UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-61542-CIV-UNGARO

IN RE BANKATLANTIC BANCORP, INC.
SECURITIES LITIGATION
_____/

ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR NEW TRIAL

THIS CAUSE is before the Court upon Defendants' Motion for Judgment as a Matter of Law and Defendants' Motion for New Trial. (D.E. 666 & 669.) Plaintiffs filed Responses in Opposition to both Motions, and Defendants filed Replies in Support of both Motions. (D.E. 674–75, 677 & 679.) Both Motions are ripe for disposition.

THE COURT has considered the Motions and the pertinent portions of the record and is otherwise fully advised in the premises.

AS SET FORTH BELOW, the Court will GRANT Defendants' Motion for Judgment as a Matter of Law and will CONDITIONALLY DENY Defendants' Motion for New Trial. Defendants are entitled to judgment in their favor as to all of Plaintiffs' claims.

I. Procedural Background

Plaintiffs are the class of individuals who purchased the common stock of Defendant BankAtlantic Bancorp, Inc. (Bancorp) between November 9, 2005 and October 25, 2007 (the Class).[1]

Bancorp is the publicly traded parent company of BankAtlantic, a federally chartered bank offering consumer and commercial banking and lending services throughout Florida. The remaining Defendants are current and former officers and directors of Bancorp: (1) James A. White, the former Executive Vice President and Chief Financial Officer (CFO) of Bancorp and former CFO of BankAtlantic; (2) John E. Abdo, the Vice-Chairman of the Board of Directors for Bancorp and BankAtlantic; (3) Valerie C. Toalson, CFO of Bancorp and Executive Vice President and CFO of BankAtlantic; (4) Jarett Levan, the President of BankAtlantic, and from January 16, 2007, the President of Bancorp and the Chief Executive Officer (CEO) of BankAtlantic; and,

[1] On February 4, 2008, the Court appointed State-Boston Retirement System as the Lead Plaintiff. (D.E. 45.) State-Boston is an institutional investor claiming to have purchased shares in Bancorp during the class period and to have suffered over $1.8 million in losses. (D.E. 45.) On October 19, 2009, the Court named State-Boston and Erie County Employees Retirement System as Co-Class Representatives. (D.E. 153.)

(5) Alan Levan, the former Chairman of the Board and CEO of Bancorp and former Chairman of the Board and President and CEO of BankAtlantic.

Plaintiffs contend that Defendants misrepresented and concealed the true quality and consequent value of certain assets in BankAtlantic's loan portfolio in violation of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. § 78a *et seq.*, and caused Plaintiffs to suffer a loss when the truth was revealed.

A. ***Pleadings & Class Certification***

Plaintiffs filed their initial Complaint on October 29, 2007 and their Consolidated Amended Complaint on April 22, 2008. On December 12, 2008, the Court dismissed the Consolidated Amended Complaint without prejudice pursuant to Defendants' motion and Federal Rules of Civil Procedure 9(b) and 12(b)(6). On January 12, 2009, Plaintiffs filed their First Amended Consolidated Complaint. And on May 12, 2009, the Court denied Defendants' motion to dismiss the First Amended Consolidated Complaint.

In the First Amended Consolidated Complaint, Plaintiffs sought damages under §§ 10(b), 20(a), and 20A of the Exchange Act, 15 U.S.C.

§§ 78j(b), 78t(a) & 78t-1. (D.E. 80.)

In Count I, Plaintiffs alleged that, throughout the class period, Defendants knowingly made materially false and misleading statements, in violation of § 10(b) of the Exchange Act as implemented by Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, regarding the value of its loan portfolio. Plaintiffs' Rule 10b-5 claims fell into three broad categories: misrepresentations and non-disclosures of the poor or deteriorating credit quality of BankAtlantic's land loan portfolio; misrepresentations and non-disclosures of its poor underwriting practices; and misrepresentations and non-disclosures of the adequacy of its loan loss reserves and the accuracy of its financial statements. The claims were further divided into two separate periods of damage ending with respective stock-price declines on April 26, 2007 and October 26, 2007.

In Count II, Plaintiffs alleged that the individual Defendants were control persons of Bancorp and as such were liable for its Rule 10b-5 violations under § 20(a) of the Exchange Act. And in Count III, Plaintiffs alleged that Defendants Abdo and Alan Levan profited from the sale of Bancorp stock while in the possession of material, non-public

information in violation of § 20A of the Exchange Act.

On October 20, 2009, after Defendants stated their non-opposition to Plaintiffs' motion to certify, the Court certified the Class.[2] (D.E. 147 & 153.) At that time, the case had been pending for two years, the discovery deadline was May 21, 2010, and trial was scheduled to begin on August 16, 2010. (D.E. 148.)

Nevertheless, on April 22, 2010, nine months after the deadline to amend the pleadings and less than a month before the close of discovery, Plaintiffs moved to amend their complaint. (D.E. 208 & 210.) Plaintiffs offered three reasons for the amendment: shortening the class period to begin on October 19, 2006; discontinuing the insider trading claims under § 20A; and identifying additional public statements which all "relate[d] to Plaintiffs' original theory of liability, *i.e.*, fraudulent misrepresentations regarding the true risk of BankAtlantic's land loan portfolio." (D.E. 210.) The Court denied the motion.

In denying the motion, the Court agreed with Defendants to the

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[2] Defendants later reversed their position and moved to decertify the class at trial. (D.E. 529.) The Court denied the motion. (D.E. 694.)

extent they argued that shortening the class period and abandoning the § 20A claims would unfairly deny them a final adjudication of those issues. Further, the Court was unconvinced the remaining amendments were necessary as Plaintiffs had argued the additional statements were substantively indistinguishable from the claims in the First Amended Consolidated Complaint and offered no authority supporting the proposition that identification of the additional statements was required to state a legally sufficient claim. Moreover, the Court observed that, if required, Federal Rule of Civil Procedure 15(b) would allow for amendment of the pleadings at trial to conform to the evidence; in that regard, the Court stated "Defendants have been put on notice of these additional misstatements and omissions." (D.E. 242.) Accordingly, the case proceeded on the First Amended Consolidated Complaint.

B. ***Motions for Summary Judgment & to Exclude Expert Testimony***

In June 2010, the parties filed cross-motions for summary judgment. Defendants moved for summary judgment on all claims. And Plaintiffs moved for summary judgment only on the narrow issues of the falsity of four statements made by Alan Levan in a July 25, 2007

conference call. In its August 18, 2010 Omnibus Order, the Court granted Defendants' motion in part and Plaintiffs' partial motion in full. *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2010 WL 6397500 (S.D. Fla. Aug. 18, 2010.) In that order, the Court also granted in part Defendants' motion to exclude the proposed testimony of Plaintiffs' loss causation and damages expert, Candace Preston. *Id.*

The order entitled Defendants to final summary judgment on the claims Plaintiffs previously attempted to abandon: the claims from the first year of the class period (pre-October 19, 2006) and the claims under § 20A of the Exchange Act. *Id.* The order also entitled Defendants to final summary judgment on claims arising from any statements regarding BankAtlantic's loan loss reserves and on claims of damages caused by Bancorp's October 29, 2007 stock-price decline. *Id.* Collectively, these rulings shortened the class period to October 19, 2006 through October 26, 2007, and finally adjudicated the claims of insider trading and accounting fraud in Defendants' favor. *Id.*

As to the balance of Plaintiffs' claims, Defendants strongly emphasized Plaintiffs' failure to produce credible, reliable evidence

regarding loss causation and damages.[3] To that end, Defendants also moved to exclude Preston's testimony. The Court granted the motion to exclude in part; what survived from Preston's testimony was, in the Court's view, sufficient to create a genuine issue of fact as to loss causation and damages.[4]

Finally, the order entitled Plaintiffs to summary judgment as to the narrow issue of the objective falsity of four statements made by Alan Levan during a July 25, 2007 earnings conference call. The four statements at issue concerned the extent to which Alan Levan perceived weakness in certain portions of its loan portfolio. Plaintiffs presented undisputed evidence that those statements were objectively false. And Defendants came forward with no evidence that raised a

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[3] Defendants also sought summary judgment based on the forward-looking-statement safe harbor under § 27A of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-5. The Court denied that portion of the motion because "Defendants fail[ed] to identify any particular statement that falls within the protection of the safe harbor." (D.E. 411.)

[4] The order allowed Preston's expert opinions on the following: the importance of information regarding a bank's credit and borrower quality to its valuation; the company-specific price declines to Bancorp stock following its April and October 2007 press releases and conference calls; the amount of the April 26, 2007 residual decline attributable to the disclosure of previously undisclosed negative information on April 25 and 26, 2007, and her belief that the entire October 26, 2007 residual decline was attributable to the disclosure of previously undisclosed negative information regarding BankAtlantic's land loan portfolio. *In re BankAtlantic*, 2010 WL 6397500.

genuine issue of material fact as to the objective falsity of the statements; rather Defendants focused their argument on the immateriality of the statements and the applicability of the forward-looking safe harbor of § 27A of the Private Securities Litigation Reform Act (the Reform Act), 15 U.S.C. § 78u, neither of which were at issue in Plaintiffs' Motion. Accordingly, the Court granted summary judgment in Plaintiffs' favor on the narrow issue of objective falsity; the Court did not address the materiality of the statements, whether they were made with scienter, or whether they came within the protection of the safe harbor.

C. *Pretrial & Trial*

Before trial the parties filed pre-trial stipulations, proposed jury instructions, and proposed verdict forms. In their joint pre-trial stipulation supplement,[5] each side framed the issues of fact to be litigated at trial. (D.E. 473.) Plaintiffs framed the issues as the elements of a Rule 10b-5 claim as they related to each of twenty-nine alleged misstatements and the individual Defendants' controlling-

[5] The parties' initial joint pre-trial stipulation failed to conform to the requirements of the Court's trial order, and on September 1, 2010, the Court ordered the parties to supplement the filing. (D.E. 470.)

person status under § 20(a) with respect to each of those statements. Plaintiffs identified the twenty-nine alleged misstatements in a document attached to the supplement as Exhibit A and titled "Misstatements and Omissions Alleged by Plaintiffs." It separately listed the twenty-nine statements and, for each statement, the date on which it was made, the document or conference call in which it was made, and the Defendants responsible for the statement.

Defendants objected to Plaintiffs' framing of the issues, stating:

> Plaintiffs' statement of the issues to be tried reflected in their Exhibit A is entirely inconsistent with the issues framed by the Court as remaining to be tried in the Court's Omnibus Order, is outside the pleadings, and is inconsistent with what remains of Plaintiffs' damages expert's testimony.

(D.E. 473.) Defendants sought to frame the issues around the assumptions of Plaintiffs' damages expert, Candace Preston, without reference to any particular misrepresentations.[6]

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[6] Preston, in her expert report, did not analyze or reference any specific fraudulent statements. Instead, Plaintiffs's counsel asked her to generally assume that Defendants misrepresented the true quality and value of the assets in BankAtlantic's commercial real estate portfolio, as follows:

a. At least from the beginning of, and throughout the Class Period, Defendants knew or recklessly disregarded the true state of the land loan portion of BankAtlantic's commercial real estate ("CRE") portfolio.

