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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DARLAN ZACHARIA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. STRAIGHT PATH COMMUNICATIONS, INC., DAVIDI JONAS, AND JONATHAN RAND, Defendants.	Case No. 2:15-cv-08051-JMV-MF **LEAD PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Lead Plaintiff Charles Frischer ("Plaintiff") respectfully submits this opposition to Defendants'[1] motion to dismiss (Dkt. No. 42, the "Motion")[2] the Amended Class Action Complaint (Dkt. No. 40, the "Complaint"). As stated herein, the Motion should be denied in its entirety.

I. PREFATORY STATEMENT

Securities law violations rarely are as straight-forward as those found here. Defendants perpetrated a years'-long fraud on the Federal Communications Commission ("FCC") and investors that was only revealed at the end of the Class Period,[3] when two reports were published containing damning revelations regarding Defendants' conduct and disclosing material risks regarding the Company's core assets and supposed operations that Defendants had previously concealed. While their scheme wiped out tens of millions of dollars of shareholder value and has triggered a full-blown FCC investigation, in their Motion, Defendants paint Straight Path as the innocent victim of a staged "attack." In so doing, they completely ignore the fact that the assertions in the reports were *true* and showed Straight Path for what it really was: a sham warehouser of spectrum with no real operations, hoping to string investors along just long enough for Defendants to hit paydirt. Like a Ponzi scheme, Defendants attracted investment by selling a *story*, but also like a Ponzi scheme, their carefully constructed artifice crumbled when the truth was revealed, devastating investors.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants in this case sold the story of a company with tremendous value built upon a vast telecommunications infrastructure that purportedly covered "every inch of the United States," which was "well-suited" for use in – and, in fact, would be "critical" to – the next generation mobile wireless network known as 5G. Defendants purportedly built this infrastructure pursuant to licenses

[1] The term Defendants includes Straight Path Communications, Inc. ("Straight Path" or the "Company"), Davidi Jonas ("Jonas"), and Jonathan Rand ("Rand").

[2] The Memorandum of Law in Support of the Motion (Dkt. No. 42-1) is cited herein as "Def. Br."

[3] The Class Period is October 29, 2013 to November 5, 2015, inclusive.

covering designated areas of electromagnetic spectrum ("spectrum") conferred by the FCC. Straight Path obtained these licenses, and in fact was *created for the purpose of holding the licenses,* in a July 2013 spin-off from its parent, IDT Corp. Defendant Jonas would later boast how, by telling the 5G "story," he took a company of seven employees and a basically worthless license portfolio and "in the span of less than two years,…created a public company with a market cap of over $300 million."

Along with Straight Path's *right* to use the spectrum, however, came the *obligation* to develop it by constructing and maintaining equipment capable of providing "substantial service" to the covered populations; the failure to do so resulting in license termination. In hyping the perceived value of the Company, Defendants assured investors that Straight Path's substantial service obligations were met and its right to the vast majority of its licenses was secured through 2020.

As it turns out, while Defendants touted the value of the rights – raising the stock price from around $5.50 in July 2013 to almost $50 in October 2015 – they utterly ignored their obligations: the licenses were not constructed and did not provide substantial service as had been attested to the FCC. Defendants also omitted from their growth story significant barriers to entry into the lucrative mobile/5G promised land, including, for example, that the area of spectrum covered by their licenses suffered from severe propagation limitations that hindered its utility for mobile services and would require significant technological advancements and investment prior to viable commercialization.

Thus, the first major crack in Defendants' façade of health and growth appeared on October 29, 2015, when a report was published questioning the viability of Defendants' 5G plans and revealing a slew of previously undisclosed risks relating thereto (the "Kerrisdale Report"). On this news, the Company's stock was hammered by sales, sending the share price plummeting by over 38%. Then, on November 5, 2015, another damning report was published (the "Sinclair Report"), revealing to investors for the first time that Straight Path's licenses had not been constructed as represented to the FCC and likely had been fraudulently renewed, were not providing substantial

service, and as a result, were subject to termination and forfeiture. On this news, the stock price tumbled an additional $13.70 per share – almost 52%. Defendants did not immediately respond to the report and instead purported to launch an investigation into its claims. On December 1, 2015, Defendants announced the "preliminary results" of their investigation revealed that "a significant amount of the equipment" that supposedly had been installed "is no longer present at the original locations." On July 22, 2016, Defendants announced the conclusion of the investigation, confirming the absence of *any* telecom equipment at the License locations. Defendants incredibly claimed that equipment installed "for a short period of time" was somehow removed without their knowledge.

Both in recent SEC filings and in their Motion, Defendants disclaim all knowledge of wrongdoing, hoping to manufacture distance between Straight Path and renewal actions undertaken by the "prior license holder" – a company that was not only Straight Path's parent company and the Individual Defendants' prior employer, but was started by Defendant Jonas's father and run by his brother. Putting aside all the reasons why Defendants can and should be held to account for their knowledge, or *at best* reckless disregard, of and failure to disclose the fraudulent renewal of the Licenses (*see* Sec. V.B, *infra*), Defendants do not even attempt to explain their supposed two-year failure to detect that Straight Path's supposed core operation did not even exist and the Company certainly did not provide "substantial service" at any point during the Class Period. Even Defendants' best-case scenario – that any wrongdoing occurred in the past and they merely failed to detect it – supports a strong inference of scienter in this case. To be sure, the most likely inference is that Defendants were aware that equipment capable of providing substantial service was never constructed or, *at least*, was not in place at any point during Straight Path's existence. They chose, however, to turn a blind eye to it and simultaneously diverted the attention of the FCC and the market to 5G, hoping that they could skip directly to this more lucrative investment with no one ever the wiser.

In their Motion, attempting to detract from the materiality of the concealed information, Defendants paint Straight Path as the victim of an unwarranted short-seller attack, focusing on the authors of the Reports rather than the devastating truth of their contents. Defendants also argue that the information revealed in the Reports was immaterial because it was publicly "available" prior to the publishing of the Reports. Fatal to this argument, however, is the law: the potential *availability* of information to a savvy investor who may undertake significant research (as, for example, the authors of the Kerrisdale and Sinclair Reports did) is irrelevant where Defendants cannot show that it was actually *transmitted* to the market (let alone with the "degree of intensity and credibility" necessary to render their misrepresentations and omissions immaterial to reasonable investors as a matter of law). This is especially so here, where immediately following the Kerrisdale Report, Defendants scrambled to discredit it, and following the Sinclair Report, Defendants feigned ignorance and insisted they needed to conduct an extensive investigation to determine whether the Company had *any* equipment providing *any* services in *any* License area. These responses betray Defendants' current claims that everything contained in the Reports was common, public knowledge. Nor does the safe harbor support dismissal: omissions are not protected, and many of Defendants' statements either were not forward looking or failed to include meaningful cautionary language.

In sum, Plaintiff has stated a strong case of securities fraud and he should be permitted to proceed to discovery. The Motion should be denied in its entirety.

III. BACKGROUND AND STATEMENT OF RELEVANT FACTS

A. Spectrum Licensing, Renewal, and "Substantial Service"

The FCC regulates and manages spectrum in the United States by licensing rights to use certain frequency bands for specified types of wireless communications. ¶¶27-29, 53-54.[4] Spectrum licenses like the ones at issue in this case are granted for 10-year periods, with available 10-year

[4] Unless otherwise indicated, "¶__" are citations to the Complaint and all references to exhibits are to those attached to the concurrently-filed Declaration of Kara M. Wolke.

renewals. ¶62. To prevent the warehousing of spectrum, *i.e.* to ensure its availability and use for the public, the FCC requires as a prerequisite for renewal that license holders provide "substantial service" to the population area covered by the license by the end of the initial license term (called the "build-out date"). To secure renewal, licensees must file with the FCC a "Substantial Service Notification" or "Notice of Construction/Coverage" attesting to such coverage. ¶¶61, 64-70, 76.

The FCC defines substantial service as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal," and provides certain "safe harbors" which, if met, will constitute substantial service. ¶¶64, 74-75.[5] Of course, in order to provide "substantial service," any license holder must first construct or install equipment capable of providing such service to the covered population. ¶¶44, 74-75. If substantial service is not provided by the build-out date, the license is terminated and permanently forfeited. ¶¶66-69. Moreover, substantial service is an ongoing obligation. If a licensee of the type that Straight Path was fails to continue to provide substantial service or "if removal of equipment or facilities has rendered the station not operational," the license terminates. ¶73 (citing 47 C.F.R. § 101.305(d)).[6]

B. Defendant Jonas Engineers Straight Path Spin-off To Hold Spectrum Licenses

Straight Path was incorporated in April 2013 as a wholly-owned subsidiary of IDT Corporation ("IDT"), a telecommunications company started by Defendant Jonas's father, Howard Jonas. ¶22. On July 31, 2013, Straight Path was spun-off by IDT to become an independent public company, the primary purpose of which was and is the holding, leasing, and marketing of over 900 licenses in the micro- and millimeter-wave ("mmWave") area of spectrum previously controlled by

[5] The safe harbor for Point-to-Point ("PTP") systems is the construction of 4 permanent links per million people. ¶74. The safe harbor for Point-to-Multipoint ("PMP") systems is "a demonstration of coverage to 20 percent of the population of its license service area." ¶75.

[6] *See also* 47 C.F.R. § 1.955(a)(2) & (3) (automatic termination if substantial service is not provided or "permanently discontinued"); 47 C.F.R. § 101.65 (a license "not operational for a period of 30 days or more" due to "voluntary removal or alteration" of equipment is "automatically forfeited").

IDT. ¶¶3, 22, 83.[7] Upon completion of the spin-off, Defendant Jonas – who had previously served in "several executive roles within IDT" including as V.P. of Business Development for IDT and manager of Straight Path Spectrum – became the newly-independent Straight Path's CEO. Ex. 1, at 2; ¶23. Defendant Rand, also a former IDT executive, was named CFO. ¶24.

From IDT to Straight Path, Defendant Jonas was centrally involved in the operations and strategic planning of the Licenses. ¶5. Jonas described himself as a major part of the "IDT strategic development team" that engineered the spin-off. ¶244; *see also* ¶243 (11/26/13 Proxy Statement: "Mr. Jonas is very familiar with the operations included within [Straight Path] and its subsidiaries, *as well as IDT's previous efforts to generate value from the related assets*.") (emphasis added), ¶245 (*Wall Street Transcript*: "Mr. Jonas implemented a strategic plan, directed all aspects of the creation and spinoff of Straight Path Communications, and managed the day-today operations….").

C. False Substantial Service Notifications Are Filed For Renewal; Straight Path Further Violates Substantial Service Requirements

Prior to the Straight Path spin-off, IDT had held most of the Licenses for almost their full 10-year terms without developing them. ¶¶80-81, 85-89, 94. Between September 2007 and March 2008, having not yet constructed the Licenses and with 2010 expiration dates approaching, IDT sought and was denied waivers of construction requirements, yet received 2-year extensions to complete construction and show substantial service. ¶¶87-90. This put the deadline to file Substantial Service Notifications for the majority of the Licenses on June 1, 2012; the failure to do so resulting in termination. ¶¶87-92. IDT's SEC filings between 2008 and 2012 confirm that no further investment was made in construction of the Licenses; instead, IDT would attempt to sell them. ¶¶93-97.

[7] The Company consists of two subsidiaries, Straight Path Spectrum, Inc. (its core business) and Straight Path IP Group, Inc. (a patent troll operation that funds the spectrum business). ¶¶22, 238. During the Class Period, Straight Path claimed to hold approximately 828 licenses in the 39-GHz band and 133 licenses in the Local Multipoint Distribution Service ("LMDS") band (28 GHz), all acquired pursuant to the spin-off (the "Licenses"). ¶78.

