing public at issue in this suit were not made by Apple; they were made by GTAT concerning GTAT. Assuming arguendo that plaintiffs had adequately alleged that Apple had the authority (or even the ability) to "force" GTAT to disclose certain false information (or withhold truthful information), plaintiffs have not identified a relationship between Apple and GTAT's shareholders that would give rise to a duty to disclose on Apple's part. Nor have plaintiffs pointed the court to case law that would support

an argument that Apple had an "obvious duty" to ensure disclosure of information about GTAT to GTAT's shareholders. For all of those reasons, plaintiffs have not adequately alleged scienter.

Finally, the court briefly addresses Apple's arguments concerning reliance. With respect to reliance, Apple argues that plaintiffs' claim is foreclosed by Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148. "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action. It ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." Stoneridge, 552 U.S. at 159 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988)).

As Apple points out, Stoneridge, 552 U.S. 148, is both instructive and persuasive. In Stoneridge, investors "sought to impose liability on entities which, acting both as customers and suppliers, agreed to arrangements that allowed the investors' company [Charter] to mislead its auditor and issue a misleading financial statement affecting the stock price." Id. at 152-153. The entities had no role in preparing or disseminating Charter's financial statements. Id. at 155.

The Court noted that it had found a "rebuttable presumption of reliance in two different circumstances:"

> First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance. Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. The public information is reflected in the market price of the security. Then it can be assumed that an investor who buys or sells stock at the market price relies upon the statement.

Id. at 159 (citations omitted). The Court then determined that neither presumption was applicable, because the entities "had no duty to disclose, and their deceptive acts were not communicated to the public. No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant time." Id. Therefore, the Court concluded that plaintiffs could not show reliance upon any of the entities actions "except in an indirect chain that we find too removed for liability." Id. at 159.

The Stoneridge plaintiffs argued that liability was appropriate because the entities had engaged in conduct "with the purpose and effect of creating a false appearance of material fact to further a scheme to misrepresent Charter's revenue." Id. at 160. And, they said, "the financial statement Charter released to the public was a natural and expected consequence of respondents' deceptive acts; had respondents not assisted Charter, Charter's auditor would not have been foiled

and the financial statement would have been a more accurate reflection of Charter's financial condition." Id. The Court was not persuaded, stating: "It was Charter, not respondents that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." Id. at 161. So it is in this case. It was GTAT, not Apple, that issued allegedly misleading statements to the public.

Plaintiffs attempt to distinguish Stoneridge by arguing that Apple's deceptive acts were, in fact, communicated to the public when GTAT announced its agreements with Apple. Plaintiffs' argument is unconvincing for two reasons. First, as set forth above, plaintiffs have not sufficiently alleged that the mere act of entering into the agreements with GTAT was deceptive.[16] But, even assuming that plaintiffs had so adequately alleged, the contractual relationship between GTAT and Apple "took place in the marketplace for goods and services, not the investment sphere." Stoneridge, 552 U.S. at 166. Section 10(b) "does not reach all commercial transactions that

[16] For that same reason, plaintiffs' argument that Stoneridge is distinguishable because Apple "was directly engaged in the issuance of false statements and pressuring GTAT to conceal problems with its sapphire production and financing" (pls.' br. at 23) is not persuasive: Plaintiffs have not sufficiently alleged Apple's involvement with the investor statements at issue.

are fraudulent and affect the price of a security in some attenuated way."[17] Id. at 162.

For all the aforementioned reasons, as well as those set forth in Apple's briefing, plaintiffs have not alleged a plausible claim under Section 10(b) and SEC Rule 10b-5 against Apple.

2. Control person liability (counts 3 and 8)

As previously described, pleading control person liability requires plaintiffs to allege: (1) an underlying violation by the controlled person or entity (here, GTAT); and (2) that "defendants controlled the violator." In re A123 Sys., Inc. Sec. Litig., 930 F. Supp. 2d 278, 286 (D. Mass. 2013) (citing Aldridge v. A.T. Cross Corp., 284 F.3d 72, 85 (1st Cir. 2002)).

[17] Plaintiffs' additional arguments in support of their contention that they are entitled to rely on the integrity of the market price of GTAT securities under the fraud-on-the-market doctrine are similarly unpersuasive. Plaintiffs argue that the "price of all GTAT securities was inflated because of the Company's false statements (controlled by Apple) pertaining to GTAT's ability to produce sapphire, the Company's ability to perform under the Apple agreement and GTAT's financial condition." Pls.' Br. at 23. Plaintiffs' argument ignores the fact that the purportedly false statements omitting this information were made not by Apple but by GTAT. So, Apple itself did not make any sort of representation concerning GTAT that the investing public relied upon.

Plaintiffs have adequately alleged an underlying violation of the securities laws by the GTAT defendants. Therefore, the question before the court is whether plaintiffs have pled sufficient facts to establish that Apple was controlling those defendants. "In the securities context, 'control' means 'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of [an entity], whether through the ownership of voting securities, by contract, or otherwise.'" In re Brooks Automation, Inc. Sec. Litig., No. CIV A 06-11068-RWZ, 2007 WL 4754051, at *13 (D. Mass. Nov. 6, 2007) (quoting 17 C.F.R. § 230.405)). "To meet the control element, the alleged controlling person must not only have the general power to control the company, but must also exercise control over the company." Aldridge, 284 F.3d at 85. "Control is a question of fact that will not ordinarily be resolved summarily at the pleading stage," as "[t]he issue raises a number of complexities that should not be resolved on such an underdeveloped record." In re Cabletron Sys., 311 F.3d at 41 (internal quotations omitted). Finally, "only 'a reasonable inference in the complaint' of control is necessary to survive a motion to dismiss." Quaak v. Dexia, S.A.n, 445 F. Supp. 2d 130, 148 (D. Mass. 2006) (quoting Cabletron Sys., 311 F.3d at 41).