The Court held an initial pre-trial conference on September 10, 2010 in which the supplemental stipulation was briefly discussed. (D.E. 483.) At the conference, Plaintiffs stated: "Our case is essentially

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b. At least from the beginning of, and throughout the Class Period, Defendants were aware of, misrepresented and failed to disclose the credit quality of their borrowers and the quality of the land loans in the land loan portion of the CRE portfolio.

c. During the Class Period Defendants provided the public with false and/or misleading information or omitted material information necessary to make other statements not misleading concerning the quality of the assets in the land loan portion of the company's CRE portfolio, the "conservative" nature of its underwriting, and the collateral supporting the loans.

d. By November 29, 2006 Defendants should have disclosed that, contrary to their assertions that they were unaware of any upcoming credit quality trends or problems and that they were comfortable with their borrowers, they were seeing an increase in problem loans ....

e. By April 26, 2007, Defendants should have disclosed that:

I. contrary to their assertions that their land bank portfolio presented risks not present in other segments of their CRE portfolio, the problem and potential problem loans were, in actuality, distributed throughout the land loan portion of the CRE portfolio;

ii. the number and dollar value of the land loan portion of the CRE problem loans on the loan watch list ("LWL") and the potential problem loans as of April 26, 2007; and

iii the trends and concerns expressed by management as of the date, representative samples of which are detailed below.

(D.E. 365, Ex. B, pp. 5–6.) The Court discusses Preston's trial testimony and the consequence of her reliance on these general assumptions below in the discussion of the Motion for Judgment as a Matter of Law. *See infra* Part III.

29 misstatements," and Defendants complained: "There's no complaint that says 29 instances." (D.E. 483, pp. 41 & 44.) The issue was raised again at a follow-up pre-trial conference on October 5, 2010. (D.E. 518.) At that conference the Court attempted to understand Defendants' position on the twenty-nine statements and asked whether Defendants were highlighting a problem with new statements not contained in the First Amended Consolidated Complaint. Defendants made clear that they were not objecting to the twenty-nine statements because some were not in the pleadings, but because they did not conform to Preston's assumptions:

> It isn't a question whether they're new or old. There are some new ones. But that isn't really [our] point.
>
> Candace Preston, who's their damage expert, was asked to make certain factual assumptions. None of those statements were in her factual assumptions ....

(D.E. 518, p. 15.) Defendants argued that Plaintiffs were precluded from proving their Rule 10b-5 claims based on any individual statement, but were instead required to prove the fraud generally articulated by Preston in her assumptions. Ultimately, the Court ruled that Plaintiffs could prove their Rule 10b-5 claims based on individual

statements so long as the fraud proven by the individual statements fit with Preston's assumptions and overall opinion on loss causation and damages. At bottom, an action under Rule 10b-5 requires that the defendant made some *statement* which is misleading or is rendered misleading by the omission of further information. *See, e.g.*, § 78u-4(b)(1); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 26–7 (1st Cir. 1987).

Trial began on October 12, 2010. (D.E. 528 & 531.) Plaintiffs rested their case on October 28, 2010, and Defendants moved for judgment as a matter of law. (Tr. 2747.) During oral argument on the motion, Defendants reiterated their position that "this is not a case about 29 separate factual statements. This is a case based on Candace Preston's broad-brush assumptions." (Tr. 2758.) The Court reserved ruling on the motion, but during the course of the arguments, Plaintiffs withdrew seven of the twenty-nine alleged misstatements. (Tr. 2776–77, 87, 99 & 2857.)

Defendants next presented their evidence and rested their case on November 3, 2010. (Tr. 3638–39.) Because the Court and the parties had not completed drafting the jury instructions and verdict form, the Court instructed the Jury to return on a later date.

The ensuing charge conference was protracted due mainly to the Reform Act's requirements that the Jury allocate proportionate liability at the levels of primary and secondary liability depending upon its determinations of scienter with respect to each statement. Both parties had submitted proposed verdict forms, but neither adequately addressed the intricate demands of the Reform Act as they applied to this case—a numerous-statement, varying-defendant, Rule 10b-5 class action involving two separate damage periods atop which was layered a varying-defendant § 20(a) class action. Plaintiffs' proposed verdict form was structured around nineteen individual statements taken from the list of twenty-nine misstatements submitted as part of their pretrial stipulation.[7] (D.E. 593.) It asked the Jury to determine: whether each statement was a material misrepresentation on the part of any Defendant to whom it was attributed; the amount of per-share price inflation caused by any misrepresentation on each day of the class period; and, the controlling person status of each Defendant under § 20(a) of the Exchange Act. Defendants' proposed verdict form contained

[7] Plaintiffs had effectively withdrawn an additional three statements of the original twenty-nine when they filed their proposed verdict form on November 1, 2010. (D.E. 593.)

no reference to any particular misstatement. (D.E. 593.) Instead, it asked the Jury to determine, for each period of damage, whether Plaintiffs proved Candace Preston's assumptions and, if so, to determine the earliest date on which any misrepresentation was made and the extent of each Defendant's liability. Defendants' form also asked the jury to determine, for each period, the amount of per-share price inflation caused by any misstatement, but not on a daily basis.[8]

On November 9, 2010, the Court finalized the jury instructions and verdict form. The final jury instructions were lengthy, but not remarkably complex. (D.E. 635.) The final verdict form, on the other hand, was both lengthy and complex—it was 75 pages long and contained over 150 questions. (D.E. 632.) In the final verdict form, the Court adopted some components of both parties' proposals. (D.E. 599.) The form divided the case into two separate periods as proposed by Defendants. But with respect to each period, rather than ask the Jury to determine the existence of some general type of fraud as assumed by Plaintiffs' damages expert, the form listed, in chronological order, each

[8] Defendants' proposed verdict form was unworkable because it failed to address the Reform Act's requirement that the jury make specific findings as to each Defendant's responsibility for each statement or omission. *See* 15 U.S.C. § 78u-4(f).

of the alleged misstatements (from Plaintiffs' list of nineteen). For each statement the Jury was asked a series of special interrogatories relating to the allocation of primary (Rule 10b-5) and secondary (§ 20(a)) liability under the Reform Act. Lastly, with respect to damages, the Court adapted Defendants' proposal that damages, if any, be assessed from the earliest date a misrepresentation was found to have been made; the verdict form instructed the Jury to determine, for each period, the damages, if any, resulting from the first misrepresentation it found to have been made in violation of Rule 10b-5.[9]

On November 10, 2010, the parties delivered their closing arguments, and the Jury began its deliberations. (D.E. 641 & 643.) After five days of deliberations, on November 18, 2010, the Jury returned a verdict mainly in Defendants' favor. (D.E. 665.) The Jury found no liability as to any Defendant for the first period[10] and no liability as to Defendants Abdo, White and Jarrett Levan for the

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[9] Defendants objected to the final verdict form in its entirety and in particular that no single alleged misstatement could support a damages finding given the assumptions on which Preston's opinion relied.

[10] Although the Jury found that several of the Defendants made materially false statements during this period, the Jury found no damages. Plaintiffs conceded prior to the discharge of the Jury that a finding of no liability as to this first period was the only possible interpretation of the verdict. (Tr. 4369.)

second. The Jury, however, found liability and damages as to Defendants Alan Levan and Bancorp for the second period; the Jury found that Statement 7, made by Alan Levan during the April 26, 2007 earnings conference call, violated § 10(b) and that the violation proximately caused damages of $2.41 per share. The Jury further found Statements 10, 13 through 17, and 19 to have been made in violation of § 10(b); all were attributed to Alan Levan (and Bancorp) except for Statement 19 which was attributed to Alan Levan and Toalson (and Bancorp).

The Jury's special findings as to Statement 7, however, were inconsistent with both the general finding of liability and each other. The Jury specially found that Alan Levan "acted knowingly with respect to that statement" but also found that Alan Levan "acted in good faith and did not directly or indirectly induce the Section 10(b) violation" as a § 20(a) controlling person of Bancorp. The relevant portion of the verdict as to Statement 7 liability was as follows:

> Question 7(a): With respect to Statement 7, do you find that Alan Levan (and therefore Bancorp) violated Section 10(b)?
>
> Yes ✓ No___
>
> Question 7(b): Do you find that Alan Levan acted knowingly with

respect to that statement?

Yes ✓ No___

* * *

Question 7(d): For each Defendant for whom you answered "yes" in Question 7(e) [re Section 20(a) controlling person status], do you find that such Defendant acted in good faith and did not directly or indirectly induce the Section 10(b) violation?

Alan Levan: Yes ✓ No___

(D.E. 665.) And the verdict as to damages was as follows:

Question II(B): What is the amount of damages per share proximately caused by the first Section 10(b) violation you found during the period from April 26, 2007 through October 26, 2007?

$ *2.41* per share

(D.E. 665.)

The Court recognized the inconsistency and addressed the issue with the parties before accepting the verdict. (Tr. 4348–49.) The Court suggested that the inconsistency was potentially irrelevant because the Jury also found Alan Levan and Bancorp liable for Statement 10—a statement from the same April 26, 2007 conference call—and because the damage finding reasonably could be applied to that statement. *Id.* The Court then stated its intention to accept and publish the verdict unless there was some objection. *Id.* No party objected, and the Court

summoned the Jury.[11] *Id.* The Court published the verdict and discharged the Jury without either party requesting clarification from the Jury or otherwise objecting. (Tr. 4359–72.)

II. Pending Judgment

The parties agree on most of the judgment compelled by the verdict—all Defendants are entitled to judgment in their favor for the first period and Defendants Abdo, Jarett Levan, and White are entitled

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[11] The relevant exchange was as follows:

THE COURT: [I]n terms of taking the verdict, there's only one place where I see that it's a little confusing. But I don't really think it matters. So that's on statement 7. So statement 7 is the April 26, '07 conference call. The next statement that they find to be associated with a 10(b) violation is from the same conference call.

So the way the case was conceptualized was if they found a 10(b) violation, it would be the first 10(b) violation in the period that damages would relate to, or relate back to. So, both those statements, statement 7 and statement 10, are both from the April 26th conference call.

The response to the questions, the series of questions that relate to 7, I think are difficult to reconcile, but, again, I don't think it matters in light of the fact that the jury found that the fraud entered the market on April 26th.

* * *

Okay. So, let's just bring the jury in. Unless there's something somebody wants me to do about this problem associated with the questions related to statement 7, my suggestion would be let's bring the jury in.

[No objections]

(Jury returns at 10:50 a.m.)

(Tr. 4348–49.)

to judgment in their favor for the second. The parties dispute only the proper judgment regarding Defendants Bancorp, Alan Levan, and Toalson as to the second period.

The threshold issue is the effect of the inconsistent verdict as to Statement 7. For the reasons set forth below, the Court will disregard the liability finding for Statement 7 and attach the damages finding to the liability finding for Statement 10.