Apparently unable to find a buyer, however – and despite no evidence of having actually constructed any transmissions equipment – IDT proceeded to file hundreds of Substantial Service Notifications listing purported hub locations and equipment specifications, such as antennae performance, transmission strength, and maps showing purported coverage area. *E.g.*, ¶¶118-27. In all, Substantial Service Notifications were filed for approximately 947 unique licenses during the period March 2011 through June 2012 (¶106) – *i.e.*, during the approximate final year before the expiration of the already extended term and not long before the 2013 Straight Path spin-off.

While in the last leg of scrambling to salvage rights to its existing licenses – in May 2012 – IDT's head of spectrum licenses (and former Straight Path Spectrum, Inc. CEO, Michael Rapaport (¶83)), acquired an additional 200 largely unconstructed spectrum licenses which also were set to expire on June 1, 2012. ¶99. Substantial Service Notifications attesting to construction and operation of at least 186 of these licenses were filed with the FCC in a matter of days. ¶¶99-104, 107.[8]

Despite the detailed equipment and services listed in the Substantial Service Notifications, it does not appear that any service was ever provided under the Licenses, either by IDT or by Straight Path. Plaintiff performed an extensive investigation, painstakingly detailed in the Complaint, which confirmed that Straight Path could not possibly be providing the service attested to in the filings any point during its ownership and purported "operation" of the Licenses. ¶¶109-31. Indeed, there is no indication of any investment by Straight Path in construction of the Licenses. ¶¶132-36. Of course, the fact that Straight Path has *never* provided *any* service under the vast majority (if not all) of the Licenses has all but been admitted by Defendants themselves only recently. *See* Exs. 3-4. In sum, underneath a carefully constructed façade of networks and links, there was nothing. No equipment, no towers, no antennae, no possibility of any signals reaching any people. *No substantial service*.

[8] After litigation between Rapaport and IDT, wherein both parties claimed to be the rightful owner of these licenses, these licenses also were transferred to Straight Path following its spin-off from IDT, in return for Straight Path making payments to Rapaport. ¶105.

D. Defendants Hype Straight Path's Stock Price to Nearly $50 Per Share

With new expiration dates of 2018 (LMDS) and 2020 (39 GHz), and the Licenses seemingly safe in the hands of the spun-off Company, Defendants began the task of hyping the Licenses' value. They focused the market on the supposed unique ability of Straight Path's holdings to host next generation 5G cellular technology, insisting that the Licenses offered the "premier frequency" and would be a "critical element" of 5G, and proclaiming that "5G is a game changer" for the Company. ¶¶4, 185, 196, 225. In promoting the Licenses' value for the mobile uses, Defendants claimed to control large "contiguous blocks" of spectrum covering "every inch of the United States," with "breadth and depth of coverage [ ] unparalleled by any company" (¶189) and insisting that Straight Path was "the only Company to have nationwide coverage in this space" (¶165).[9]

By "telling the story, creating an interest on the Street relating to Straight Path and 5G" (¶¶5-6), Defendants were able to inflate the Company's stock price from around $5.50 in July 2013 to a high of nearly $50 in October 2015 (¶7). As Defendant Jonas boasted in July 2015:

> To look at it historically, we took two divisions that accounted for almost none of the value of IDT, and in the span of less than two years, we have created a public company with a market cap of over $300 million. I think that in itself is important for investors to recognize.

¶5. Even then, Jonas insisted that Straight Path was "2,700 times undervalued" and was actually worth $2.5 billion when valuing its Licenses in the mobile realm. ¶6; Ex. 1 (insisting "the most important takeaway [for] investors" is "understanding the compelling story about 5G and mobility").

E. The Truth Is Revealed

Defendants' value "story" first began to unravel when, on October 29, 2015, Kerrisdale Capital published a report revealing a number of important misconceptions and undisclosed risks underlying Defendants' 5G claims. ¶¶9, 137 (the "Kerrisdale Report"). The Kerrisdale Report

[9] *See also* ¶116 ("we cover every market in the country and own about 96% of [39 GHz] licenses"); ¶185 (boasting "nationwide, unparalleled spectrum assets"); ¶229 ("we cover all of the U.S. population").

revealed, for example, that despite Straight Path's seemingly impressive claims of coverage, its Licenses constituted a "tiny drop in the mmWave bucket," and that its purported control of 96% of 39 GHz licenses was misleading and overstated because it was subject to likely dilution as the FCC auctioned additional rights in the same band. ¶137. It also dispelled Defendants' claims that 5G would *need* to use mmWave spectrum and discussed a number of fundamental limitations of Straight Path's spectrum as it relates to 5G mobility – *i.e.* material risks threatening Defendants' value story – that belied Defendants' claims of contiguous coverage. *Id.* (including, for example, severe propagation limitations which would inhibit cellular use); *see also* ¶¶8, 32, 51 (detailing previously undisclosed risks to Straight Path's 5G entry). On this news, the Company's shares fell $18.23 per share, from $47.58 to close at $29.35 per share on October 29, 2015 (a drop of over 38%). ¶¶9, 138.

While the revelations of the Kerrisdale Report were still sinking in, another damning report was published on November 5, 2015, concluding based upon extensive research that Straight Path's License renewals were "obtained under fraudulent misrepresentation" and that "the systems were never built on the sites as specified in the filings." ¶¶10, 139 (the "Sinclair Report"). On this news, the Company's shares fell $13.70 per share, from $26.51 to close at $12.81 per share on November 5, 2015 (a drop of almost 52%), further damaging investors. *Id.* The jig was up.

F. Defendants Attempt to Discredit the Kerrisdale Report; Claim Need to "Investigate" Sinclair Report's Claims That Licenses Were Not Constructed

Within days of the Kerrisdale Report, on November 2, 2015, Defendants held an investor conference call for the specific purpose of dispelling it. They also hit back at the Kerrisdale Report in their Form 10-Q, filed on December 10, 2015, stating "[o]n October 28, 2015, a short-seller report was published which *disagreed with our understanding of the importance of 5G* and the [FCC's Notice of Proposed Rulemaking] for Straight Path."). Ex. 2, at 16.

Unlike their strong response to the Kerrisdale Report, Defendants did not immediately respond to the Sinclair Report. Then, on November 24, 2015, Defendants published a letter to

shareholders with the Company's 2015 annual report, insisting "we do not believe that there is merit in the allegations raised in the anonymous 'report,'" but also stating that they would conduct an investigation into its claims. *Id.* About a week later, on December 1, 2015, Defendants stated that preliminary results of the investigation revealed that "a significant amount of the equipment ***that had been installed...is no longer present*** at the original locations." ¶149; Ex. 2. Defendants substantially repeated this line in the Company's subsequent quarterly SEC filings and refused to take questions on the matter, stating that they would defer "providing updates until we have final definitive information." ¶¶150-53. On June 9, 2016, Defendants explained that they were attempting to "back" their way into the substantial service requirements, stating: "[r]ather than wait for the results of the investigation, we are deploying equipment across our 39 GHz holdings." ¶154.

G. Defendants' Post-Class Period Statements Confirm that the Licenses Likely Were Not Constructed, Straight Path Never Provided Substantial Service, and the Licenses Are Subject To Termination; the FCC Launches an Investigation

On July 22, 2016, Defendants announced the final results of their investigation. Ex. 3 (7/22/2016 Form 8-K). Rather than anything "definitive," however, Defendants' explanations are only more opaque. Defendants again confirmed that no equipment is present at the specified locations, but claim that equipment was initially installed "for a short period of time," suggesting that it was later removed or stolen. *Id.* Defendants have provided no credible explanation for their suggestion that equipment at hundreds of License locations once constructed and capable of providing substantial service to millions of people suddenly "disappeared" without their knowledge. To this day, Defendants refuse to take questions from analysts or investors on the topic.

They are talking to one entity, however: the FCC. In a Form 8-K/A filed on August 19, 2016, Defendants confirmed that the FCC had launched its own investigation. Ex. 4.

IV. APPLICABLE STANDARDS DISFAVOR DEFENDANTS' MOTION

To state a claim for securities fraud under § 10 and Rule 10b-5, a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37 (2011).[10] These claims are subject to the pleading standards of the Private Securities Litigation Reform Act ("PSLRA") and Fed. R. Civ. P. 9(b), requiring allegations of fraud to be stated with particularity. 15 U.S.C. § 78u-4(b). The PSLRA does not require a plaintiff to plead *evidence* of claims, however; on a motion to dismiss, courts must accept all facts alleged as true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("*Tellabs I*").

As such, a complaint should not be dismissed if it contains sufficient factual matter that, if accepted as true, states a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Third Circuit has explained that, even under *Twombly*, stating a claim "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).[11]

In sum, the issue on Defendants' Motion is not "whether the plaintiffs will ultimately prevail" but "whether they are entitled to offer evidence to support their claims." *Langford v. Atl. City*, 235 F.3d 845, 847 (3d Cir. 2000). This is not the insurmountable standard that Defendants paint it to be. As demonstrated below, the Complaint adequately alleges that Defendants made

[10] Unless otherwise noted, citations and quotations are omitted and emphasis is added.

[11] *See also In re Enzymotec Sec. Litig.*, No. 14-5556 (JLL) (MAH), 2015 WL 8784065, at *6 (D.N.J. Dec. 15, 2015) (following *Twombly* and *Iqbal*, courts should "assume the[] veracity [of well-pleaded factual allegations] and then determine whether they plausibly give rise to an entitlement for relief.") (citing *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011)).

material misrepresentations and omissions regarding the Licenses, that they acted with extreme recklessness or actual knowledge regarding the same, and that Straight Path's stock price declined when the truth was revealed.[12] Indeed, the Motion is meritless and should be denied in its entirety.

V. ARGUMENT

A. The Complaint Adequately Alleges that Defendants Made Materially False and Misleading Statements and Omissions During the Class Period

To plead falsity, the Third Circuit requires securities fraud claims be alleged with "all of the essential factual background that would accompany 'the first paragraph of any newspaper story' – that is, the 'who, what, when, where and how' of the events at issue." *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276 (3d Cir. 2006). The Complaint far exceeds this standard. In fact, Defendants do not challenge whether Plaintiff has pleaded falsity with sufficient detail; rather, they invoke a number of affirmative defenses rooted in materiality – including the truth-on-the market and puffery doctrines, as well as the PSLRA safe harbor – to argue that they are insulated from liability for misleading the market. On each of these theories, Defendants' Motion fails.

1. Defendants' Omissions Are Material and Actionable

Defendants' concealment throughout the Class Period that the Licenses were not constructed as specified, fraudulently renewed, not operational, and subject to termination permeated *all* of their statements regarding the Licenses, including their supposed coverage and utility as related to 5G.[13] Defendants further failed to disclose major potential bars to 5G entry.[14] These omissions are actionable.

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[12] Defendants do not challenge, and thus concede, that Plaintiff has adequately alleged the third, fourth and fifth factors delineated in *Matrixx* (*i.e.*, purchase/connection, reliance, and economic loss). As such, Plaintiff only addresses the elements of falsity, scienter, and loss causation herein.

[13] *E.g.*, ¶¶85-136, 139-145 (detailing underlying facts); ¶¶158-167, 169-173, 175-181, 183-184, 187-190, 193-195, 199-215, 217-219, 221, 227-230 (identifying statements and omissions).

[14] *E.g.*, ¶¶8-9, 32, 51, 137 (detailing underlying facts); ¶¶166-168, 171-174, 179-182, 185-186, 191-192, 196-98, 203-208, 211-212, 215-217, 220-226, 231-232, 234-236 (statements and omissions).