Plaintiffs' allegations relating to Apple's control over GTAT fall into four general categories: (1) those relating to

Apple's control over the contracting process and the terms of its agreements with GTAT; (2) those relating to Apple's role in GTAT's operations, including its sapphire business; (3) those relating to confidentiality agreements between Apple and GTAT that required GTAT to obtain Apple's approval prior to making public statements concerning either the agreements with Apple, or the sapphire product; and (4) those relating to Apple's status as GTAT's most significant lender. Framing all of the control-related contentions are plaintiffs' allegations reciting defendant Squiller's statements in his Bankruptcy Declaration, in which he testified that Apple exercised "de facto control of GTAT," and "inordinate control over GTAT's liquidity, operations (including control over product specifications), and decision making." Complaint at ¶ 171.

To be sure, plaintiffs' allegations of Apple's control are thin. However, they are barely sufficient to withstand Apple's motion to dismiss. As previously noted, plaintiffs rely heavily on Defendant Squiller's testimony that Apple was exercising "inordinate control" over GTAT's decision making. Id. at ¶ 171; see Aldridge, 284 F.3d at 85 ("Unless there are facts that indicate that [defendants] were actively participating in the decision[]making processes of the corporation, no controlling person liability can be imposed"). And, Squiller's sworn statements are to some extent substantiated by some of

plaintiffs' allegations concerning Apple's purported control, including those relating to GTAT's sapphire segment, Complaint at ¶¶ 174-179, GTAT's corporate structure, Complaint at ¶ 213, and GTAT's credit agreements, Complaint at ¶ 214).[18] Accordingly, given the Court of Appeals' caution that "[c]ontrol is a question of fact that will not ordinarily be resolved summarily at the pleading stage," Cabletron Sys., 311 F.3d at 41, the court finds that plaintiffs' allegations adequately support a reasonable inference that Apple was exercising control for purposes of Section 20(a), at this preliminary stage. As discussed earlier, the court has found that plaintiffs have not sufficiently alleged that Apple actually exercised control over GTAT's statements to investors. That is not determinative, however, for purposes of Section 20(a). It is sufficient that plaintiffs allege control over GTAT. See, e.g., In re Allaire Corp. Sec. Litig., 224 F. Supp. 2d 319, 341 (D. Mass. 2002)

[18] At this time, the court observes -- but does not rule -- that several of plaintiffs' control-related allegations fall short of sufficiently establishing that Apple actually exercised control over GTAT. For example, plaintiffs allege that Apple "had the unilateral power to approve and reject replacements for one dozen of GTAT's most critical employees," but do not allege that Apple ever exercised that power. Complaint at ¶¶ 192-206. The same can be said for plaintiffs' allegations relating to Apple's purported control over GTAT's statements to investors; and allegations relating to Apple's purported access to GTAT's financial statements, GTAT's records and information systems, monthly progress reports, and all "relevant" GTAT facilities. See Complaint at ¶¶ 192-202, 190, 180-182.

("Control person liability, unlike primary liability, does not require that individuals have issued the false or misleading statements, but merely that the individuals have controlled the entity that issued the statements."); see also Brooks Automation, 2007 WL 4754051, at *13 ("Control over the company is all that is necessary" for the imposition of 20(a) liability); In re StockerYale Secs. Litig., 453 F. Supp. 2d 345, 361 (D.N.H. 2006) ("[Defendants] base their motion to dismiss on plaintiffs' failure to allege facts establishing their direct involvement in drafting or issuing the . . . press releases [at issue], but a plaintiff need not make such allegations to state a claim under section 20(a)"). Viewing the complaint in the light most favorable to plaintiffs, accepting their factual allegations as true, and drawing all reasonable inferences in their favor, the court finds that plaintiffs have sufficiently pled a claim for control person liability against Apple under Sections 15 and 20(a).

IV. CONCLUSION

For the reasons set forth herein, defendants Gutierrez, Gaynor and Bal's motion to dismiss[19] is DENIED. Defendants Kim and Squiller's motion to dismiss[20] is GRANTED only with respect

[19] Doc. no. 111.

[20] Doc. no. 107.

to count 1 against Kim, and otherwise DENIED. Defendants Conway, Cote, Godshalk, Massengill, Petrovich, Switz, Watson and Wroe's motion to dismiss[21] is GRANTED as to count 7, and otherwise DENIED. Apple's motion to dismiss[22] is GRANTED with respect to count 4 and otherwise DENIED. Defendants Canaccord Genuity Inc., Goldman, Sachs & Co. and Morgan Stanley & Co. LLC's motion to dismiss[23] is DENIED WITHOUT PREJUDICE.

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: May 4, 2017

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[21]Doc. no. 108.

[22]Doc. no. 109.

[23]Doc. no. 105.

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