The resolution of verdict inconsistencies is governed by Federal Rule of Civil Procedure 49. Rule 49 separates verdict forms into two categories: special verdicts under Rule 49(a) and general verdicts, with or without special interrogatories, under Rule 49(b). The verdict form in this case is a general verdict form accompanied by special interrogatories under Rule 49(b).[12] *See Mason v. Ford Motor Co.*, 307 F.3d 1271, 1273–76 (11th Cir. 2002). As explained above, while the Jury generally found Alan Levan (and Bancorp) violated § 10(b) as to

[12] Defendants argue it is a special verdict form under Rule 49(a). The Court disagrees. The verdict form asked the jury to make conclusory findings which involved application of the law to the facts, such as whether "Alan Levan (and therefore Bancorp) violated Section 10(b)" and to respond to special interrogatories as required by the Reform Act. *See* § 78u-4(f)(3). Accordingly, the verdict form is appropriately characterized as a general verdict form accompanied by special interrogatories under Rule 49(b). *See Mason v. Ford Motor Co.*, 307 F.3d 1271, 1273–76 (11th Cir. 2002).

Statement 7 and specially found that he did so knowingly, it also specially found that he acted in good faith as a controlling person as to the violation. The two special findings are inconsistent with each other, and the latter is inconsistent with the general finding.[13]

Rule 49(b)(4) addresses the resolution of such inconsistencies as follows:

> *Answers Inconsistent with Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Under this rule, the Court and the parties have two options: further deliberation or new trial. But a party that raises no objection to the inconsistency under Rule 49(b) prior to the discharge of the jury waives the objection. *E.g.*, *Austin-Westshore Constr. Co. v. Federated Dep't Stores*, 934 F.2d 1217, 1226 (11th Cir. 1991). And if the objection is waived the district court is no longer constrained by the two options

[13] There is no question the findings are inconsistent. The jury instructions required at least a finding of severe reckless disregard as to the falsity of the statement in order to find a § 10(b) violation. (D.E. 635.) One cannot act either knowingly or with severe reckless disregard as to the falsity of a statement and at the same time act in good faith as a controlling person with respect to the same act.

contained in Rule 49(b).[14] *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 726 (4th Cir. 1999) *cited in* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2513 (3d ed. 2008).

The parties waived the objection in this case, and so the Court is unconstrained by Rule 49(b)(4) in resolving the inconsistency. Constrained only by reason and equity, the Court finds that the most fair and reasonable resolution is what the Court suggested at trial before the parties waived their objection—the Court will disregard the Statement 7 liability finding and, subject to the remaining Rule 50(b) and Rule 59 challenges, construe the Jury's verdict as finding $2.41-per-share damages caused by Statement 10.

This resolution is more fair than a new trial both because it is essentially what the parties agreed to and also because granting a new trial (and selecting and swearing a new jury) now, when all the parties had to do was ask that the Jury clarify the inconsistency, would unnecessarily protract the final resolution of this complex, lengthy, and expensive dispute. *See Coralluzzo v. Educ. Mgmt. Corp.*, 86 F.3d 185,

[14] If this was not the case, the rule of waiver would be meaningless and its goal of efficient trial procedure would not be achieved because the Court would be left with no option but new trial. *See Coralluzzo v. Educ. Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996).

186 (11th Cir. 1996) ("To allow a new trial after the objecting party failed to seek a proper remedy at the only time possible [*i.e.*, before the jury is discharged] would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures ... by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.") (modification in original). And this resolution is reasonable for the reasons explained at trial regarding the conceptualization of the verdict form and the similarities of Statements 7 and 10, including the fact that Alan Levan made both in the same conference call.[15]

Having resolved the inconsistency, much of the remaining dispute as to the second period is now moot, *e.g.*, the disagreements regarding Statement 7 and the absence of a damages finding attached to

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[15] It is no impediment to this resolution that Statement 10 was not identified in the First Amended Consolidated Complaint. When Plaintiffs first submitted their list of twenty-nine statements as part of the pretrial stipulations, Defendants did note that some of the statements were not included in the First Amended Complaint. But when questioned further about their resistance to the twenty-nine statements, Defendants clarified that they were not concerned with the fact that statements were not pled, but that they were concerned about Preston's failure to reference any individual statement in her expert opinion. Most importantly, at no point did Defendants identify Statement 10 as a statement which was not pled or object to the inclusion of Statement 10 on the verdict form on that basis. Accordingly, regardless of whether or not the finding as to Statement 10 was sufficient to support a damages finding, it was at issue and properly submitted to the Jury. *See* Fed. R. Civ. P. 15(b)(2).

Statement 10. And much of the remaining issues will become moot as the discussion below ensues. The Court begins with a discussion of Defendants' Motion for Judgment as a Matter of Law and then addresses the Motion for New Trial. Any argument not addressed in this order is rejected by the Court.

III. Motion for Judgment as a Matter of Law

Defendants make numerous arguments in support of their Motion for Judgment as a Matter of Law. Among other arguments, Defendants contend that Plaintiffs failed to put forth sufficient evidence at trial to support any of the elements of a Rule 10b-5 claim as to Statement 10 (or any other statement) and that Statement 10 falls within the forward-looking safe harbor of the Reform Act. The Court focuses its discussion on whether the evidence supported a finding that Statement 10 was an actionable misrepresentation or omission and, if so, whether the evidence supported a finding of loss causation or damages as to Statement 10. And because the Court agrees that the evidence of loss causation or damages was insufficient as to Statement 10, it does not address Defendants' remaining arguments.

A. *Rule 50(b) Standard*

Rule 50(a) allows a party, prior to the submission of the case to the jury, to move for judgment in its favor on the basis "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [opposing] party on that issue." If the Court does not grant the motion under Rule 50(a), a party may renew the motion under Rule 50(b) after the jury has returned a verdict.

"Regardless of timing, ... a district court's proper analysis is squarely and narrowly focused on the sufficiency of evidence." *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007). "The question before the district court regarding a motion for judgment as a matter of law remains whether the evidence is 'legally sufficient to find for the party on that issue,' regardless of whether the district court's analysis is undertaken before or after submitting the case to the jury." *Id.* (citations omitted). Generally, "any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of evidence and prior to the case being submitted to the jury." *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 903 (11th Cir. 2004).

"[I]n entertaining a motion for judgment as a matter of law, the court should review all the evidence of record." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "In so doing, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may *not* make credibility determinations or weigh the evidence." *Id.* (emphasis added). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. "That is, the court should give credence to evidence favoring the non-movant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from a disinterested witness." *Id.* (internal quotations omitted).

But "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Nebula Glass Int'l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1210 (11th Cir. 2006). "[T]he court should deny a motion for judgment as a matter of law if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiff's case." *Id.*

B. *Section 10(b) & Rule 10b-5*

Section 10(b) of the Exchange Act makes it unlawful "to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." § 78j(b). In turn, Rule 10b-5 makes it unlawful for any person "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

Courts have long recognized the implicit private right of action created by § 10(b) and Rule 10b-5, "which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (citations omitted). For cases involving publicly traded securities and purchases or sales in a public securities markets, the elements of the action include: (1) *a material misrepresentation (or omission)*; (2) *scienter*, *i.e.*, a wrongful state of mind; (3) *a connection with the purchase or sale of a security*; (4) *reliance*, often referred to in cases involving public securities markets

(fraud-on-the-market cases) as "transaction causation;" (5) *economic loss*; and (6) *loss causation*, *i.e.*, a causal connection between the material misrepresentation and the loss. *Id.* at 341–42 (citations omitted).

C. *Actionable Misrepresentation or Omission*

Like all banks, BankAtlantic's income is substantially dependent on its borrowers' ability to make loan interest payments. And internal information that its borrowers might likely default on their obligations is highly relevant to BankAtlantic's prospects for future income and the value of Bancorp's stock. Plaintiffs contend that, in late 2006 and early 2007, Defendants had significant indications that the land loan portion of its construction loan portfolio would experience widespread defaults and collateral devaluations, but fraudulently misrepresented or concealed the true extent of this risk from investors. The Court agrees that a jury could have found Statement 10 to have been an actionable concealment of that risk under Rule 10b-5. The following facts are taken from the evidence introduced at trial and viewed in the light most favorable to Plaintiffs.

In 2006 and 2007, BankAtlantic's commercial real estate loan

(CRE) portfolio, valued at $1.2 to $1.3 billion dollars, was a major portion of its total loan portfolio. Included within the CRE portfolio was a portfolio of "land loans" valued at $400 to $500 million. (Tr. 272 & 1051–52; DX 5.)

At that time, BankAtlantic had several policies for the approval and monitoring of its CRE loans, including the land loan portfolio. (Tr. 275.) First, BankAtlantic's Major Loan Committee had to approve the initial grant and any modifications to loans in excess of $5 million.[16] (Tr. 285.) Second, BankAtlantic monitored its loan portfolio through an internal loan-grading system in which loans were graded 1 through 13.[17] (PX 151.) Grades 1 through 7 were passing; grade 10 loans were "specially mentioned assets," which have "potential weaknesses that deserve management's close attention"; and, grade 11 loans were "substandard," meaning that the "asset is inadequately protected by the current sound worth and paying capacity of the obligor or the collateral

[16] Alan Levan and Abdo were members of the Major Loan Committee, and Alan Levan's approval was required for each loan presented to the committee. (Tr. 285 & 3523.)

[17] The loan's sponsoring officer assigns a grade to each loan at the time it is made. (PX 151; Tr. 319–20.) After closing, the loan officer or Chief Credit Officer may adjust a loan's grade to reflect changes to its level of risk. (PX 151; Tr. 321–22.)

pledged, if any."[18] (PX 151; Tr. 317–19.) Additionally, if BankAtlantic determined that a borrower most likely would not repay his loan according to the terms of the original agreement, that loan was deemed "non-accrual," regardless of the assigned grade. (Tr. 338.) Finally, BankAtlantic created a monthly report called the Loan Watch List to help management track significant potential problem loans. (Tr. 336.) The list included all loans risk-graded 10 or 11 and all non-accrual loans and was distributed monthly to BankAtlantic's senior management. (Tr. 329–30.)

By early 2007, Defendants began to take notice of negative performance trends within the land loan portfolio. From January through March 2007, the Major Loan Committee approved payment extensions and modifications for at least nine land loans. (PX 122, 217, 340, 341, 342, 343, 344, 348; Tr. 1171–72 & 1175; DX 15.) On March 14, 2007, Alan Levan sent an email to members of the committee, referencing "a parade of land loans coming in for extentions [*sic*] recently." (PX 138.) He stated:

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[18] BankAtlantic employees testified inconsistently at trial as to whether loans graded 10 and higher or loans graded 11 and higher were considered "classified" assets. (*See* Tr. 319, 335, 471–74 & 2924.)

> I'm not sure what the purpose of the extentions [*sic*] are other than hoping that more time will solve their problems (and ours). Experience tells us that in these markets, it is better to force a resolution early rather than wait for the market to further deteriorate.... Later, with pressure from all the banks, the borrower will not be able to accommodate us.
>
> * * *
>
> I believe we are in for a long sustained problem in this sector.

(PX 138.) On March 20, 2007, Marcia Snyder, BankAtlantic's former chief of commercial real estate lending, sent an email to BankAtlantic's loan officers, noting that the Major Loan Committee had "significant concerns" about the land loan portfolio. (PX 124, Tr. 458–61.) Snyder informed the loan officers that the Bank would conduct a review of all the loans in the land loan portfolio.[19] (PX 124.)