In *Matrixx*, the Supreme Court reaffirmed that omissions are actionable "when there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" 563 U.S. at 38 (*citing Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). Thus, "the making of an affirmative statement on a securities matter triggers a duty to include such information as would prevent the statements from misleading a reasonable investor." *Jaroslawicz v. Engelhard Corp.*, 704 F. Supp. 1296, 1299 (D.N.J. 1989); *In re ViroPharma Inc. Sec. Litig.*, 21 F. Supp. 3d 458, 472 (E.D. Pa. 2014) ("[W]hen a company 'put[s] an issue in play,' it acquires a duty to disclose information relating to that topic.") (quoting *In re Merck & Co., Inc. Sec., Deriv., & ERISA Litig.*, No. 1658 (SRC), 2012 WL 3779309, at*3 (D.N.J. Aug. 29, 2012)). Finally, the "total mix" standard requires a "contextual inquiry" that is "fact-specific." *Matrixx*, 563 U.S. at 43-44. Dismissal is only appropriate if the misrepresentations or omissions are so immaterial that reasonable minds could not differ as to their importance. *EP Medsys., Inc. v. Echocath, Inc.*, 235 F.3d 865, 875 (3d Cir. 2000).

Defendants cannot seriously contend that the circumstances surrounding the renewal and lack of operations under the Licenses – including the fact that they were subject to termination – are immaterial as a matter of law. To the contrary, this information clearly "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information" available. *Matrixx*, 563 U.S. at 38-39. Certainly investors would have viewed Straight Path differently if they were made aware of the vital fact that the Company's core assets were subject to forfeiture.[15]

[15] Thus, Defendants find no refuge in the technical truth of some of their statements, such as the bare number of Licenses Straight Path holds. Def. Br. at 24. *Wallace v. Sys. & Computer Tech. Corp.*, No. 95-CV-6303, 1997 WL 602808, at *9 (E.D. Pa. Sept. 23, 1997) ("A statement is false or misleading if it is factually inaccurate, or additional information is required to clarify it;" an omission is actionable where the silence "make[s] other statements misleading or false."); *City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, 686 F. Supp. 2d 404, 419-20 (D. Del. 2009) ("By failing to disclose the fact that Horizon was obtaining its revenue, in part, through an illegal price-fixing conspiracy, the financial reports, though numerically accurate, did not fairly present a complete picture of Horizon's financial condition.").

Moreover, when Defendants chose to make "affirmative statement[s]" regarding the value of the Licenses as related to 5G mobility, they "put the issue in play" and had the further duty to disclose all factors presenting "significant risk to the commercial viability" of the Licenses' 5G development. *Matrixx*, 563 U.S. at 28. Those factors included, *inter alia*, that the Licenses: (i) were subject to termination for failure to provide substantial service; (ii) suffered from severe propagation limitations, including weather and object interference; (iii) would require major and costly technological advances prior to any viable 5G mmWave launch; and (iv) fell well short of providing the contiguous coverage over "every inch of the United States" as claimed. The context of Defendants' many positive statements regarding 5G – *i.e.*, that 5G would serve as the real value of the Company (*e.g.*, ¶¶6, 185, 191, 196, 216) – created "a substantial likelihood that a reasonable investor would find [the] information" cited above as having "significantly altered the 'total mix' of available information." *Matrixx*, 563 U.S. at 38-39; *Local 731 I.B. of T. Excavators & Pavers Pension Trust Fund v. Swanson*, No. 09-799, 2011 WL 2444675, at *10 (D. Del. June 14, 2011) (failure to disclose decline of print yellow page directories when discussing yellow pages market was actionable).[16] Having put the topic of 5G in play, Defendants were obligated to disclose all material information relating thereto, including significant risks to 5G entry and commercial viability. Their failure to do so is actionable.

2. Defendants Cannot Rely on the Truth-on-the-Market Defense

Unable to escape the gravity of their omissions, Defendants try to evade their duty to disclose by arguing that that the information revealed in the Kerrisdale and Sinclair Reports already was

[16] *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 180 (S.D.N.Y. 2010) ("If a company…puts the topic of the cause of its financial success at issue, then it is obligated to disclose information concerning the source of its success, since reasonable investors would find that such information would significantly alter the mix of available information."); *In re Providian Fin. Corp. Sec. Litig.*, 152 F. Supp. 2d 814, 824-25 (E.D. Pa. 2001) ("statements attribute Providian's good fortunes to its 'customer focused approach[]'…puts the topic of the cause of Providian's success in play…. Providian is obligated to disclose information concerning the source of its success").

"available" to the public and, as such, was "immaterial as a matter of law." Def. Br. at 2, 15-16, 23-25. This amounts to an untenable truth-on-the-market defense which does not support dismissal.

(a) The Information Defendants Omitted and Concealed Was Not Otherwise Communicated To the Market

"The 'truth on the market' defense recognizes that a statement or omission is materially misleading only if the allegedly undisclosed facts have not already ***entered*** the market." *Enzymotec*, 2015 WL at *16 (citing *The Winer Family Trust v. Queen*, No. 03-4318, 2004 WL 2203709, at *4 (E.D. Pa. Sept. 27, 2004) ("*Winer Family Trust I*") *aff'd sub nom, Winer Family Trust v. Queen*, 503 F.3d 319 (3d Cir. 2007). To obtain dismissal on the truth-on-the-market defense, Defendants must show that information was "***transmitted*** to the public with the degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by the insiders' one-sided representations." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989).[17]

Defendants, who bear the burden of establishing the defense,[18] incorrectly argue that truth-on-the-market applies where information is merely "publicly available." Def. Br. at 14-16, 21-25.[19]

[17] To this end, courts routinely recognize that "[t]he truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a § 10(b) complaint for failure to plead materiality." *Ganino v. Citizens Util. Co.*, 228 F.3d 154, 167 (2d Cir. 2000); *Merck*, 2011 WL 3444199, at *35 (noting the "fact-intensive" nature of truth-on-the-market defense); *Enzymotec*, 2015 WL 8784065, at *16 (denying motion to dismiss based on strong inferences in favor of plaintiffs at this stage and fact-intensive inquiry of truth-on-the-market defense, stating that "discovery is necessary to determine that doctrine's applicability.").

[18] *See In re Res. Am. Sec. Litig.* ("*Resource America I*"), No. CIV. 98-5446, 2000 WL 1053861, at *5 (E.D. Pa. July 26, 2000) ("To prevail on a "truth on the market" defense at this stage of the litigation the [ ] defendants must establish that defense as a matter of law….").

[19] Defendants cite *no* cases holding that the truth-on-the-market defense applies where information was merely "available." *Klein v. GNC, Inc.*, for example (Def. Br. at 25), was an omissions case where defendants did not argue that the omitted information was publicly *available*; rather, the court held that the allegedly omitted risk (a global shortage of vitamin E) was so widely-*known* within the industry that defendants had no duty to disclose it. 186 F.3d 338, 343 (3d Cir. 1999). Meanwhile, the court *In re Synchronoss Sec. Litig.* (Def. Br. at 16), similarly did not dismiss pursuant to a truth-on-the-market defense based on publicly-*available* information; rather, the court held that defendants' projections contained adequate risk disclosures. 705 F. Supp. 2d 367, 411-12. Finally, in *Wallace* (Def. Br. at 15), the court found materiality lacking where, based on the totality of facts

Whereas the Kerrisdale and Sinclair Reports may have culled tremendous amounts of data and information from various public sources, there is *no* indication that the information was *transmitted* to the public prior to the Reports' publication; as such, dismissal is not warranted. *In re Unisys Corp. Sec. Litig.*, Civ. A. No. 00-1849, 2000 WL 1367951, at *4 (E.D. Pa. Sept. 21, 2000) (no truth-on-the-market in case alleging that defendants misled the market about a large contract where the contract was available online, but required investors to visit two websites to find it); *Resource America I*, 2000 WL 1053861, at *4-*5 (no truth-on-the-market where defendants failed to show as a matter of law that the allegedly omitted information had been effectively transmitted to the market).

To the contrary, Plaintiff alleges that *for the first time*, the Kerrisdale Report revealed major risks underlying the supposed value of the Licenses as they related to 5G. ¶¶9, 137, 257.[20] To be sure, Defendants had not previously disclosed these risks. In fact, rather than responding that the Kerrisdale Report disclosed nothing new and that the problems it discussed were widely known – as Defendants now claim – Defendants at the time punched back, insisting *not* that what Kerrisdale Report said was already common knowledge, but that it was *wrong*. *See* Sec. III.F, *supra*.

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alleged, including defendants' specific risk warnings, it determined that "the market was aware of the potential effect of existing problems…." 1997 WL 602808, at *14. Defendants point to no evidence of any such awareness in this case. Indeed, the omitted information and risks here are hardly so "*obvious*" or "*known*" that they can be deemed immaterial as a matter of law.

[20] Prior to the Kerrisdale Report, there seem to have been *no* public criticisms of Straight Path. Even general criticisms, however, would not support a truth-on-the-market defense in this case. *Cf. In re DaimlerChrysler AG Sec. Litig.*, 269 F. Supp. 2d 508, 515 (D. Del. 2003) (no truth-on-market where skeptical reports were "substantially offset" by the defendants' own positive assurances); *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 706 (9th Cir. 1999) (*Forbes* article critical of company and its stock did not demonstrate that the market already knew of the company's fraud); *Walsingham v. Biocontrol Tech., Inc.*, 66 F. Supp. 2d 669, 679-80 (D. Pa. Dec. 1, 1998) (no truth-on-the-market from "public skepticism" about FDA; "[a]lthough there was publicly available information which warned of investment risks, we cannot conclude at this stage…that such information effectively counterbalanced the defendants' alleged misrepresentations and omissions."); *In re Newbridge Networks Sec. Litig.*, 962 F. Supp. 166, 178 (D.D.C 1997) (no truth-on-the-market where defendants simultaneously "made positive public statements without acknowledging the continued problems"); *Merck*, 2011 WL 3444199, at *35 (rejecting defendant's claim that "the truth about Vioxx's…risk was well-known to the market" in light of Merck's "repeated reassurances" of drug safety).

Similarly, the Sinclair Report informed the market *for the first time*, of bombshell news that Straight Path's Licenses likely were never constructed as represented, fraudulently renewed, never operated, and subject to termination.[21] Again, Defendants did not tell the market at the time that the Sinclair Report was merely reporting widely-known, public information, as they now claim. Rather, Defendants hid behind a wall of silence, stating only that they would investigate the Sinclair Report's claims and incredibly claiming that it "would take several months" for them to determine whether *any* services were being provided under any of the Licenses. ¶¶13-14, 148-49.[22]

Having failed to show any "transmission" to the market, there is no way Defendants can show any corrective communication to the market with the "degree of intensity and credibility" necessary to support a finding of immateriality as a matter of law as required for application of the truth-on-the-market defense. *Apple Computer*, 886 F.2d at 1116. At the heart of Defendants' argument is the notion that investors should be charged with digging up information that might contradict Defendants' positive statements. As the court in *DaimlerChrylser* observed, "Defendants are basically seeking to punish Plaintiffs for trusting their word, a position which I find to be at odds with their role as corporate insiders." 269 F. Supp. 2d at 515. Indeed, Defendants cannot extinguish their duty to disclose by imposing upon investors the burden of an investigative reporter; such is not the function of the truth-on-the-market defense.

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[21] As Defendants recognize, the Reports were the product of much research culled from a variety of sources (*e.g.*, Def. Br. at 8-9). That the authors were able to assemble such research does equate to truth-on-the market, nor does the dramatic price drop following the Reports in any way complicate Plaintiff's allegations of market efficiency. Rather, the most reasonable inference is that the market was not previously aware of the information contained in the Reports and reacted once they were published. *In re Res. Am. Sec. Litig.*, 202 F.R.D. 177, 190 (E.D. Pa. 2001); Sec. V.C, *infra*.