The Loan Watch List for March 31, 2007 indicated that two land loans aggregating $20.2 million were on non-accrual status and another $21.3 million loan was risk-grade 11. (PX 350; Tr. 342.) On April 7, 2007, seven additional land loans aggregating approximately $93.2 million were adjusted to grade 10 or 11 and added to subsequent Loan

[19] As a result of that review, BankAtlantic determined that many of the land loans had depleted interest reserves which is an indication that the borrower will not be able to continue to pay down the loan. (Tr. 461–62, 1226–28 & 3563.)

Watch Lists. (DX 15; PX 351 & 356; Tr. 343–47.) In response to concerns over land loans, in the first quarter of 2007, BankAtlantic created a special Land Loan Committee, which met twice monthly to monitor land loans. (Tr. 454.) In early April, Alan Levan authorized a "full legal review" of all the loans in the land loan portfolio, because of the possibility that the Bank would have "legal issues" with the entire portfolio. (Tr. 3563–64.)

As the deadline for filing the 2007 first-quarter financial results approached,[20] BankAtlantic began to distinguish between what came to be called the "builder land bank" or "BLB" loans and the remainder of the land loan portfolio. (Tr. 1071, 3390.) The BLB land loans were loans made to developers to acquire and develop parcels of land into finished lots; these borrowers, who had option contracts for the "take down" of the finished lots with large regional or national homebuilders, relied on the homebuilders to exercise the options on schedule in order

[20] Each quarter, Bancorp publishes its quarterly financial results. The results are first announced in an 8-K press release filed with the Securities and Exchange Commission and are then discussed in an investor conference call. (Tr. 3318.) Conference calls are open to public participation; investment analysts participate in these calls and ask questions of management regarding its quarterly results. (Tr. 3312.) Conference calls provide management an opportunity to speak to investors and analysts and provide more information than is available in the quarterly financial results. (Tr. 3312.) After the conference call, the Company files a 10-Q quarterly earnings report with the Commission. (Tr. 3318.)

to provide the borrowers with revenue to meet their loan obligations to BankAtlantic on a timely basis. (DX 6, p. 18.) The remaining, non-BLB land loans were made to developers to acquire land, develop it into finished lots, and sometimes build residential developments, but did not involve option contracts with national homebuilders. (Tr. 357–59; DX 6, p. 18.)

The problems Defendants observed in the land loan portfolio were not limited to either the BLB or non-BLB land loans—they were spread throughout the portfolio: the Major Loan Committee had approved extensions for both BLB and non-BLB land loans (PX 122, 217, 340, 341, 342, 343, 344 & 348; DX 15; Tr. 1171–72 & 1175); Marcia Snyder did not distinguish the categories of land loans in her email (PX 124, Tr. 458–61); both BLB and non-BLB land loans had depleted interest reserves (Tr. 461–62, 1226–28 & 3563); the March 31, 2007 Loan Watch List included one non-accrual BLB land loan and one non-accrual non-BLB land loan (PX 350; Tr. 342.); and the April 7, 2007 Loan Watch List additions included three BLB land loans and four non-BLB land loans (DX 15; PX 356; Tr. 343–47).

On April 26, 2007, Bancorp filed its first quarter 2007 financial

results in an 8-K press release, which reported that BankAtlantic earned $5.7 million net income for the quarter. (DX 4.) Bancorp also announced an increase in non-accrual loans of $19.6 million from the first quarter of 2006, which related to loans in its CRE loan portfolio. (DX 4.) The release warned:

> The current environment for residential land acquisition and development loans is a concern, particularly in Florida, and represents an area where we remain very cautious in our credit management. In view of market conditions, we anticipate we may experience further deterioration in the portfolio over the next several quarters as the market attempts to absorb an oversupply of available lot inventory.

(DX 4.)

The same day, Bancorp held its first-quarter earnings conference call. (DX 5.) In preparing for the call, Alan Levan asked James White, the then-CFO, to focus his discussion only on the BLB land loans.[21] (PX 139; Tr. 1673–76 & 3565–66.) And during the call, Alan Levan emphasized the risks of the BLB land loans to the exclusion of the remaining land loans. He discussed a $19.6 million increase in non-accrual loans, which he attributed to two loans in the "land banking

[21] In preparation for the first quarter 2007 conference call, Defendant Jim White, then Bancorp's Chief Financial Officer, had prepared to discuss concerns with entire land loan portfolio. (Tr. 1666–73.)

portfolio," and described that portfolio as follows:

> ... those very simply are loans that we made to land developers, people that buy land in anticipation of selling that land to national developers, national or local developers. Generally at the time of borrowing, the borrower or developer had contracts with builders to buy a significant or a substantial portion of the property, which would have been used to pay down the loan in the normal course. As we all recognize, the housing market in the—nationally, but particularly in Florida, is suffering some economic distress. And the amount of deposits that homebuilders nationally in Florida that have walked away from these deposits is pretty high.

(DX 5, p. 4.) This was the first time Alan Levan or Bancorp publicly distinguished the BLB portfolio from the remainder of the land loan portfolio.[22] (Tr. 3328–29 & 3568; DX 5, p. 23.) Alan Levan noted

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[22] Coincidental with the announcement of the first quarter losses and the discussion of Bancorp's concerns with the BLB land loans, Bancorp's stock price declined $0.56 on April 26, 2007. (Tr. 2558.)

On May 10, 2007, Bancorp filed its 10-Q for the first quarter of 2007. The Company noted that the residential real estate market, both in Florida and nationally, "continued to deteriorate during the first quarter of 2007." (DX 6, p. 18.) The report identified the BLB portfolio as comprising $140 million of the $562 million "commercial real estate acquisition and development portfolio." (DX 6, p. 18.) With respect to the non-BLB loans in the portfolio, it stated:

> The loans ... in this category are generally secured by residential and commercial real estate which will be fully developed by the borrower or sold to third parties. These loans generally involve property with a longer investment and development horizon and are guaranteed by the borrower or individuals and/or secured by additional collateral such that it is expected that the borrower will have the ability to service the debt under current conditions for a longer period of time.

that this "portfolio" consisted of $140 to $160 million in loans and explained that it was a subject of concern because the national homebuilders had "slowed their takedown of lots" and many of the borrowers were requesting extensions "to give the builders more time to ultimately take down the lots." (DX 5, pp. 5 & 24.)

Alan Levan also stated as to the remainder of the CRE portfolio: "The portfolios that are buying land for their own development, those are proceeding in the normal course. We're not really seeing any difference in that portfolio than we've seen in the billion-and-a-half dollar portfolio." (DX 5, p. 24.) And when an investment analyst asked Alan Levan a question regarding the composition of the land loan portfolio, the following exchange ensued:

> [ANALYST]: Hi. So just to follow up on the last set of questions, is it right to infer that your construction portfolio apart from the land bank is about $250 million? Is that the right inference, the construction loan portfolio?
>
> * * *
>
> ALAN LEVAN: I think we—if we—we'd probably have to get back to you on that. By deduction, that would certainly seem likely. If it's a $400 million portfolio and $140 million to $160

(DX 6, p. 18.)

> million is in this one, probably the rest of it is in some stage of development to our borrower. The answer to that is probably yes, but perhaps we can get back to you (unintelligible)...
>
> [ANALYST]: Okay, but that—I mean, that $400 million number that was referenced before would encompass all construction-related loans generally speaking?
>
> ALAN LEVAN: No, no, no. Other—I mean, the entire portfolio is $1.4 billion, $1.5 billion. So there's lots of construction in our portfolio. And Valerie noted today, she'll tell you as soon as I stop talking, we're—we'll have to tell you offline, there's a certain designation when we finance a land acquisition with the anticipation of a building going on that. It tends to get into this land portfolio. And it may re-characterize as we start to build, but lots of our portfolio is a construction portfolio that we're not in any way concerned about.

(DX 5, p. 29.) The last portion of the exchange is what Plaintiffs identified as Statement 10: "But lots of our portfolio is a construction portfolio that we're not in any way concerned about."

Given the context of the statement, a jury could have found that when Alan Levan professed a lack of concern as to "lots of our portfolio," he was essentially stating that he was only concerned with the BLB land loans and *not* with the entire land loan portfolio. Indeed, Plaintiffs argued to the Jury in closing that Statement 10 was misleading with

respect to the non-BLB land loans *only*. (Tr. 4093–94.) And a jury also could have found that Alan Levan's professed lack of concern about the balance of the land loan portfolio was untrue.

But not every untrue statement is actionable under Rule 10b-5. Generally, a misstatement or omission is actionable under the Rule if it is of a definite factual nature. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991). And, under certain circumstances, management statements couched as conclusory beliefs can be actionable. *Id.* "Such statements are factual in two senses: as statements that [managers] do hold the belief stated and as statements about the subject matter of the ... belief expressed." *Id*. at 1092. A statement of conclusory belief is actionable as a misrepresentation if a plaintiff demonstrates *both* the managers' disbelief and the falsity of the underlying facts. *Id.* at 1093–96.

In this case, the evidence supports a finding that Statement 10 is actionable. A jury could have found that Alan Levan was in fact concerned about the entire land loan portfolio and that certain of the same justifications he identified as the basis of his concern for the BLB loans existed (and were concealed) with respect to the remainder of the

land loan portfolio.

With respect to the first point, Plaintiffs presented evidence that Alan Levan internally expressed undifferentiated concern regarding the entire land loan portfolio prior to the conference call. As detailed above, in a March 2007 email, Alan Levan stated that the land loan portfolio was facing "a long sustained problem," and in another March 2007 email, Marcia Snyder stated that the Major Loan Committee had "significant concerns" about both the BLB and non-BLB land loans. (PX 138 & 124.) Further, by the time of the conference call, BankAtlantic had created a special Land Loan Committee to review and address concerns regarding the entire land loan portfolio—twenty-nine loans were under review, nearly half of which were non-BLB land loans. Based on this evidence a jury could have found that Alan Levan falsely professed a lack of concern about the remainder of the land loan portfolio.

With respect to the second point, the stated justification for his relative lack of concern was the distinction between the BLB and non-BLB land loans, namely the involvement of national homebuilders in the BLB loans. Alan Levan explained that the BLB loans were made to

borrowers whose business model depended on the sale of lots to these national home builders. According to Alan Levan, because of a softening residential real estate market, these builders were not "taking down" lots from the borrowers as scheduled which, in turn, was causing the borrowers to request payment extensions and in a few instances causing the borrowers to miss payments, resulting in non-accrual classifications. Another distinction was that for some BLB loans, the equity component was comprised of a letter of credit from the national home builder as opposed to a cash deposit. In the conference call, Alan Levan claimed these characteristics were unique to the BLB loans.

Plaintiffs put forth evidence, however, that certain of these characteristics were not confined to the BLB loans and were present throughout the land loan portfolio. A jury could have found that, by the time of the conference call, one non-BLB land loan was also on non-accrual status—in fact, it could have found that one of the two non-accrual BLB loans Alan Levan identified during the conference call was actually a non-BLB land loan. And a jury could have found that eight of the nine land loan extensions and modifications the Major Loan

Committee had approved by March 2007 were non-BLB land loans. (PX 122, 217, 340, 341, 342, 343, 344, 348; Tr. 1171–72 & 1175; DX 15.) In short, a jury could have found Statement 10 to be an actionable concealment of the risk of substantial losses to the non-BLB land loans.

D. *Loss Causation & Damages*

Plaintiffs contend that they suffered an actual loss when the true level of risk concealed by Statement 10 (the risk of substantial losses to the non-BLB land loans) was revealed on October 25 and 26, 2007 and the price of Bancorp's stock fell by $2.93. The issue therefore is whether Plaintiffs put forth sufficient evidence that their damages, if any, were "caused" by the concealment of this risk.

On October 25, 2007, Bancorp announced its third quarter 2007 financial results in a press release filed as an 8-K on October 26, 2007. (DX 11.) Bancorp suffered a loss from continuing operations of $29.6 million or $0.52 per diluted share and BankAtlantic suffered a net loss for the quarter of $27.1 million. The press release stated that BankAtlantic's loss:

> was driven by increased loan loss provisions and impairments of real estate owned and held for sale. Other factors contributing to the decline included net interest margin compression and costs associated with

> opening new stores, offset in part by an increase in non-interest income.

(DX 11.)

Bancorp further announced that BankAtlantic's loan loss provision for the quarter was $48.9 million.[23] (DX 11.) The provision was required by an increase in non-performing loans; Bancorp specifically noted the placement of eleven commercial real estate loans on non-accrual status during the quarter. (DX 11, p. 2.) In the 8-K, Bancorp did not specify what amounts of the $48.9 million loan loss provision were attributable to specific, qualitative, or quantitative reserves, nor did it break down the provision across the various

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[23] BankAtlantic reserves funds for potential loan losses; the reserves are counted as losses against BankAtlantic's income in the quarter in which they are taken. (Tr. 2937.) Loan loss reserves include three components: specific reserves, qualitative reserves, and quantitative reserves. (Tr. 539–541.) Specific reserves are provisions for individual, large-balance loans. When BankAtlantic downgrades to a risk grade of 10 or 11 a loan whose balance exceeds a set amount, it may then determine that it is necessary to take a specific reserve for that loan. (Tr. 540–41.) BankAtlantic takes quantitative and qualitative reserves, when necessary, for groups of loans with similar characteristics. Quantitative reserves are determined based on the historic performance of the group of loans. (Tr. 539 & 2930.) Qualitative reserves are based on current and expected economic factors that may affect the repayment of a given group of loans. (Tr. 539–40 & 2931.) When BankAtlantic determines that it will not be able to collect all or a portion of a loan, it charges off that amount. (Tr. 2964–65.) If a specific reserve was previously taken for that loan, the reserved amount is applied to the charge off. (Tr. 2967–68.) If the specific reserve is insufficient to cover the charge off, the difference between the charge off and the reserve is counted as a loss against BankAtlantic's income. (Tr. 2967–68 & 3003–04.)

segments of its loan portfolio. However, for the first time, Bancorp detailed the deterioration across the entire land loan portfolio. The release stated:

> "The categories within this 'Commercial Residential' portfolio where we believe we have exposure to the declines in the real estate market are as follows:
>
> - Builder land bank loans [BLB land loans]: This category of 13 loans aggregates $149.3 million, of which five loans totaling $81.1 million are non-accrual and an additional three loans totaling $28.7 million were considered classified assets at quarter-end.
>
> - Land acquisition and development loans [non-BLB land loans]: This category of 37 loans aggregates $218.5 million, of which three loans totaling $13.2 million are non-accrual and an additional five loans totaling $19.7 million were considered classified assets at quarter end.
>
> - Land acquisition, development and construction loans [non-BLB land loans]: This category of 24 loans aggregates $165.3 million, of which seven loans totaling $62.0 million are non-accrual and an additional four loans totaling $41.9 million were considered classified assets at quarter end.

(DX 11.) The "classified" loans Bancorp disclosed in this 8-K included those graded 10 and 11. (Tr. 714–16.)

On October 26, 2007, Bancorp held its third quarter 2007 earnings conference call. (DX 12.) During the call, Alan Levan

reiterated the results announced in the 8-K. Toalson noted that the loans placed on non-accrual status necessitated a specific reserve of $27.9 million and additional general reserves. *Id.* p. 12. She also noted that the value of BankAtlantic's real estate owned decreased by $6.7 million. *Id.* Coincidental with the announcement of third-quarter losses, Bancorp's stock price declined by $2.93 on October 26, 2007. (Tr. 2560.)

"Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005) (citation omitted). In order to prove loss causation in a fraud-on-the-market case, a plaintiff must show: (i) that the fraudulently concealed truth was revealed to the market and (ii) that the revelation caused, at least in substantial part, a decline in the market-price of the security. *See Dura*, 544 U.S. at 342–345; *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448–49 (11th Cir. 1997). Based on the evidence at trial, a jury could have found the first part of the showing to have been satisfied, but not the second. The Court discusses both below.

(i) *Revelation of the Fraud*

In this case, Plaintiffs contend that Alan Levan, when he made Statement 10, concealed the risk of losses to the entire land loan portfolio by misrepresenting that the risk of significant losses was limited to the BLB loans and that this concealed risk was revealed to the market on October 25 and 26, 2007 when it materialized in the form of significant losses throughout the land loan portfolio. The materialization-of-the-risk theory is not new. Although the Eleventh Circuit has not expressly recognized the theory,[24] numerous courts have recognized that a concealed risk can be revealed when the risk materializes. *See, e.g.*, *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010); *In re Vivendi Universal S.A. Sec. Litig.*, — F. Supp. 2d —, 2011 WL 590915, **35–36 (S.D.N.Y. Feb. 17, 2011); *In re Scientific Atlanta Sec. Litig.*, — F. Supp. 2d —, 2010 WL 4793386, **24–26 (N.D. Ga. Nov. 18, 2010). Its general purpose is to allow defrauded investors to prove loss causation and recover under Rule 10b-5 even where the defendant does not publicly correct his fraud, but instead the fraud is revealed through some other event. *See, e.g.*, *Scientific Atlanta*, 2010 WL

[24] The Eleventh Circuit has acknowledged the concept of the materialization-of-the-risk theory, but has not explicitly adopted it. *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 851 (11th Cir. 2004); *Huddleston*, 640 F.2d 534.

4793386 at *26 (citing *Alaska Elec. Pension Fund v. Flowserve Grp.*, 572 F.3d 221, 230 (5th Cir. 2009)). With this purpose in mind, the Court agrees with those decisions recognizing the theory and adopts it here.

Further, the Court agrees that the evidence supports a finding that the disclosures on October 25 and 26, 2007 revealed that the risk of substantial losses was not limited to the BLB loans but existed throughout the entire land loan portfolio. In the 8-K, for instance, Bancorp announced that an almost equal amount of BLB and non-BLB land loans ($81.1 and $74.2 million, respectively) were in non-accrual and also that the majority of the classified land loans at the end of the third quarter were non-BLB land loans. A jury could have found that these announcements revealed information about the risk to the entire land loan portfolio that had been concealed by Alan Levan when he made Statement 10. *See Vivendi*, 2011 WL 590915 at *36.

(ii) *Price Decline Caused by the Revelation*

Plaintiffs next contend that the revelation of this risk was the sole cause of the $2.93 decline in Bancorp's stock price on October 26, 2007. Plaintiffs argue that the market-price of Bancorp's stock was

artificially inflated by Alan Levan's concealment of the risk to the non-BLB portion of the land loan portfolio and that when the concealed risk was revealed to the market, the market-price corrected and the inflation was removed. And it was the market's release of this inflation which Plaintiffs claim caused the price decline on October 26, 2007. Plaintiffs rely exclusively on the unrebutted trial testimony of their expert, Candace Preston, to establish that the price decline resulted from the revelation.

At trial, Preston testified to the results of an "event study" she used to analyze the cause of the October 26, 2007 price decline. Preston began her event study by identifying two stock indices she thought best represented the general market and banking industry—the S & P 500 Index and the NASDAQ Bank Index. (Tr. 2550.) Preston explained that she first looked to these indices because Bancorp itself used them as benchmarks for market and industry performance comparisons in its public filings. (Tr. 2550–54.) Preston then confirmed that these indices historically had a "statistical fit" with the market-price of Bancorp's stock. (Tr. 2551.) In other words, through statistical regression analysis Preston confirmed a correlation

between the general market and industry indices and the market-price of Bancorp's stock. *Id.*

Using this model, Preston was able to identify, on a daily basis, movements in Bancorp's stock price which were "statistically significant" because they did not correlate with the performance of the general market and industry indices. (Tr. 2557.) According to Preston, this statistical significance was a strong indication that the movement in Bancorp's stock price was caused by some Bancorp-specific event or information and not general market or industry information. (Tr. 2557–59.) Further according to Preston, the $2.93 decline in Bancorp's stock price on October 26, 2007 was statistically significant and, when measured against the expected market-price movement as predicted by the indices, represented a "residual decline" of $3.15. *Id.* Thus, Preston concluded that the decline was attributable to Bancorp-specific information.[25]

Preston next discussed her opinion that the entire decline was caused by the October 25, and 26, 2007 announcement in the 8-K and

[25] In reaching this conclusion, Preston also examined the trading volume of Bancorp stock, which, on October 26, 2007, soared above Bancorp's standard trading volume. (Tr. 2562.) Preston opined that this was further indication that Bancorp-specific information caused the $2.93 decline. *Id.*

conference call of new, negative information regarding the land loan portfolio. (Tr. 2595–96.) Preston noted that on October 25 and 26, 2007 Bancorp published an 8-K with its third-quarter results and held a teleconference regarding those results. (Tr. 2594.) Preston further identified Bancorp's announcement of a significant increase in non-accrual and classified assets across the BLB and non-BLB portions of the land loan portfolio as the negative information to which the market reacted.[26] (Tr. 2595.) Preston explained that she reviewed over a hundred analyst reports, many of which identified the negative information about the land loan portfolio as a surprise. (Tr. 2599–608.) She referenced one analyst report which stated that, though some stress was expected, "a provision of this magnitude is, in our view, a surprise." (PX 632; Tr. 2600.) The analyst further noted that Bancorp's announcement that many of its land loans were classified assets suggested "the possibility of migration into nonaccruals in the coming quarter." (PX 632; Tr. 2601.) Another analyst report noted that the "pipeline of potential nonperforming loans implies more pain ahead."

[26] Specifically, Preston identified the information contained in the "three bullet points" on "page 3" of the 8-K as the information regarding non-accruals and classified assets which caused the price decline. (Tr. 2594–95.)

(PX 630; Tr. 2606.)

Preston acknowledged that Bancorp also announced other information that might have affected the stock price on October 26, 2007, including net interest margin compression, the curtailment of BankAtlantic's branch expansion, and changes in the performance of home equity loans; but she maintained that this other news did not contribute to the residual decline of Bancorp's stock price on October 26, 2007. (Tr. 2608–10.) Preston based this opinion on the analysts' overwhelming focus on the deterioration of the land loans; the fact that Bancorp attributed the net interest margin compression to challenges it faced in its land loan portfolio; and, the analysts' positive reaction to the curtailment of the branch expansion. *Id.*

Finally, Preston concluded that the $3.15 residual decline on October 26, 2007, which she opined was caused by the negative information regarding the land loan portfolio, represented the amount by which Bancorp's stock price was inflated, beginning on April 26, 2007, *i.e.*, "the amount that investors overpaid as a result of [the fraud]." (Tr. 2527 & 2620–22.) Preston also concluded that "the decline due to the release of inflation on October 26th was ... $3.15." (Tr.