[22] Less than a month after the Sinclair Report, Defendants conceded that "a significant amount" of equipment was gone. ¶149. According to Defendants, it supposedly took about 9 months to complete their investigation. Whereas Defendants have insisted – and have urged investors, the FCC, and this Court to believe – that they needed to conduct an "investigation" to discern whether they had any equipment in the field, they cannot now charge the market with such knowledge in an attempt to evade liability. In fact, even *after* their purported investigation, they still are unwilling to explain exactly what happened to the missing equipment. *See* Exs. 3 & 4.

(b) Dramatic Price Drops on the Disclosure Dates Indicate That There Was No Prior Truth-On-The-Market and that the Omitted Information Was Material

Further indicia of the market's *lack* of awareness of the information disclosed in the Kerrisdale and Sinclair Reports, and further confirming its materiality, are the dramatic price drops that occurred immediately following the disclosures. *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) ("the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock.") (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1417 (3d Cir. 1997)).[23] Following the publication of the Kerrisdale Report, Straight Path's stock price fell over 38% and following the Sinclair Report, the stock price fell over 50%. ¶¶9-10. Under the *Burlington-Oran* rule, these dramatic price movements support the conclusion that the information revealed in the Reports was not previously known to the market, and that it was material.

3. Defendants Find No Refuge in the PSLRA Safe Harbor

The PSLRA "safe harbor" provides protection for statements about the future, provided that the statements are actually forward-looking and identified as such, accompanied by meaningful cautionary disclosures, and not made with actual knowledge that the statements were false or misleading. 15 U.S. C. 78u-5(c); *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242 (3d Cir. 2009); *ViroPharma*, 21 F. Supp. 3d at 470-71. The safe harbor does not apply here.

(a) Omissions Are Not Entitled To Safe Harbor Protection

As this case primarily concerns Defendants' material omissions, the safe harbor does not apply. *Viropharma*, 21 F. Supp. 3d at 471 ("omissions of existing facts or circumstances are not forward-looking, and thus do not qualify for safe harbor protection."); *In re MobileMedia Sec. Litig.*,

[23] *See also S.E.C. v. Berlacher*, No. 07-3800, 2010 WL 3566790, at *7 (E.D. Pa. Sept. 13, 2010) (noting the "Third Circuit's commitment to the *Burlington–Oran* rule" on materiality); *Resource America I*, 2000 WL 1053861, at *5 ("Such a drop in price creates a reasonable inference that the information contained in those reports was material information that had not been previously available to the market.").

28 F. Supp. 2d 901, 930 (D.N.J. 1998) ("Allegations based upon omissions of existing facts or circumstances do not constitute forward looking statements protected by the safe harbor of the Securities Act.").[24] Indeed, no amount of cautionary language could cure the fact that, all the while Defendants were lauding the value of the Licenses, they were not constructed, were not operating, and were subject to termination and forfeiture.

(b) The Vast Majority of Statements Were Not Forward Looking

Most of the statements at issue in this case are not forward-looking. Specifically, Defendants' statements about the Company's then-current License holdings and purported network coverage, and that renewals were secured through 2020, all referred to historical or present fact and do not qualify for safe harbor protection. *In re Urban Outfitters, Inc. Sec. Litig.*, 103 F. Supp. 3d 635, 650 (E.D. Pa. 2015) (statements that "characterize 'past events or current events,' or make reference to both future events and present events" are not subject to safe harbor). Specifically, statements in the Company's Class Period Form 10-K filings that: (i) Straight Path "holds" hundreds of LMDS and 39 GHz band licenses, (ii) its Licenses "cover all of the U.S. population," (iii) the Company "has met its substantial service build-out obligations" and that substantial service showings "have been accepted by the FCC," (iv) the Licenses are "effective . . . through 2020," and (v) "as a result" Straight Path is "well positioned to provide a single source of fixed and mobile wireless spectrum solutions…" are *not* forward-looking. *See* ¶¶158, 189, 229 (2013, 2014, 2015 Forms 10-K, respectively). In sum, none of Defendants' statements regarding the vastness of Straight Path's License holdings, the

[24] *See also Marsden v. Select Med. Corp.*, No. 04-4020, 2006 WL 891445, at *7 (E.D. Pa. Apr. 6, 2006) *vacated in part on other grounds*, 2007 WL 518556 (E.D.Pa. Feb. 12, 2007) (no safe harbor where statements omitted "'present facts'- facts known at the time the statement was made."); *In re Majesco Sec. Litig.*, No. 05CV-3557 PGS, 2006 WL 2846281, at *4 (D.N.J. Sept. 29, 2006) (no safe harbor where plaintiff alleged a material omission); *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, No. 00–4285, 2002 WL 33934282, at *11 (D.N.J. June 26, 2002); *In re Veritas Software Corp. Sec. Litig.*, No. 04-831-SLR, 2006 WL 1431209, at *7 (D. Del. May 23, 2006) ("a purposeful omission of existing facts or circumstances does not qualify as a forward-looking statement and is not protected by the safe harbor of the Reform Act").

completion of Substantial Service filings, or its supposed right to control the Licenses through 2020 are even *potentially* subject to safe harbor protection.[25]

Moreover, many of Defendants' statements specific to the purported value or utility of the Licenses to 5G mobility were presented in affirmative and then-present (*i.e.* not forward-looking) terms.[26] For example:

- "we are solving that problem" [of providing affordable access to mobile spectrum] (¶171);
- "Our spectrum holdings, particularly in the 39 gigahertz band, are deep and broad enough to connect millions of small cells to the communication networks across the U.S.…" (¶179);
- "Our Spectrum holdings—which cover the entire continental US, and have capacity that is substantially greater than currently used access frequencies—are well-suited for use in a 5G network." (¶¶191 & 231);
- "Utility determines value, and the utility of [Straight Path's] millimeter wave spectrum is mobile broadband…" (¶216);
- Straight Path's spectrum licenses "can be used for mobile services." (¶223); and
- "5G is a game changer…. [T]here is no reason why our spectrum cannot or should not be used for mobile services." (¶225).

All of these statements concerning the relationship of Straight Path's Licenses to 5G mobility

[25] Defendants repeated essentially these statements about the breadth of License coverage, the Substantial Service filings, the 2020 expiration date, and the purported value of the Licenses throughout the Class Period. *E.g.*, ¶¶161, 165, 175, 199, 207, 211, 215, 220-21, 235. Defendants also provided the following past-tense "Regulatory Assurance" in the Company's December 4, 2013 Form 8-K: "Straight Path has satisfied substantial service for all of its 28 GHz and 39 GHz licenses" and "Substantial service has been satisfied for all SPS's 39 GHz licenses covering a population of more than 300 million." ¶161.

[26] Defendants characterize statements regarding the relationship between the Licenses and 5G mobility as "Plaintiff's Kerrisdale Report-based claims" and then proceed to focus on the supposedly "forward-looking nature *of the Kerrisdale Report*" rather than their own Class Period statements. Def. Br. at 17-19 (emphasis added). Of course, the safe harbor inquiry focuses *not* on the nature of the statements in a corrective disclosure, but rather, on Defendants' own statements during the Class Period. As set forth herein, Defendants' statements here were *not* forward-looking. Moreover, "prediction[s]" aside (Def. Br. at 18), the Kerrisdale Report certainly contained disclosures revealing for the first time risks relating to Straight Path's Licenses and 5G mobility that Defendants had previously omitted from their public statements (*see* Secs. V.A.2(a) & (b), *supra*).

are expressions of current conditions or beliefs, or at the very least "make reference to both future events and present events," and as such are not amenable to safe harbor protection. *Urban Outfitters*, 103 F. Supp. 3d at 650 (no safe harbor for "statements that 'sales trends continue to be strong' and that there is 'no reason to believe that we couldn't see a continued decrease in markdowns'"); *In re Vivendi, S.A. Sec. Litig.*, Nos. 15–180–cv(L), 15–208–cv(XAP), 2016 WL 5389288, at *13 (2d Cir. Sept. 27, 2016) (statement that Vivendi had a "very strong balance sheet" amidst defendants' future projections was not forward-looking).[27]

(c) Where Some Statements Were Forward Looking, They Were Not Accompanied by Meaningful Cautionary Language

Plaintiff concedes that certain aspects of Defendants' statements relating to their plans to develop the Licenses for use with 5G mobility were forward-looking. *E.g.*, ¶166 (potential future leasing to national mobile wireless carriers); ¶185 ("we plan" to be the "premier frequency" for mmWave 5G); ¶213 (Straight Path's "goal [is] to have our spectrum be selected for mobility."). Even these forward-looking statements, however, are not subject to safe harbor protection because they lacked "*meaningful* cautionary language identifying important factors that could cause actual results to differ materially" from Defendants' representations. 15 U.S.C. § 77z-2(c)(1)(A)(i); *Avaya*, 564 F.3d at 258 (to be meaningful, cautionary language must be "substantive, extensive, and tailored to the future-looking statements they reference" and "vague or blanket disclaimers" provide no protection). Specifically, Defendants failed to warn investors that the Licenses: (1) were fraudulently

[27] *See also Makor Issues & Rights, Ltd. v. Tellabs Inc.* ("*Tellabs II*"), 513 F.3d 702, 705 (7th Cir. 2008) (statements that sales were "still going strong" not subject to safe harbor); *Enzymotec*, 2015 WL 8784065, at *11 ("statements relating to Enzymotec being 'well positioned for future growth,'" "achieving rapid penetration," and "increased market penetration [ ] relate to then-existing conditions as opposed to future projections" and "even if made within the context of truly forward-looking statements, are not entitled to the safe harbor"); *Frater v. Hemispherx Biopharma, Inc.*, 996 F. Supp. 2d 335, 348 (E.D. Pa. 2014) (statements regarding FDA process were expressions of current beliefs, not subject to protection); *In re Lucent Techs., Inc. Sec. Litig.*, 217 F. Supp. 2d 529, 557 (D.N.J. 2002) (rejecting argument that statements about growth "amount to forward-looking statements regarding the Company's economic performance and position in a changing market.").

renewed, in violation of substantial service requirements, and subject to termination and forfeiture; and (2) covered spectrum that presented significant limitations to 5G development, including major propagation problems, and did not actually offer the contiguous coverage represented.

(i) No Meaningful Cautionary Language Regarding Fraudulent Renewals, Lack of Equipment, Lack of Operations, or Risk of Termination

In describing their plans for the Licenses, Defendants failed to disclose a major risk underlying them, to wit, that they were subject to termination and permanent forfeiture as a result of Defendants' substantial service violations. *E.g.*, ¶264. Such glaring omissions rendered Defendants' discussion of future plans for the Licenses unreasonable. In such circumstances, the safe harbor does not justify dismissal. *City of Hialeah Emps.' Ret. Sys. & Laborers Pension Trust Funds for N. Cal. v. Toll Bros., Inc.*, No. 07-1513, 2008 WL 4058690, at *2 (E.D. Pa. Aug. 29, 2008) ("Plaintiffs have specifically pled that there existed several material adverse facts at the time the future projections were made that suggest that these projections were unreasonable at the time they were made.").