2547–48.)

Defendants contend that neither Preston's testimony nor any other evidence is sufficient to support a finding of loss causation or damages. With respect to Preston's testimony, Defendants argue that Preston's underlying assumption of fraud relating to both the BLB and non-BLB land loans was rejected by the Jury's findings and, therefore, that the Jury could not have relied on her opinion. And even if a jury could have relied on her opinion, Defendants argue that it was insufficient to support a finding that the revelation of the fraudulently concealed risk caused the price decline because Preston failed to disaggregate the non-fraud effects of other negative information, including information regarding the risk to the BLB loans which was already known to the market.

These arguments are not new. Defendants consistently raised them since the filing of their motions for summary judgment and to exclude Preston's testimony. And the Court first discussed them in its Omnibus Order addressing those motions:

> With respect to the company-specific decline of $3.15 per share on October 26, 2007, Preston opines that 100% of the decline is attributable to information regarding the credit quality of the entire land loan

> portfolio. Essentially, Preston's opinion is that there was no other bad news to disaggregate from the information regarding the credit quality of the land loan portfolio and, therefore, that 100% of the residual decline is attributable to the negative land loan information.
>
> Defendants argue that this opinion is inadmissible because Preston fails to disaggregate the confounding, non-fraudulent factors from the October announcements. Specifically, Defendants contend that Preston failed to disaggregate the loss related to BLB loans, the loss related to the increase in general reserves, and the loss attributable to market forces.
>
> In her affidavit, Preston explains that her opinion does not purport to focus only on the non-BLB land loans, but instead the entire land loan portfolio: "Defendants claim that the allegations are somehow limited to [LAD] and [LADC] loans—at the exclusion of the BLB loans. I am advised by Counsel that this is incorrect." Accordingly, the Defendants' arguments regarding the failure to disaggregate the BLB loan information do not go to the reliability of Preston's opinion because Preston is explicitly offering an opinion on the residual decline attributable to information regarding the entire land loan portfolio, including the BLB loans.

In re BankAtlantic, 2010 WL 6397500 at *17 (footnotes and citations omitted). The Court went on to note: "However, the Court will revisit this issue should it become apparent that Plaintiffs have put forth insufficient evidence to support a fraud claim relating to the BLB loans which extends past the April 2007 disclosures." *Id.* at *17 n.26.

The Court did revisit the issue at trial in connection with Defendants' motion for judgment as a matter of law, but determined that as there was sufficient evidence in the record to support a finding of BLB fraud after April 2007, the Jury would have to decide the issue. (Tr. 3044.) But, again, the Court noted that it would reconsider the issue post-verdict if the Jury found no such BLB fraud:

> Now, in the end, though, I suspect that the Court is not going to be able to rule as a matter of law that there was BLB fraud after April 26th; that the jury is going to have to decide that.
>
> ... There is an issue down the road ... of what should the jury be told about its decision as to whether there was BLB fraud after April 26th and what to do if they find there is no BLB fraud after April 26th.

(Tr. 3045.)

As it turns out, the verdict hinges on Statement 10 which, under *Virginia Bankshares*, does not support a finding of BLB fraud, but only a finding that the risk to the *remainder* (*i.e.*, the non-BLB portion) of the land loan portfolio was fraudulently concealed. *See* 501 U.S. at 1092–94. The Jury effectively rejected Preston's assumption, and so her testimony is—at best—incomplete because she failed to disaggregate the effect of the earlier disclosed negative BLB

information on Bancorp's stock price.

As the Supreme Court noted in *Dura,* even if a defrauded plaintiff sells his shares at a lower price after the truth of the fraud is revealed to the market "that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." 544 U.S. at 343. Accordingly, where a fraud is revealed contemporaneously with the announcement of other negative, but non-fraud-related information, plaintiffs bear the burden of disaggregating the effect of the unrelated negative information on the stock price. Simply, establishing that the price reacted in some statistically significant way "to the *entire bundle* of negative information ... suggests only market efficiency, not loss causation, for there is no evidence linking the *culpable* disclosure to the stock-price movement." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 271 (5th Cir. 2007) (emphasis in original).

In this case, there is no question that Bancorp announced a bundle of negative information on October 25 and 26, 2007, some of it

fraud-related and some of it not fraud-related. Preston herself testified that Bancorp announced negative information in addition to that regarding the land loans, but she claimed this information had no effect on the stock price. (Tr. 2609.) However, the negative information regarding the land loans was itself a bundle of information. For instance, in its October 25, 2007 8-K, Bancorp did not simply announce an increase in non-accrual and classified assets within the land loan portfolio, it announced the particular increases in each portion of the land loan portfolio. Preston freely admitted at trial that she did not attempt to disaggregate this bundle of negative land loan information because she assumed that it was all fraud related, *i.e.*, that the fraud related to the entire land loan portfolio, including the BLB loans.[27] (Tr.

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[27] In fact, on cross-examination, Preston testified that, without a finding supporting her assumption of continuing BLB fraud after April, her opinion was basically irrelevant:

> Q. And those, in fact, are the assumptions that if those are true, you then rendered your opinion based on those facts?
>
> A. That's correct.
>
> Q. And if those opinions [*spoken error*] are not true, then your opinion on damages, I think you would agree, isn't of much moment?
>
> A. Correct. If there is no liability, the there are no damages.
>
> * * *

2691.) Preston did qualify this admission by claiming that such a disaggregation could only have been conducted using information which was not publicly disclosed as of October 26, 2007—Preston claims that Bancorp did not publicly disclose the breakdown of the negative land loan information between BLB and non-BLB loans. (Tr. 2710–11.) This claim is simply untrue, and no jury could have found otherwise. Although there may have been some items of negative news which were not publicly broken down (*e.g.*, the $48.9 million loan loss provision), as explained above, the negative news to which Preston explicitly attributed the price decline in her direct testimony—*i.e.*, the three bullet points in the 8-K announcing the increase in non-accrual and

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> Q. So in other words, if the jury finds that the company did adequately warn of the risk of the builder land bank portfolio then your opinion as to the damages in October is wrong, correct?
>
> A. The jury would not find liability, so they would not find damages.
>
> * * *
>
> Q. So we are perfectly clear, if the jury finds no fraud with the BLB portfolio from April to October, then your entire opinion dies?
>
> A. In [*sic*] the jury finds no fraud related to the assumptions I have made regarding the land bank portfolio ..., then they not will find liability and than there will be no damages.

(Tr. 2691, 2713.) Preston may have avoided answering with a clear "yes," but her own assessment of the opinion is clear—without a finding in support of her assumption, it was not of much moment.

classified assets—was publicly broken down, *in the 8-K*, into its BLB and non-BLB components.

Moreover, the fact that neither Bancorp nor any analysts precisely quantified the effects of the negative BLB loan information versus the negative non-BLB information did not relieve Plaintiffs of the burden to disaggregate—the very nature of the task presumes that the competing factors will not always lend themselves to a mathematically precise disaggregation analysis. *See Dura*, 544 U.S. at 343. And Preston testified at trial that she was capable of a disaggregation analysis where the competing factors were not quantified. With respect to the first period, Preston claimed she was able to disaggregate from the $0.55 residual price decline on April 26, 2007, the effect of non-fraudulent information even though "that wasn't quantified by anyone"—not Bancorp and not the analysts. (Tr. 2588.) For that period, Preston arrived at a "conservative" estimate of $0.37 per share after disaggregation. (Tr. 2582–93.) Preston offered no explanation why a similar analysis would not have been possible to disaggregate the effects of the negative BLB loan information on the October 26, 2007 price decline.

Given that a jury could not have found Statement 10 to include BLB fraud and Preston's admitted failure to disaggregate the effect of the negative information regarding the BLB loans, the Court agrees with Defendants that a jury could not have relied on her opinion—at least not with respect to Statement 10. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). This is fatal to the Jury's verdict because there is no other evidence from which a jury could have found loss causation.

Without Preston's opinion, a jury would be left with no more than the text of the 8-K and the conference call—both jumbles of qualitative and quantitative financial information—and several independently admitted analyst reports which point to the negative information regarding the land loan portfolio as a whole as the most important news. (PX 630, 632 & 638.) This evidence, however, was insufficient to allow the Jury to conclude that the fraud-related (*i.e.*, non-BLB information) affected the stock price. *See, e.g.*, *Oscar*, 487 F.3d at

270–71 (holding that evidence of "analyst commentary" is "little more than well-informed speculation" as to whether a price decline is attributable to one piece of negative information or another). "[A]nalyst speculation about materiality, while better informed than a layman, more closely resembles the latter." *Id.* at 271. Expert testimony may not be required to prove loss causation in every Rule 10b-5 case, but where a tangle of fraud and non-fraud factors affect a stock's price, it usually is—and this case is no exception. *See, e.g.*, *Archdiocese of Milwaukee Supporting Fund, Inc. v. Haliburton Co.*, 597 F.3d 330, 341 (5th Cir. 2010) ("This showing of loss causation is a 'rigorous process' and requires both expert testimony and analytical research or an event study that demonstrates a linkage between the *culpable* disclosure and the stock-price movement.") (citations omitted).

Further, even if a jury could have relied on Preston's opinion up to a point—the point where she opined that the entire decline was attributable to the negative land loan information—it could not have completed the analysis and disaggregated the effects of the BLB information on its own. As explained above, the negative land loan information was itself a *bundle* of negative news—some regarding the

BLB loans, some regarding the non-BLB loans, and some regarding both. Any attempt to attribute some price decline to one particular piece without expert testimony would also be impermissible speculation. *See id.* While it may be true that the negative land loan news was spread equally between the BLB and non-BLB portions, any inference that each had an equal effect on the stock price is only speculation. *See, e.g.*, *Fener v. Operating Eng'rs Constr. Indus.*, 579 F.3d 401, 410 (5th Cir. 2009) ("[F]raudulent practices could have resulted in 90% of the circulation decline, but if the stock price fell because the market was concerned with *only* the reason for the other 10%, loss causation could not be proven."). Accordingly, a jury could not have found loss causation with respect to Statement 10, and judgment as a matter of law will be entered for Defendants.

In concluding that Plaintiffs failed to produce sufficient evidence from which the jury could find loss causation, this Court readily concedes that reasonable minds can differ on the nature and extent of a plaintiff's burden in proving loss causation in a fraud-on-the-market-case under Rule 10b-5.