Defendants hang their safe harbor hat on supposed cautionary language that "[t]he FCC may cancel or revoke our licenses for past or future violations of the FCC's rules, which could limit our operations and growth." Def. Br. at 6, 24-25. Such a disclosure is meaningless in light of Defendants' failure to disclose that numerous material rules subjecting the Licenses to termination *actually were violated* not only at the time of filing of the Substantial Service Notifications, but throughout Straight Path's ownership. *See* Secs. III.C, *supra* and V.B.1-3, *infra*. Indeed, to warn of the seemingly theoretical (that the FCC *may* find a rule violation) when Defendants knew and failed to disclose the existence of *hundreds* of past and ongoing material rule violations garners Defendants no protection. *Enzymotec*, 2015 WL8784065, at *9-*11 (no safe harbor where plaintiffs "specifically alleged that the statements were not accompanied by meaningful cautionary language" because certain risks "had already come to pass"). As the court in *Viropharma* held, "any cautionary

language could not cure the fact that, at the time the statements were made, the sNDA was already lacking a necessary condition precedent to exclusivity." 21 F. Supp. 3d at 471. Similarly here, no cautionary language could cure the fact that, at the time Defendants publicly laid their plans for the Licenses and 5G, they did not disclose that the Licenses *already were* subject to termination.

(ii) No Meaningful Cautionary Language Relating to Risks of 5G Mobile Development

In discussing their 5G plans, Defendants also failed to disclose "the numerous complications and limitations that presented a serious bar to 5G entry for Straight Path's spectrum holdings." ¶264. The supposed cautionary language cited by Defendants – *i.e.*, "we may not obtain meaningful revenues", a "substantial market…may never develop", "mobile use is a continuing evolving sector", and "competing technologies could be developed" (Def. Br. at 20-21) – is entirely vague and boilerplate.[28] Defendants' motion fails to identify cautionary language discussing any specific risks tailored to their 5G-related representations; *i.e.*, the risks that Plaintiff alleges Defendants failed to disclose. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 182 (3d Cir. 2000) ("[A] vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation."); *Vivendi*, 2016 WL 5389288, at *14 (affirming that "kitchen-sink disclaimer[s], listing garden-variety business concerns" are not meaningful).[29]

Such risks in this case should have included, for example: (i) the Licenses' significant propagation limitations due to short signal range, RainFade, and object interference (¶32); (ii)

[28] Defendants further cite to Exhibit 7 to the Declaration of Joel A. Pisano, a chart purporting to summarize cautionary language that applies to "all of the statements Plaintiff alleges to be false and misleading…." Def. Br. at 21. Not only should the chart be stricken as presenting additional factual and legal argument in a declaration in violation of L. Civ. R. 7.2(a), *see* concurrently-filed Motion to Strike, the supposed cautionary language cited therein is wholly boilerplate and vague. See Dkt. No. 42-2, Ex. 7 (listing boilerplate "forward-looking-statement" identifiers).

[29] *See also Avaya*, 564 F.3d at 256 (same); *Swanson*, 2011 WL 2444675, *13 (despite safe harbor statement and cautionary language, court declined to dismiss because "none of these statements warned of a secular decline, the issue that Plaintiff here claims Defendant failed to disclose").

significant technological advances that would need to be made in mmWave spectrum before it could be viable for mobile use (¶50); and (iii) that Defendants' claimed "contiguous blocks" of service covering "every inch of the United States" were contingent upon a host of FCC determinations that would need to be resolved in Straight Path's favor and were then under review (¶51).[30] At *bottom*, Defendants should have disclosed that the Company *had no equipment at any purported License location* capable of providing substantial service or in any way supportive of the mobile services contemplated. Defendants' failure to include any such tailored risks in their forward-looking statements regarding 5G mobile precludes application of the safe harbor defense.[31]

(iii) Defendants Can Cite No Cautionary Language That Supports a Finding of Immateriality as a Matter of Law

Whether cautionary language is sufficiently meaningful so as to render any misstatements or omissions in forward-looking statements immaterial as a matter of law is rarely properly decided on a motion to dismiss. *Lucent*, 217 F. Supp. 2d at 557 ("The question whether any cautionary language is sufficiently 'meaningful' raises fact issues that are improperly resolved on this motion to dismiss."); *EP Medsys.*, 235 F.3d at 872-73 (whether risk disclosure was "sufficient to neutralize" misrepresentations and omissions could not be decided as a matter of law against plaintiff on motion

[30] On a related note, Defendants misapprehend Plaintiff's claim regarding network coverage (Def. Br. at 20). Plaintiff does not claim a duty to disclose that Straight Path's holdings might be diluted by additional FCC auctions; rather, as a result of Defendants' material omissions, including that the Licenses were subject to termination, Plaintiff alleges that the breadth of the holdings was overstated. Also, when discussing 5G, Defendants failed to disclose a host of FCC decisions that would have to go their way in order to secure "continuous blocks" of coverage for mobile use. ¶51.

[31] Further underpinning the fact that Defendants had not previously sufficiently warned investors of the risks revealed in either the Kerrisdale or Sinclair Reports, Defendants revised their risk disclosures in their first quarterly SEC filing issued after the Reports, *specifically in response to the Reports*. Ex. 2 (12/10/15 form 10-Q, stating "On October 28, 2015, a short-seller report was published [*i.e.*, the Kerrisdale Report] which disagreed with our understanding of the importance of 5G and the NPRM for Straight Path. This viewpoint is considered in our revised Risk Factors." The revised risk factors went on to discuss a number of risks related to the fraudulent renewal of the Licenses and the failure to provide substantial service.).

to dismiss).[32] Thus, even if Defendants *could* cite to more specific risk disclosures – which they cannot – whether those disclosures were sufficiently cautionary as to render all of the misleading statements and omissions alleged immaterial as a matter of law is not properly decided in favor of Defendants at this stage.

(d) Defendants had Actual Knowledge that their Statements Were False or Misleading

Finally, the safe harbor does not protect statements made with actual knowledge that they were false or misleading. *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 285 (3d Cir. 2010) (citing 15 U.S.C. § 78u–5(c)(1)(B)); *Chubb*, 2002 WL 33934282, at *11 (same). "In other words, the safe harbor provision does not afford corporations a free pass to lie to investors." *Veritas*, 2006 WL 1431209, at *7 (citing *In re Advanta Corp. Sec. Litig.*, 180 F.3d 524, 536) (3d Cir. 1999)); *see also Lucent*, 217 F. Supp. 2d at 557 ("a plaintiff can defeat this 'safe harbor' by demonstrating that the statement 'was made with actual knowledge...that...[it] was false or misleading.'").[33]

Plaintiff has alleged facts sufficient to support a finding at this stage that Defendants had actual knowledge that Straight Path was in violation of substantial service requirements, and that as a result the Licenses were subject to termination; their failure to warn of this known risk rendered any forward-looking statements regarding the value of the Licenses false and misleading. *E.g.*, ¶¶136, 277, 285; *see also* Secs. V.B.1-3, *infra* (scienter). Moreover, Defendants – self-proclaimed spectrum

[32] *See also In re PDI Sec. Litig.*, No. 02-CV-0211(JLL), 2005 WL2009892, at *14 (D.N.J. Aug. 17, 2005) (after recounting numerous specific risk disclosures, the court nonetheless declined to dismiss pursuant to safe harbor, holding "it is not so clear to this Court [whether] the cited cautionary language renders all of the statements immaterial as a matter of law.").

[33] *See also Frater*, 996 F. Supp. 2d at 348 (refusing to dismiss based on safe harbor and stating "[i]n any event, the safe harbor provision does not apply to statements made with actual knowledge of falsity, *Avaya*, 564 F.3d at 254, which remains a distinct possibility in this case."); *cf Marsden*, 2006 WL 891445, at *7 (no safe harbor for omission of "'present facts'-facts known at the time the statement was made."); *In re SeeBeyond Techs. Corp. Sec. Litig.*, 266 F. Supp. 2d 1150, 1165-66 (C.D. Cal. 2003) (cautionary language is not "*meaningful*" if "the forward-looking statement is made with actual knowledge that it is false or misleading….").

and telecom experts – knew and failed to disclose numerous complications and limitations that presented a serious bar to 5G entry. *E.g.*, ¶¶32, 41, 45-52. The safe harbor cannot save Defendants from their knowing omissions of such material risks in this case.

4. Defendants' Statements Cannot Be Dismissed as Mere Puffery

As explained in Sec. III.D, *supra*, Defendants presented 5G as the key to the Company's value; these statements surely were important to investors and cannot be dismissed as mere puffery. *Aetna*, 617 F.3d at 283-84 (holding that a statement can be dismissed as puffery *only* if it is so *obviously unimportant* to reasonable investors that it can be deemed immaterial as a matter of law, and affirming dismissal of statements regarding "disciplined" pricing because they were too vague to be material). Unlike the vague statements about "discipline" in *Aetna*, Defendants presented purportedly detailed support for their 5G strategy and perceived 5G value. *E.g.*, ¶229.[34] By Defendants' own design and admission, their statements regarding the use of the Licenses in 5G mobility underpinned the entire perceived value of the Company by the market. *E.g.*, ¶¶4, 185, 196, 223, 225; Ex. 1 (showing Defendants' focus was on 5G mobility and making sure investors "understand[] the compelling story about 5G and mobility"). These statements were not immaterial.

B. The Complaint Raises a Strong Inference of Scienter

Scienter is sufficiently alleged in the Third Circuit when a complaint's allegations give rise to a strong inference of "either reckless or conscious behavior." *See Advanta*, 180 F.3d at 534-35.

[34] Despite the purported detail Defendants provided in support of their 5G plans, these statements were nonetheless misleading because they omitted material information (*see* Sec. V.A.1, *supra*). Moreover, as the Supreme Court recently held in *Omnicare*, an opinion is actionable, regardless of the speaker's subjective belief, if the statement "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion" and the omitted facts show the speaker "lacked the basis for making those statements that a reasonable investor would expect." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1329-30 (2015). Here, for example, Defendants' statements regarding the value of the Licenses in 5G that were prefaced by "we believe" (*e.g.*, ¶¶165, 166, 189, 196, 229), are actionable because they omitted material facts concerning that opinion, to wit, that the Licenses already were subject to termination.

Recklessness encompasses "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Avaya*, 564 F.3d at 280 (quoting *Advanta*, 180 F.3d at 535). Conscious behavior, meanwhile, exists where a plaintiff "specifically allege[s] defendants' knowledge of facts or access to information contradicting their public statements." *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 599 (D.N.J. 2001) (citing *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000)); *see also Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002) ("[T]he fact that the defendants published statements when they knew facts suggesting the statements were inaccurate or misleadingly incomplete is classic evidence of scienter.").

An inference of scienter is "strong" if it is "cogent and compelling" and "*at least as likely as* any plausible opposing [non-culpable] inference." *Tellabs I*, 551 U.S. at 324, 328 (emphasis in original). An inference of scienter need not be *more* likely than any non-culpable inference; in the face of equally compelling inferences, a tie goes to the plaintiff. *Id.* at 324 ("[t]he inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even the 'most plausible of competing inferences.'"). Moreover, scienter can be inferred from "circumstantial evidence." *Burlington*, 114 F.3d at 1418; *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009) (same). On Defendants' Motion, the key inquiry "is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs I*, 551 U.S. at 310.

The Complaint here is replete with facts that, when considered holistically, give rise to a strong inference that Defendants acted with knowledge, or at a minimum, deliberate recklessness when speaking about the Licenses and Straight Path's business prospects during the Class Period. For example, Plaintiff alleges that Defendants knew and recklessly disregarded that: (a) the Licenses were fraudulently renewed; (b) Straight Path provided *no* service, let alone substantial service, as

required by FCC rules; (c) that as a result of the foregoing, the Licenses were subject to termination and forfeiture; and (d) that the Licenses, and supposed underlying network and operations, did not amount to a monopoly on the "premier frequency" to host next generation 5G cellular technology as Defendants claimed. Taken together, these facts support a strong inference of scienter.

1. Defendants Knew or Recklessly Disregarded that the Licenses Were Fraudulently Renewed

In an attempt to distance themselves from the fraud, Defendants argue that scienter fails in this case because the allegedly fraudulent License renewals took place under the watch of IDT, before Straight Path's spin-off from IDT. *E.g.*, Def. Br. at 26-29 (attempting to de-emphasize role of Defendants and emphasize conduct of "prior license holders"). While this is likely what Defendant Jonas had *hoped* when he engineered the Straight Path spin-off, it does not support dismissal for failure to allege scienter.

To be sure, whether or not Jonas or Rand caused or directed the fraudulent renewals is not dispositive of their knowledge or reckless disregard of the same. Plaintiff alleges specific facts indicating that Defendants had "knowledge of facts or access to information"[35] regarding the fraudulent License renewals both by virtue of their previous roles at IDT and in connection with their roles in the Straight Path spin-off. Indeed, the Individual Defendants – both former IDT executives (¶¶23-24) – are neither strangers to IDT nor to the Licenses prior to their transfer to Straight Path. Defendant Jonas, who became Straight Path's CEO in April 2013, served as the manager of the Company (known as Straight Path Spectrum) when it was still a subsidiary of IDT at least as early as August 2012 (*i.e.*, shortly after the last of the fraudulent renewals were filed in June 2012), and also served as a V.P. of Business Development and various other roles in IDT prior to August 2012. ¶23.[36] Moreover, Defendant Jonas presents himself as a major player who spearheaded

[35] *Campbell Soup*, 145 F. Supp. 2d at 599.

[36] IDT and Straight Path are tightly-knit Jonas family companies. Defendant Jonas is the son of Howard Jonas – IDT's founder, controlling stockholder, Chairman, and CEO from October 2009 to

IDT's corporate strategy regarding the Licenses and the engineer of the Straight Path spin-off. ¶245 ("Mr. Jonas implemented a strategic plan, directed all aspects of the creation and spinoff of Straight Path Communications, and managed the day-to-day operations of the spectrum and I.P. divisions."). Straight Path's November 26, 2013 Proxy Statement similarly emphasized Jonas's familiarity with the actions that IDT had taken with respect to the Licenses. ¶243 ("Mr. Jonas is very familiar with the operations included within [Straight Path] and its subsidiaries, as well as IDT's previous efforts to generate value from the related assets."). Whereas Jonas was "very familiar with" IDT's efforts to generate value from the Licenses, and also engineered the transfer of the Licenses to Straight Path, his scienter is adequately alleged. *See, e.g.*, *In re Tronox, Inc. Sec. Litig.*, No. 09 CIV. 6220 (SAS), 2010 WL 2835545, at *1, *2, *10 (S.D.N.Y. June 28, 2010) (scienter satisfied for executives of spun-off company where plaintiff "allege[d] that these defendants played a role in a specific set of transactions that would have made them aware of, or given them access to, information contradicting their public statements.").

Furthermore, even cursory due diligence[37] performed by Jonas as CEO or Rand as CFO of the newly-formed Company in connection with the spin-off would have revealed that no actual operations or services were being provided pursuant to the Licenses, that no equipment existed at the License locations, and that IDT had valued the Licenses at $0. *See* ¶83, 93-94.[38] Neither Jonas – the

December 2013. ¶247. Defendant Jonas's brother, Samuel (Shmuel) Jonas, serves as the current IDT CEO (¶79), and Howard Jonas has effectively retained control of the vast majority (approximately 72%) of Straight Path's aggregate voting power. *See* ¶¶247-48.

[37] As they were required to do. *See, e.g.*, *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 459, 496 (S.D.N.Y. 2005) ("In order to sign the SEC filing documents, [CEO and CFO] had a "duty to familiarize themselves with the facts relevant to the core operations of [the company]"); *In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F. Supp. 2d 474, 491 (S.D.N.Y. 2004) ("As signatories to the SEC filings…each individual defendant who served as a high-level officer had a duty to familiarize himself with the facts relevant to the core operations of the company…. The individual defendants were not entitled to make statements concerning the company[]…and ignore reasonably available data that would have indicated that those statements were materially false or misleading.").

[38] Prior to the transfer to Straight Path, IDT Spectrum had written down the value of the Licenses to $0 – strongly suggesting that IDT had never actually constructed the Licenses, as an actual build-out

manager of Straight Path Spectrum when it was a subsidiary of IDT, the engineer of the Straight Path spin-off, and the new Straight Path CEO, nor Rand – the newly-formed Company's CFO, can reasonably claim ignorance of these facts. The most compelling inference – and, seemingly, the only logical inference – from just these few allegations, is that the Individual Defendants knew that there was no construction or installation of equipment capable of providing substantial service pursuant to the Licenses, yet Substantial Service Notifications were filed to secure renewal anyway. *See, e.g.*, *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1235 (N.D. Okla. 2003) (scienter alleged where the company's problems "were so large, pervasive and fundamental, that their existence must have been known" to defendant because he was the Chairman of subsidiary at issue prior to its spin-off and was also responsible for the spin-off of the subsidiary); *cf. In re Marsh & Mclennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 483 (S.D.N.Y. 2006) (allegations of parent company's awareness of subsidiary's "operations and ultimately, its misconduct," as well as pervasiveness of the fraud, established scienter of executives with respect to subsidiary's misconduct).

In sum, the utter lack of existence of any equipment, operations, or value would have revealed that the Licenses were not legitimately renewed, were not providing substantial service, and were subject to termination. Defendants' knowing or reckless disregard of these central facts is sufficient to establish their scienter even as related to "pre-spin-off" facts.

2. Defendants Furthered the Fraudulent Scheme In Effecting the Spin-Off and Continuing to Warehouse Spectrum In Violation of FCC Rules

Defendants' scienter is further evidenced in their actions in engineering the spin-off and transfer of the Licenses to Straight Path, thereby furthering the fraud born out of IDT. *See In re Able Labs. Sec. Litig.*, No. 05-2681JAG, 2008 WL 1967509, at *19 (D.N.J. Mar. 24, 2008). Notably, the

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of such would have retained some value in at least the equipment. ¶¶83, 93-94. IDT stated in its Form 8-K filed on November 4, 2009 that it "did not expect to be able to invest adequate cash in [the licenses] in the near term." Moreover, IDT did not report any construction expenses relating to any build-out, nor any leasing expenses that would indicate a lease to place spectrum equipment on third-party property, at any point between 2001 and 2012. ¶¶93-94, 97.

court in *Able Labs* held that liability is not limited "solely to architects or masterminds of a scheme to defraud." *Id.* at *21. In rejecting the defendant's argument that he was not the "architect" or "mastermind" of the scheme to defraud, the court found that allegations including "complicity…[in] conceal[ing] adverse quality control results from the FDA" were sufficient to allege "a manipulative act or deceptive conduct" to allege scienter. *Id.* at *20-*22.

Similarly, here, Defendants cannot escape liability because they may or may not have been the original architects of the scheme to fraudulently renew the Licenses. While Defendants may not have masterminded the fraudulent renewals, they surely were complicit in and furthered the fraud. Defendant Jonas, familiar with IDT's previous failed efforts to generate value from the Licenses, engineered the spin-off, purportedly distancing Straight Path from the acts of IDT. The scheme was furthered still by both Jonas and Rand during the Class Period, as they continued to operate as though the License renewals and year 2020 expiration dates were valid, all the while concealing that substantial service requirements were not met and the Licenses were subject to termination.[39]

As Defendants knew, FCC rules required Straight Path to continue to provide substantial service under its Licenses, or risk termination and forfeiture. ¶73. By continuing to violate substantial service requirements, and by concealing the same from the FCC (*see* ¶¶73, 76-77), Jonas and Rand were complicit in and furthered the deceptive scheme to fraudulently renew and warehouse the spectrum covered by the Licenses until such time as it might become highly profitable. Indeed, Jonas and Rand concealed Straight Path's failure to provide substantial service throughout the Class Period from both the FCC and investors. *See, e.g.*, n.13.

[39] The Complaint is not only replete with facts alleging that Straight Path's network was largely a sham throughout the Class Period (¶¶118-136), Defendants have recently been forced to admit as much as a result of the Sinclair Report. Exs. 3, 4.

3. At All Times During the Class Period, Defendants Knew that the Networks Supposedly Underlying Straight Path's Licenses Were Non-Existent, that Straight Path Did Not Provide Substantial Service, and that the Licenses Were Subject to Termination and Forfeiture

Even if Defendants truly were unaware of the fraudulent renewal of the Licenses – a benefit of the doubt to which they are not entitled on this Motion – they cannot escape knowledge of the fact that Straight Path *provided no services*, let alone substantial service, pursuant to the Licenses at any point during the Class Period. They cannot escape the fact that there is no evidence of any operable *equipment having existed at any of the License locations at any point during Straight Path's corporate existence*.[40] When viewing Defendants' statements regarding Straight Path's spectrum business against this unavoidable backdrop, a strong inference of scienter is alleged. *See, e.g.*, *Avaya*, 564 F.3d at 269 ("[T]he most powerful evidence of scienter is the content and context of [the] statements themselves."). Indeed, where, as here, high-level executive officers make statements contradicted by available facts, an inference arises that they "had intimate knowledge of those facts or should have known them." *See Atlas*, 324 F. Supp. 2d at 489; *Able Labs.*, 2008 WL 1967509, at *15 (defendants were reckless in not knowing of problems in company's manufacturing process in violation of FDA rules – defendants "departed from the standards of ordinary care by, among other things, not adequately investigating or following up" on significant red flag warnings).

Defendants' utter disregard for the Company's actual provision of services, in combination

[40] While claiming (without explanation) in recent SEC filings that equipment was somehow removed without their knowledge, Defendants cannot escape that Straight Path seems to have provided no service during the Class Period. Tellingly, in their Motion, Defendants do not even attempt to argue that substantial service was actually provided at any point during Straight Path's corporate existence. Indeed, contrary to Defendants' recent opaque suggestions (Exs. 3-4), all signs indicate that no equipment existed at the purported License locations *at any point* during Straight Path's existence. ¶¶86, 92-94, 97, 100-01, 104, 132-36, 149-54. For example, Plaintiff's investigation confirms that IDT did not construct the Licenses, nor is there any record of any subsequent equipment investment made by Straight Path. ¶¶83, 92-95, 97, 100-01, 104-06, 132-33. Moreover, Straight Path's direct revenue costs, which included connectivity costs, was $0 in the Company's 2015 annual report. ¶133. In the same year, Straight Path reported only a $600 monthly leasing cost to place equipment on a single roof. ¶¶134-35. Despite Defendants' suggestions that equipment had been in place and removed without their knowledge, there is not a scintilla of evidence in support of such a conclusion.

with Jonas's role as a "'key participant in the development of the mid and long term strategies and plans for [Straight Path Spectrum]'" and Rand's "'contributions to the Company's operations, particularly the developments at Straight Path Spectrum, [and] the plans for the development of the short, mid and long-term strategies for that business'" (¶253), are sufficient to allege scienter in this case. At a *minimum*, the Individual Defendants were "reckless with respect to maintaining [substantial service requirements], or with respect to not being aware of the existing problems" throughout the Class Period. *Able Labs.*, 2008 WL 1967509, at *16-*17.