In *Dura*, the Supreme Court rejected the Ninth Circuit's view

that a securities plaintiff adequately pled and proved loss causation by proving that he purchased stock at an inflated price due to fraud and subsequently suffered a loss. While such a showing might show that the misrepresentation "touches upon" a later economic loss, it does not, according to Justice Breyer's opinion, adequately account for the "tangle of factors affecting stock price" such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events" taken separately or together. *Dura*, 544 U.S. at 343. However, in describing the plaintiff's burden, Justice Breyer merely stated: "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the economic loss and proximate cause that the plaintiff has in mind." *Id.* at 347. He further stated: "We need not, and do not, consider other proximate cause or loss-related questions." *Id.* at 346. Yet, the greater weight of authority as reflected in many of the circuit and district court opinions that have followed *Dura* and are cited herein, is that a securities-fraud plaintiff can satisfy his burden of proving loss causation only by producing the testimony of an expert who has completed a reliable multiple-regression analysis, event study,

and financial analysis in order to quantify the extent to which the claimed losses are the result of the alleged fraud.

Whether *Dura* actually requires this level of statistical and econometric analysis to prove loss causation is, in the view of this Court, a debatable proposition, and notwithstanding the conclusion herein that Plaintiffs' proof of loss causation failed, this Court has endeavored to apply a less rigorous standard in its consideration of Candace Preston's testimony and any other evidence relevant to the issue presented at trial. The evidence, however, ultimately failed in this case because Preston, on whose testimony proof of loss causation hinged, wholly failed to consider that the Jury would reject the assumption—the assumption that she was asked by Plaintiffs' counsel to make—that the BLB fraud persisted after April 26, 2007. The Jury therefore was left to impermissibly speculate as to the relative market effects of the various pieces of qualitative and quantitative land loan data contained in the 8-K and conference call. *See, e.g.*, *Oscar*, 487 F.3d at 271 ("[P]laintiffs must, in order to establish loss causation ..., offer some empirically based showing that the corrective disclosure was more than just present at the scene. And this burden cannot be discharged

by opinion bereft of the analysis plaintiff's own expert conceded was necessary."); *In re Williams Sec. Litig.*, 558 F.3d 1142–43 (10th Cir. 2009).

Further, Preston's testimony, even if sufficient to support a finding of loss causation, was insufficient to support a finding of damages—an essential element of Plaintiffs' claim. *See Dura*, 544 U.S. at 342. Where a plaintiff proves loss causation by demonstrating that the disclosure of the fraud was a substantial contributing cause of his loss, to prove damages, a more rigorous showing is required, because by the express terms of the Exchange Act, a plaintiff's recovery is limited to "actual damages on account of the act complained of." *See* § 78bb(a). And as stated by the Eleventh Circuit in *Robbins v. Koger Properties*: "as long as the misrepresentation is one substantial cause of the investment's decline in value, other contributing forces will not bar recovery under the loss causation requirement. But in determining recoverable damages, these contributing forces must be isolated and removed. This is often done ... with the help of an expert witness." *Robbins*, 116 F.3d at 1447 n.5; *accord Miller v. Asensio & Co., Inc.*, 364 F.3d 223 (4th Cir. 2004) (requiring a more rigorous disaggregation

analysis to prove damages than loss causation).

Preston's testimony on damages fails for the same reasons as it does with respect to loss causation; she fails to adequately isolate the damages caused by the fraud. Without Preston's testimony, Plaintiffs failed to produce sufficient evidence for the Jury to find both the fact of proximately caused damage and the amount of proximately caused damage. *See In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1276 (N.D. Okla. 2007) (plaintiffs' failure to prove fact and amount of damages fatal to claims). Thus, even had Plaintiffs made a sufficient showing of loss causation, they did not produce sufficient evidence to support an award of damages in any amount.

D. *Remaining Statements*

Having determined that the verdict, which rested on Statement 10, was not supported by the evidence at trial, the question arises as to what should be done with the remaining statements for which the Jury found liability but was not asked to assess damages.[28] The simple answer is that these findings cannot support any judgment for

[28] In addition to Statement 10, the jury found that Statements 13 through 17 and 19, were made in violation of Rule 10b–5 by certain Defendants, including Bancorp, Alan Levan, and Toalson.

Plaintiffs because there is no finding of damages attached to them.[29] Accordingly, the Court will enter a final judgment for Defendants as to all claims and statements. However, because the Court anticipates that Plaintiffs will move for a new trial on damages as to these remaining statements, the Court will also address under Rule 50(b), the insufficiency of the evidence supporting the liability findings as to these statements.

As with Statement 10, these remaining statements do not fit with Preston's assumptions about the nature of the fraud. The result is a similar failure of proof regarding the causal relationship between the statements and any decline in the price of Bancorp's stock—*i.e.*, loss

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[29] Plaintiffs argue that "while the jury [was] asked to determine the first statement from which damages flowed, it was understood that any finding of damages would be constant and extend to any subsequent actionable misstatements and omissions." (D.E. 675, p. 26.) The Court disagrees. The verdict form *only* asked the Jury to attach damages to "the first Section 10(b) violation [they] found," and, consequently, the Jury only found the amount of damages caused by the first Section 10(b) violation. (D.E. 665; Tr. 3951, 62.) In fact, the initial draft of the verdict form instructed the Jury to skip the remaining statements once the first violation was found in each damage period. (Tr. 3934–35.) Plaintiffs requested that the Jury be asked to adjudicate each statement regardless of whether they found a prior violation in case the first violation the Jury found was disregarded on appeal or in a post-trial motion. *Id.* And the Court accommodated the request. Also, the record is clear that Defendants never agreed that the Jury's finding of damages as to the first violation would automatically shift to the next violation if the first failed. (The resolution of the inconsistency as to Statement 7, on the other hand, was a completely separate issue governed by Rule 49 and for which their was a waiver by both parties. *See* Part II *supra.*)

causation and damages.

Statements 13 through 17 are excerpts of comments made by Alan Levan during the July 25, 2007 second-quarter earnings conference call. (DX 8.) During the call, Alan Levan reiterated his concern for the BLB loans and his relative lack of concern for the remainder of the land loan portfolio.[30] *Id.*

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[30] As with the third-quarter earnings conference call, the transcript of the entire second-quarter earnings conference call was admitted into evidence at trial. The following are the relevant portions of Alan Levan's comments, embracing Statements 13 through 17:

> [ANALYST]: Basically what I'm trying to—ask you is the $135 million in the land loans that you are concerned about, are there other portfolios (unintelligible) focus you on the construction portfolio that you feel there might be some risk down the road as well.
>
> ALAN LEVAN: There are no asset classes that we are concerned about in the portfolio as an asset class. You know, we've reported all of the delinquencies that we have, which actually I don't think there are any other than the ones that we've, you know, that we've just reported to you.
>
> So the portfolio has always performed extremely well, continues to perform extremely well. And that's not to say that, you know, from time to time there aren't some issues as there always have, even though we've never taken losses in that—we've not taken—I won't say ever taken any losses, because that's probably never going to be a correct statement, but that portfolio has performed extremely well.
>
> The one category that we just are focused on is this land loan builder portfolio because, you know, just from one day to the next, the entire homebuilding industry, you know, went into a state of flux and turmoil and is impacting that particular class. But to our knowledge and in—just in thinking through, there are no particular asset classes that we're concerned about other than that one class.
>
> * * *

Thus, apart from the fact that these statements were made some three months after the April 26, 2007 conference call each of these statements, like Statement 10, is at best a fraudulent concealment of the risk to the non-BLB portion of the land loan portfolio. And like Statement 10, a jury could not have found them to be actionable misrepresentations or omissions regarding the BLB loans. Accordingly, Preston's opinion and the other evidence of loss causation and damages

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> [ANALYST]: ... If I can just question you about the commercial portfolio for a second, for the construction portion of that, which I think you said was 63% of the portfolio, can you give us some sense of what the various delinquency buckets on that portion of the portfolio looks like at the end of June and how that's changed since the beginning of the year?
>
> ALAN LEVAN: I could be wrong, but I think it's zero. I don't think we have any delinquency in that portfolio, in the entire portfolio.
>
> * * *
>
> Other than the non-accruals we've reported to you, there is, you know, there is no—there are no other delinquencies in that portfolio.
>
> And again, I'm—I could be—don't take it as an absolute, but I'm just telling you to date we have—we do not have any concern about the balance of the portfolio.
>
> * * *
>
> Brian, we've confirmed that—while we were talking, somebody checked and to our knowledge, at this moment we have no delinquencies in the balance of the portfolio ... in the commercial portfolio.

(DX 8, pp. 20–21, 32–33.)

fails for the same reason: Preston's failure to disaggregate the non-fraudulent negative information related to the BLB loans from the bundle of negative information announced on October 25 and 26, 2007.

The sole remaining statement for which the Jury found liability, Statement 19, is different from the other misstatements submitted to the Jury. It is not taken from an earnings conference call but from the text of Bancorp's 2007 second quarter 10-Q, published on August 9, 2007. (DX 9.) It is also not a general statement about levels of risk or management concern regarding the land loan portfolio. Instead, it is a discrete statement about the amount of "Total Potential Problem Loans," *i.e.*, a statement that the amount of "Total Potential Problem Loans" amounted to $8.35 million.[31] *Id.* p. 23. At trial, Plaintiffs

[31] The amount was listed in the following table:

	June 30, 2007
NON PERFORMING ASSETS	
Non-accrual:	
Tax Certificates	$ 711
Loans	21,806
Total non-accrual	22,517
Repossessed Assets:	
Real estate owned	23,886
Total nonperforming assets, net	$ 46,403
Allowances	
Allowances for loan losses	$ 54,754

contended this figure was a fraudulent misrepresentation because one of its components, the amount of "Performing impaired loans" was greatly understated at $4.6 million. According to Plaintiffs, all of BankAtlantic's then-classified assets met the stated definition of performing impaired loans and should have been disclosed as such. The true amount of performing impaired loans, Plaintiffs argued, was tens of millions of dollars higher, as was revealed by the October 25 2007 8-K. (DX 9, p. 23; PX 151; Tr. 4107–08.)

Assuming this was an actionable misrepresentation, there is insufficient evidence to connect it to any decline in the price of BankAtlantic's stock. While it may be true that a jury could have found Statement 19 to be a misrepresentation of the amount of potential problem loans across the land loan portfolio, including the BLB portion, Preston offered no opinion on such a fraud. Preston's opinion was based

Allowances for tax certificate loses [*sic*]		3,829
Total allowances	$	58,583
POTENTIAL PROBLEM LOANS		
Contractually past due 90 days or more	$	164
Performing impaired loans		4,596
Restructured loans		3,588
TOTAL POTENTIAL PROBLEM LOANS	$	8,348

(DX 9, p. 23.)

on the assumption that Bancorp broadly misrepresented or concealed the risk of significant losses throughout the land loan portfolio *as of April 26, 2007*, not on the assumption that Bancorp concealed *only* the total amount of classified assets by failing to report them as "performing impaired loans" months later on August 9, 2007.[32] (D.E. 365 Ex. B, p. 6.)

As with the previous statements, the divergence between Statement 19 and Preston's assumption about the fraud is fatal to her disaggregation analysis. Without accurate assumptions as to the nature, scope and duration of the fraud, Preston had no way of distinguishing fraudulent information from non-fraudulent information, much less disaggregating their effects on the stock price.[33]

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[32] Indeed, it should be of no surprise that Preston's assumptions do not fit with Statement 19 because Statement 19 was not plead in the First Consolidated Amended Complaint—the pleading Preston claimed to have reviewed in formulating her opinion. (D.E. 365 Ex B., p. 4.) Preston's expert report predated Plaintiffs' motion to amend the complaint to include fraudulent understatement of the total potential problem loans in the 2007 second quarter 10-Q. (D.E. 210 & 365 Ex. B.) The importance of this point should not be understated; Preston herself testified at trial when asked why she reviewed the legal complaint: "I've [*sic*] just had to review the complaint, see what the allegations were .... I had to make sure I understand what the allegations are so I don't and up saying, without any basis, oh, the whole decline is related to that." (Tr. 2545.)