Defendants further knew that under FCC regulations, the Licenses were subject to termination if operations were permanently discontinued[41] or if equipment was removed.[42] ¶¶66-69, 73, 77; *see also* n.6, *supra*. During the Class Period, Defendants openly discussed the FCC's substantial service requirements and explained that failure to meet these requirements would subject the Licenses to termination (¶¶71, 158), demonstrating Defendants' knowledge both of what is required to meet the FCC's substantial service requirements, and the drastic implications should Straight Path fail to comply. As discussed above, throughout the Class Period, Defendants failed to provide substantial service, all the while touting Straight Path's compliance with FCC regulations and a 2020 expiration date for most of the Licenses. ¶¶161; 175; 199. These facts further support a strong inference of scienter in this case. *See Reese v. Malone*, 747 F.3d 557, 580 (9th Cir. 2014) (the magnitude of the violation and contemporaneous evidence of management's awareness of the company's non-compliance made it "absurd" to suggest that management was not aware).

[41] 47 C.F.R. §§ 1.955(a)(3) ("authorizations automatically terminate, without specific Commission act, if service is permanently discontinued") & 101.65(b) (defining "permanently discontinued" as "any station which has not operated for one year or more").

[42] 47 C.F.R. § 101.65(a) ("a license will be automatically forfeited in whole or in part without further notice to the licensee upon the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more").

4. Defendants Consciously Misrepresented Straight Path's Licenses as Offering the Premier Frequency for 5G Mobile Communications

Defendants' statements regarding Straight Path's supposed unique ability to host 5G cellular technology due to, *inter alia*, the Company's "breadth and depth of coverage" (¶165; *see* Sec. III.D, *supra*), were similarly made with the knowledge as to the misleading nature of these statements.

First, Defendants knew that Straight Path's supposed "breadth and depth of coverage" in the 39 GHz band was not as monopolistic as presented. *E.g.*, ¶116 (claiming to "cover every market in the country and own about 96% of the licenses."). In fact, Straight Path's 39 GHz licenses did not provide contiguous coverage, did not constitute 96% of the available licenses, and many of the licenses in the 39 GHz band had been abandoned, including by IDT. *See* ¶51 (Defendants' request that the "FCC approve a pre-auction spectrum exchange program" so that Straight Path could attempt to create contiguous coverage for more attractive 5G service contradicts claim of "contiguous blocks" of service covering "every inch" of the country); ¶137 (revealing that Straight Path's "828 39GHz licenses comprise just 34% of the total 2,450 licenses that were up for bid at the FCC's 2000 auction" and "these unused licenses will ultimately be reauctioned to the public").

Second, Defendants purposely omitted the significant technological advances and investment that would be required to make utilization of mmWave bands for 5G use commercially viable. *See Meyer v. Jinkosolar Holdings Co., Ltd.*, 761 F.3d 245, 250 (2d Cir. 2014); *ViroPharma*, 21 F. Supp. 3d at 472. The Complaint alleges numerous facts that Defendants knowingly disregarded in their consistent touting of the future hosting of 5G mobile as the main value and key to Straight Path's growth and success, including: (1) the FCC had traditionally allocated spectrum bands much lower than 39 GHz for mobile use (¶¶49, 51, 54); (2) the 39GHz frequency suffered from severe propagation limitations, including, high susceptibility to object and weather interference (*i.e.*, interference from rain and fog, inability to pass through buildings), posing severe challenges to the operation of 5G mobility (¶¶32, 41, 49, 51, 54); and (3) actual trials of 5G mobile technology had

not actually used 39GHz frequency (¶137). Considering these crucial facts relating to 5G mobile technology, the most plausible inference is that Defendants knew these hindrances, but touted Straight Path's "unique ability to host" 5G mobility anyway. *See Atlas Air*, 324 F. Supp. 2d at 489-91 (where "a plaintiff can plead that a defendant made false or misleading statements when contradictory facts of critical importance to the company either were apparent, or should have been apparent, an inference arises that high-level officers and directors had knowledge of those facts by virtue of their positions with the company") (citing *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989)). Indeed, in a seven-person company, it is inconceivable that the Chief Technology Officer Jerry Pi, who Jonas described as "the leader in 5G" did not understand the impediments to 5G mobile technology, and communicate these risks to Defendants. ¶¶185, 191.

Finally, Defendants' immediate rebuttal of the Kerrisdale Report's discussion of the various 5G risks and limitations that Defendants had previously failed to disclose further supports an inference of scienter. *See* Sec. III.F, *supra*. Affirmative steps taken by Defendants to discredit specific public criticisms weigh in favor of finding scienter. *See Matrixx*, 563 U.S. at 49 & n.15 (describing the misleading press release as the "[m]ost significant[ ]" fact in favor of a finding of scienter); *see also Avaya*, 564 F.3d at 270 (strong inference of scienter alleged where CFO denied "widespread and unusual discounting" in response to analyst questions about pricing).

5. The Core Operations Doctrine Supports a Strong Inference of Scienter

"[U]nder the core operations doctrine, misstatements and omissions made on 'core matters of central importance' to the company and its high-level executives gives rise to an inference of scienter when taken together with additional allegations connecting the executives' positions to their knowledge." *Urban Outfitters*, 103 F. Supp. at 654.[43]

[43] *See also Avaya*, 546 F.3d at 268 (recognizing a "core operations inference" supports scienter when securities fraud alleged related to core matters of central importance to a company); *Campbell Soup*, 145 F. Supp. 2d at 599 ("knowledge may be imputed to individual defendants when the disclosures involve the company's core business.") (collecting cases); *Viropharma*, 21 F. Supp. 3d at 473 ("the

This case presents a textbook application of the core operations doctrine. It is indisputable that the Licenses (and their supposed underlying equipment and networks) were Straight Path's core assets (¶78), that spectrum licensing was the Company's core business (¶238), and that the Company's main value was derived from its potential ability to host 5G mobile networks on its licensed spectrum (¶¶4-6, 171, 225). *See also* n.7, *supra*. Moreover, Straight Path had (at most) only seven employees during the Class Period, with Jonas and Rand, the CEO and CFO, respectively, serving at the senior-most levels. ¶237 (total number of employees grew from three, to six, to seven employees during the Class Period). To infer that the Individual Defendants were without knowledge of the Company's core assets, business operations, and focus in a company of such a small size is "absurd." *Reese*, 747 F.3d at 575 (scienter alleged when "the nature of the relevant fact is of such prominence that it would be 'absurd' to suggest that management was without knowledge of the matter."); *see also Patel v. Axesstel, Inc.*, No. 3:14-CV-1037-CAB-BGS, 2015 WL 631525, at *11 (S.D. Cal. Feb. 13, 2015) ("[I]t would be absurd to think that the CEO and CFO of a company with just thirty-five employees…would be unaware of the lack of written agreements or definitive payment terms…that represented the company's first sales of a significant new product that constituted between twenty and forty percent of…overall revenue").

6. Evasive Responses to Analyst Questions Demonstrate Scienter

Jonas and Rand's artful dodging of analyst questions concerning Straight Path's actual operations, and their continued omissions of material risks when answering questions relating to the

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fact that sales of Vancocin comprised ViroPharma's 'core business,' also supports the inference that Defendants either knew or should have been aware of the issues concerning the drug's approval."); *Shenk v. Karmazin*, 867 F. Supp. 2d 379, 387 (S.D.N.Y. 2011) (scienter pled where defendants made "or failed to correct[] statements that contradicted reasonably available data and that concerned major transactions or touched upon the heart of their companies' business.").

Defendants cite cases that question the applicability of the "core operations" doctrine ***on a standalone basis***. Def. Br. at 27-28. As explained throughout, that spectrum operations constituted Straight Path's core business is just one of many allegations raising a strong inference of scienter.

Company's ability to host 5G mobile, is further evidence of scienter. *See, e.g.*, *Urban Outfitters*, 103 F. Supp. 3d at 653 ("maybe the most powerful evidence of scienter is the content and context" of defendants' statements "in response to analyst questions" which omitted contradicting circumstances and "'present[ed] an obvious risk of misleading investors.'") (quoting *Avaya*, 564 F.3d at 270).[44]

When asked point blank by an analyst about the number of links Straight Path had in the field, as well as a request to "give a sort of a qualitative assessment of how you think they're working," Defendant Jonas dodged both questions – insisting that the Company could not disclose the actual number of links constructed because, in essence, it was too complicated to determine, and completely ignoring the "qualitative assessment" portion of the question. ¶183. Of course, Jonas could not provide the number of communications links in operation because that would have exposed the entire corporate artifice. Nor could he provide a qualitative assessment of how the License networks were working because *they were not working.* Jonas's refusal to answer these simple questions, and his supposed explanation as to why, provides powerful evidence of his scienter. He not only displays a seemingly thorough knowledge of the subject, but his "omission of actual circumstances" (*i.e.*, that the Licenses were never constructed and/or were not then in operation) "were contrary to [his] answers" thus "present[ing] 'an obvious risk of misleading investors.'" *Urban Outfitters*, 103 F. Supp. 3d at 653.[45]

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[44] *See also In re St. Jude Med., Inc. Sec. Litig.*, 836 F. Supp. 2d 878, 888 (D. Minn. 2011) (scienter alleged where "[m]any of the statements at issue were provided in direct response to questions from financial analysts at conferences held expressly to discuss [the company's] earnings and guidance"); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 597-98 (7th Cir. 2006) (statements to analysts "went well beyond puffery: it was a direct response to an analyst's inquiry about a possible decline" in sales), *vacated in part on other grounds*, 551 U.S. 308 (2007) (scienter standard); *Shankar v. Imperva, Inc.*, No. 14-CV-1680-PJH, 2016 WL 2851859, *8 (N.D. Cal. May 16, 2016) (misleading answers to analyst questions concerning Imperva's performance against its primary competitor were made with scienter because it "goes to the heart of Imperva's business").

[45] Defendants continued to refuse to respond to similar questions after the end of the Class Period. *See, e.g.*, ¶¶147, 153, 155 (refusal to take any questions after the release of the Sinclair Report).

During Class Period earnings calls, Defendants similarly skirted analysts' questions regarding the ability of Straight Path's spectrum holdings to host next generation 5G cellular technology, overstated the Company's coverage and supposed 39 GHz monopoly, and misrepresented the Licenses' utility and ability to actually host 5G cellular technology, while indicating to investors and analysts their apparent knowledge concerning these matters. ¶¶216-17; 235-36. These evasive and misleading responses to analyst questions are indicative of scienter.

7. The Individual Defendants' SOX Certifications Support Scienter

Defendants argue that Sarbanes-Oxley ("SOX") certifications are boilerplate and add noting to the calculus. Def. Br. at 33. However, SOX certifications are meant to ensure corporate executives thoroughly review the information reported in SEC filings so as to present a fair picture of the company. *Roseville*, 686 F. Supp. 2d at 419-20 ("the SEC interprets 'fair presentation' of financials to include 'any additional disclosure necessary to provide investors with a materially accurate and complete picture of an issuer's financial condition.'"). Thus, SOX certifications of financial statements that contain false or misleading information are indicia of scienter. *Urban Outfitters*, 103 F. Supp. 3d at 653 (SOX certifications "can be probative of scienter when in conjunction with other evidence of recklessness."); *see also* n.37, *supra*.

In signing SOX certifications here,[46] Jonas and Rand knew of and recklessly disregarded Straight Path's lack of operations and the related risks of termination, and ignored numerous red flags and risks regarding 5G viability – two areas that should have been disclosed in accordance with SOX requirements to present a fair picture of the Company. In omitting the barriers to 5G entry and the potential for License termination, Defendants "did not fairly present a complete picture of [Straight Path's] financial condition." *Roseville*, 686 F. Supp. 2d at 419-20. Their failure to do so in contravention of their corporate duty is indicative of scienter.

[46] ¶¶157, 160, 163-64, 169-70, 177-78, 187-88, 201-02, 209-10, 218-19, 227-28 (SOX certifications).

8. Jonas and Rand's Motive Support a Strong Inference of Scienter

Unusual stock sales – *i.e.*, those that are substantial in comparison to the "seller's ordinary compensation" (*Suprema*, 438 F.3d at 277) – can contribute to a strong inference of scienter. *Avaya*, 564 F.3d at 279.[47] Jonas's Class Period stock sales yielded net proceeds of almost $540,000. ¶249. When compared to his average salary, his stock sales are both substantial and unusual. Moreover, both Jonas and Rand's compensation rose dramatically during the Class Period. From 2013 to 2015 Jonas's salary grew from $99,115 to $325,000, whereas Rand's salary likewise grew from $20,192 in 2013 to $250,000 in 2015. ¶¶252-54. While not dispositive, together with all of the other indicia of scienter explained above, the Individual Defendants' desire to increase their compensation is further indicative of motive and scienter. *See In re Honeywell Int'l*, 182 F. Supp. 2d at 427.

9. Defendants Do Not Provide a *More* Compelling Non-Culpable Inference

Aside from feigning ignorance, Defendants do not even attempt to offer a plausible inference of non-culpable conduct, let alone a non-culpable inference that is *more* compelling than Plaintiffs' allegations of conscious and reckless behavior. *See* Def. Br. at 27-33. Nor can they; all of the facts recounted above, when taken together and viewed holistically as required under the Supreme Court's holding in *Tellabs*, give rise to a very strong inference of scienter. As the Seventh Circuit observed on remand in *Tellabs II*:

> at the top of the corporate pyramid sat Notebaert, the CEO. The 5500 and the 6500 were his company's key products. Almost all the false statements that we quoted emanated directly from him. Is it conceivable that he was unaware of the problems of his company's two major products and merely repeating lies fed to him by other executives of the company? It is conceivable, yes, but it is exceedingly unlikely.

Tellabs II, 513 F.3d at 711.

[47] *See also Urban Outfitters*, 103 F. Supp. 3d at 654 at n.5 (stock sales that are double the amount of average compensation are unusual); *In re Honeywell Int'l Inc. Sec. Litig.*, 182 F. Supp. 2d 414, 427 (D.N.J. 2002) ("[t]hese are factors that may be considered in determining if scienter has been adequately pled"); *Tellabs I*, 551 U.S. at 325 (motive is relevant, though not required, for scienter).

C. The Complaint Adequately Alleges Loss Causation

"Loss causation is a causal connection between the material misrepresentation or omission and the loss suffered." *Urban Outfitters*, 103 F. Supp. 3d at 655. Loss causation is not subject to any heightened pleading requirements; rather, pursuant to Rule 8(a), all that is required is that plaintiff provide "some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 348 (2005); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 180 n.24 (3d Cir. 2001) ("to establish loss causation, a claim must demonstrate that the fraudulent conduct proximately caused or substantially contributed to causing plaintiff's economic loss.").[48] "Third Circuit precedent instructs that loss causation is a fact intensive inquiry which is best resolved by the trier of fact." *In re Wilmington Trust Sec. Litig.*, 29 F. Supp. 3d 432, 450 (D. Del. 2014) (citing *EP Medsys.*, 235 F.3d at 884).

The Complaint alleges two dates – October 29, 2015 and November 5, 2015 – in which the Defendants' misleading statements and undisclosed risks were revealed and, as a result, Straight Path's stock price plummeted.[49] These allegations provide Defendants with ample notice of "a causal connection between the material misrepresentation and the loss." *Dura*, 544 U.S. at 342.

On October 29, 2015, the Kerrisdale Report revealed that Defendants' claims of contiguous coverage over the United States were misleading and overstated, and disclosed serious limitations to Straight Path's supposed invaluable future in 5G. ¶¶8, 9, 32, 51, 137, 257; *see also* Secs. III.E & V.A.2(b), *supra*. In response to this news, the Company's shares fell $18.23 per share, from $47.58 to close at $29.35 per share on October 29, 2015 (a drop of over 38%). ¶¶9, 138. Then on November

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[48] *See also In re Heckmann Corp. Sec. Litig.*, 869 F. Supp. 2d 519, 541 (D. Del. 2012) ("plaintiff must establish economic loss and proximate causation under the requirements of Rule 8(a) to state a claim under § 10(b).").

[49] "[T]he exposure of the alleged fraud need not occur in a single, all-encompassing corrective disclosure; instead, the truth can be revealed through a series of partial corrective disclosures." *Urban Outfitters*, 103 F. Supp. 3d at 655-56.

5, 2015, the Sinclair Report revealed that Straight Path's License renewals were "obtained under fraudulent misrepresentation[s]" to the FCC and that "the systems were never built on the sites as specified in the filings." ¶¶10, 139. Straight Path's stock price plummeted almost 52% on this disclosure, falling $13.70 per share, from $26.51 to close at $12.81 per share on November 5, 2015. These allegations sufficiently plead loss causation. *In re Cigna Corp. Sec. Litig.*, 459 F. Supp. 2d 338, 349 (E.D. Pa. 2006) (citing *Semerenko*, 223 F.3d at 185).

Apparently arguing that the corrective disclosures must mirror the false statements made during the Class Period, Defendants claim that the disclosures did not actually "reveal[] the truth that had been hidden by Defendants' alleged misstatement." Def. Br. at 33; *see also id.* at 34-35. Defendants' argument misstates both the facts alleged and the standard for pleading loss causation in the Third Circuit. *See Urban Outfitters.*, 103 F. Supp. 3d at 655 ("Although a corrective disclosure must be related to the same subject as the misrepresentation, and not some other adverse facts about the company, there is no requirement that the disclosure mirror the earlier misrepresentation."). As the court in *Freudenberg*, 712 F. Supp. 2d at 202, observed:

> neither the Supreme Court in *Dura*, nor any other court addressing the loss causation pleading standard requires a corrective disclosure be a "mirror image" tantamount to a confession of fraud. Because corporate wrongdoers rarely admit that they committed fraud, "it cannot ordinarily be said that a drop in the value of a security is "caused" by the misstatements or omissions made about it, as opposed to the underlying circumstance that is concealed or misstated." Thus, the "relevant truth" required under *Dura* is not that a fraud was committed per se, but that the "truth" about the company's underlying condition, when revealed, causes the "economic loss."

Defendants also rehash their truth-on-the-market defense in challenging loss causation, claiming that the Kerrisdale and Sinclair Reports are "mere repackaging of already-public information" that cannot support loss causation. Def. Br. at 33, 35. As with the materiality inquiry, that the information cited in the Kerrisdale and Sinclair Reports may have been publically *available* does not equate to "'facts already [being] in the market'" to defeat loss causation. *Id.* at 35 (citing *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 551-52 (S.D.N.Y. 2008)); *see* Secs. V.A.2(a)

& (b), *supra*. As explained in detail above, after extensive research, the Kerrisdale and Sinclair Reports revealed previously omitted, material information to the market for the first time. For the same reasons that Defendants cannot rely on the truth-on-the-market defense to defeat falsity, they cannot contend that the facts revealed in the Kerrisdale and Sinclair Reports were already in the market to negate loss causation.

Moreover, courts in this Circuit have specifically held that the market may learn the truth regarding a defendant's misrepresentation from analysts questioning financial results. *Urban Outfitters*, 103 F. Supp. 3d at 656 (citing cases), *W. Palm Beach Police Pension Fund v. DFC Global Corp.*, No. 13-6731, 2015 WL 3755218, at *17 (E.D. Pa. June 16, 2015) (holding same). The Kerrisdale and Sinclair Reports are no different than any other analyst report questioning financial results. While Defendants attempt to throw a loss causation Hail Mary suggesting that a short seller report can never constitute a corrective disclosure (Def. Br. at 36-38), this argument has been soundly rejected. "To be sure, a short seller's report can constitute a corrective disclosure if the report reveals accurate information about a company that exposes actual misstatements by the company." *Harris v. AmTrust Fin. Servs., Inc.*, 135 F. Supp. 3d 155, 177 n.30 (S.D.N.Y. 2015) (citing *In re Winstar Commc'ns*, No. 01-CV-3014(GBD), 2006 WL 473885, at *12-*15 (S.D.N.Y. Feb. 27, 2006)).[50] Thus, the court in *Winstar* swiftly rejected the defendant's argument that alleged disclosures in reports from a notorious short-seller "simply constitute[d] a third party's opinions and speculation regarding facts already publically available[,]" and thus could not have proximately caused investors' losses. 2006 WL 473885, at *12, *14. As the court explained, "[a]llegations that

[50] While in *Harris* the short seller report "did not 'correct' public knowledge about the company" and did not alter the company's practices (135 F. Supp. 3d at 177 n. 30), by stark contrast here, not only did the Reports expose material omissions by Defendants and cause them to revise their risk warnings (*see* Ex. 2), the Sinclair Report was the impetus of Straight Path's purported investigation into its License equipment, with Defendants ultimately admitting that they had no idea where the equipment was. *See* § III.G, *supra*; ¶¶148-51.

the market reacted negatively to an opinion or speculation which in fact exposes the falsity of defendants' representations can be sufficient to plead loss causation." *Id.* at *14.[51]

D. The Complaint Adequately Alleges Control Person Liability

To state a claim under § 20(a), Plaintiff must allege (1) an underlying violation of § 10(b), and (2) that the defendants controlled the person or entity that committed the underlying violation. *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 142 F. Supp. 2d 589, 623 (D.N.J. 2001). Contrary to Defendants' argument (Def. Br. at 39-40), "the overwhelming trend in this circuit" is that "culpable participation does not have to be pled in order to survive a motion to dismiss." *Dudley v. Haub*, No. 2:11-CV-05196 (WJM), 2013 WL 1845519, at *21 (D.N.J. Apr. 30, 2013) (citing cases).[52]

As set forth above, the Complaint alleges a primary violation of § 10(b). Moreover, the Complaint alleges that each Individual Defendant was a control person. For example, each of the Individual Defendants was and is a high level officer of the Company (¶237). *See Able Labs.*, 2008 WL 1967509, at *28-*29 (that defendants were officers supported a §20(a) claim). Further, each of the Individual Defendants signed one or more of Straight Path's public filings during the Class Period, thereby "accepting responsibility for its contents." *Steamfitters Local 499 Pension Fund v. Alter*, No. 09-4730, 2011 WL 4528385, at *9 (E.D. Pa. Sept. 30, 2011) ("Courts assume that corporate officers have read the SEC filings they sign, and in signing attest to their accuracy and accept responsibility for the contents."). This is sufficient to place Individual Defendants within the meaning of "controlling persons" under Section 20(a). *Able Labs.*, 2008 WL 1967509, at *28 ("[A]ll

[51] *See also Snellink v. Gulf Res., Inc.*, 870 F. Supp. 2d 930, 942 (C.D. Cal. 2012) (in rejecting a truth-on-the-market loss causation defense, court found that a short seller report revealed the fraud).

[52] *See also Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1013 (D.N.J. 1996) (plaintiff "need only plead circumstances establishing control because: (1) the facts establishing culpable participation can only be expected to emerge after discovery; and (2) virtually all of the remaining evidence, should it exist, is usually within the defendants' control"); *Dutton v. Harris Stratex Networks Inc.*, 270 F.R.D. 171, 181 (D. Del. 2010) (same). Even though culpable participation is not required, however, the Complaint does adequately allege that each Individual Defendant culpably participated in the fraud. *Dudley*, 2013 WL 1845519, at *21, n.5.

that is required in order to survive a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), is an allegation, not proof, that these individuals were controlling persons.").

VI. CONCLUSION

The Court should deny Defendants' Motion in its entirety. Alternatively, if the Court grants any portion of the Motion, Plaintiffs respectfully request leave to amend.

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Respectfully submitted,

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