[33] Jeffrey Mindling, BankAtlantic's Chief Credit Officer, testified at trial that many of the loans that were risk-graded 11 were accounted for in the same table in the category "Allowance for loan losses." (Tr. 611–20.) This, then, is an example of the type of information that arguably should have been considered as part of the

In the end, the Jury is left to unreasonably speculate as to whether Preston's disaggregation opinion based on the assumed fraud is equally applicable to some other fraud. *See Brooke*, 509 U.S. at 242. The October 25, 2007 8-K for instance announced increases in classified assets, non-accrual assets, and loan loss reserves relating to the entire land loan portfolio, but Statement 19 concealed only the true amount of total potential problem loans (or classified assets)—the total amount of non-accruals were separately disclosed in the 10-Q and was not found to have been false. *See* Table, *supra* note 31; (DX 9.) And Preston's opinion is silent as to why the increases in either the non-accrual assets or loan loss reserves did not require disaggregation.

Moreover, even if Statement 19 could be construed as an actionable misrepresentation or concealment of the general risk to the entire land loan portfolio, it is hard to conceive how a jury could find it to be a *material* misrepresentation as to the BLB portion, considering Bancorp's numerous warnings of risk and concern regarding the BLB loans up to that point.[34] *See Basic Inc. v. Levinson*, 85 U.S. 224, 231

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disaggregation analysis if liability flowed from Statement 19.

[34] Bancorp continued to warn of the risk to the BLB loans in the 10-Q:

(1987). Thus, the original problem of Preston's failure to disaggregate the negative BLB information persists.

For the foregoing reasons, the Court will enter final judgment as a matter of law in favor of Defendants as to all claims and statements.[35]

IV. Motion for New Trial

Along with their Motion for Judgment as a Matter of Law, in the alternative, Defendants move for a new trial pursuant to Federal Rule of Civil Procedure 59. Federal Rule of Civil Procedure 50(c) provides that, if the court grants a renewed motion for judgment as a matter of

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> Conditions in the residential real estate market nationally and in Florida in particular continued to deteriorate during the six months fo 2007. ... The "builder land bank loan" segment, at approximately $135 million, consists of twelve land loans to borrowers who have or had option agreements with regional and/or national home builders. These loans were originally underwritten based on projected sales of the developed lots to the builders/option holders and timely repayment of the loans is primarily dependent upon the acquisition of the property pursuant to the options. If the lots are not acquired as originally anticipated, BankAtlantic anticipates that the borrower may not be in a position to service the loan with the likely result being an increase in nonperforming loans and loan losses in this category.

(DX 9, p. 22.)

[35] Under § 20(a) of the Exchange Act, every person who directly or indirectly controls any person liable for a § 10(b) violation shall also be liable jointly and severally to the same extent as such controlled person. Because liability under § 20(a) is derivative upon liability under § 10(b), the failure to produce sufficient evidence to support a § 10(b) violation is necessarily fatal to a § 20(a) claim. *See Edward J. Goodman Life Income Trust v. Jabil Cir., Inc.*, 594 F.3d 783 (11th Cir. 2010). Accordingly, because all Defendants are entitled to judgment as a matter of law in their favor on all Plaintiffs' claims under § 10(b) and Rule 10b-5, they are likewise entitled to judgment in their favor as to Plaintiffs' claims under § 20(a).

law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. Accordingly, the Court addresses whether Defendants would be entitled to a new trial, should the judgment for Defendants be vacated or reversed.[36] For the reasons stated below, the undersigned finds that, should the Court of Appeals reverse the Court's determination that Plaintiffs failed to put forth sufficient evidence of loss causation, Defendants would not be entitled to a new trial.

The Court first addresses Defendants' arguments regarding evidentiary errors. The Court then discusses Defendants' argument that the Court failed to properly instruct the Jury on various points of law and to utilize their proposed verdict form. Finally, the Court discusses Defendants' argument that the Court's instruction on the falsity of Alan Levan's July 25, 2007 statements was prejudicial error.

A. *Rule 59 Standard*

Rule 59 provides that "the court may, on motion, grant a new trial on all or some of the issues ... after a jury trial for any reason for

[36] Specifically, the Court examines whether Defendants would be entitled to a new trial should the Court of Appeals reverse the Court's judgment for Defendants and hold that the evidence of loss causation was sufficient to support a finding of liability against Alan Levan and Bancorp with respect to Statement 10.

which a new trial has heretofore been granted in an action at law in federal court." A party may seek a new trial by arguing that "the verdict is against the great weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940); *Steger v. Gen. Elec. Co.,* 318 F.3d 1066, 1081 (11th Cir. 2003). But under Federal Rule of Civil Procedure 61, the court must disregard all errors and defects that do not affect any party's substantial rights.

B. ***Evidentiary Errors***

Defendants argue that the Court made several evidentiary errors and that they are entitled to a new trial as a result. First, they argue that the exclusion of their proposed expert witnesses' testimony was erroneous. Second, Defendants argue that the Court improperly excluded testimony concerning disclosures made by other financial institutions. Finally, Defendants argue that the Court wrongly admitted various statements made in emails by a BankAtlantic employee, Perry Alexander.

The admissibility of evidence is committed to the broad discretion of the trial court. *Walker v. NationsBank of Fla.*, 53 F.3d 1548, 1554 (11th Cir. 1995). A new trial is not warranted due to evidentiary error unless the error substantially prejudiced the affected party. Fed R. Civ. P. 61; *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004).

(i) *Exclusion of Proposed Expert Testimony*

Prior to trial, Plaintiffs moved to exclude the proposed testimony of Defendants' three independent expert witnesses: Stephen Morrell, Jack DeWitt, and Michael Keable. (D.E. 312, 315 & 321.) Upon careful consideration of the Motions, the Court excluded all of Morrell's and DeWitt's proposed testimony and the majority of Keable's proposed testimony. (D.E. 466, 479 & 460.) Defendants contend that the Court's rulings on these matters constitute prejudicial error warranting a new trial.

In the instant Motion for New Trial, Defendants largely reargue issues raised in their responses to Plaintiffs' motions to exclude. (D.E. 366, 369 & 367.) The Court considered and addressed those arguments in its prior rulings and incorporates those findings in the instant order.

(*See* D.E. 466, 479 & 460.) Below, the Court addresses only those additional arguments raised in Defendants' Motion for New Trial related to the Court's exclusion of their proposed experts.[37]

a. *Stephen Morrell*

Defendants argue that the exclusion of the proposed testimony of Stephen Morrell was erroneous and warrants a new trial. Defendants incorporate by reference the arguments from their Response to Plaintiffs' Motion to Exclude Morrell's testimony and further argue that the exclusion of Morrell's testimony affected their substantial rights, "because Morrell would have explained how the decline in Bancorp's stock price was driven by a depression in the Florida real estate market." (D.E. 666, p. 25.)

The Court did not err in excluding Morrell's proposed testimony. In his report, Morrell offered two broad opinions: first, that the recession in Florida began earlier, lasted longer, and was more severe than that suffered in the rest of the nation; and second, that, few, if any, economists or analysts could have foreseen the depth and breadth

[37] Because Defendants raise no new issues with respect to DeWitt's testimony, the Court incorporates by reference and relies on the rulings made and reasons provided in its Order on Motion to Exclude Expert Testimony of Jack DeWitt. (D.E. 479.)

of the recession in Florida while it was happening. (D.E. 313, Ex. A ¶¶ 1 & 16.) These opinions were based on Morrell's comparison of a variety of economic measures for Florida and the United States as a whole over dates ranging from 2006 through 2010.

The Court excluded Morrell's proposed testimony under Federal Rules of Evidence 401, 402, 702 and the standards provided by *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). First, the Court found that Morrell failed to explain the connection between his opinions and the raw economic data cited in his report. (D.E. 466, pp. 5 & 7). Second, the Court found that Morrell's opinions would not assist the trier of fact in determining a fact in issue. (D.E. 466, pp. 6 & 8.) His data and the conclusory opinions derived therefrom related to the economic recession in Florida from 2006 through 2010. Such testimony was both too broad temporally to relate to the instant action and not sufficiently connected to the question of whether Defendants' alleged misrepresentations concerning BankAtlantic's land loans caused Bancorp's stock price to decline in 2007.

Though Defendants argue that Morrell would have explained that Bancorp's share price decline was driven by the collapsing Florida real

estate market, Morrell offered no opinion to that effect in his expert report. In fact, Morrell's expert report concerned itself with the Florida real estate market only in the most limited way. He stated that "[h]ousing markets in Florida are experiencing a depression versus a severe United States recession." (D.E. 313, Ex. A ¶ 13.) This opinion was apparently based on two measures: a comparison of the number of building permits for new housing units issued in Florida in 2005 and the number issued in 2009; and a comparison of housing price indices for the Miami and Tampa regions from 2006 through January 2010 against a nationwide index. *Id.* These data and Morrell's resultant opinion were not sufficiently connected to the facts in issue in this case to meaningfully assist the trier of fact. *See Boca Raton Comty. Hosp., Inc. v. Tenet Healthcare Corp.*, 582 F.3d 1227, 1233–34 (11th Cir. 2009). The Court, thus, committed no error in excluding Morrell's proposed testimony.

b. *Michael Keable*

Defendants argue that the exclusion of the proposed expert testimony of Michael Keable was erroneous and warrants a new trial. Defendants offered Keable as an expert on loss causation and damages

to counter Preston's testimony. Prior to trial, the Court determined that the bulk of Keable's opinions were inadmissible because they were insufficiently supported or explained and were not helpful to the trier of fact in deciding a question in issue. (*See* D.E. 460.) However, the Court ruled that Keable could offer at trial his "opinion regarding the false sense of precision in Preston's calculation of a $0.37 residual decline on April 26, 2007 attributable to negative information regarding the BLB loans." (D.E. 460, p. 8.) Nonetheless, Defendants elected not to call Keable to testify at trial.

In their Motion for New Trial, Defendants raise no new arguments regarding the admissibility of Keable's testimony but argue that the Court's rulings on Keable's testimony "affected Defendants' substantial rights by eliminating their most direct answer to Candace Preston's damages analysis and exposing them to the argument made in closing that Alan Levan could not provide testimony to rebut her analysis because he was not an independent, third party expert." (D.E. 666, p. 27.) To the extent that Defendants' argument addresses parts of Keable's testimony previously deemed inadmissible, the Court incorporates its earlier rulings. And insofar as Defendants chose not to

present Keable's admissible testimony, any prejudice they suffered as a result is wholly self-inflicted and does not warrant a new trial.

(2) *Evidence of Other Banks' Disclosures*

Defendants argue that the Court erroneously excluded evidence and testimony that "few, if any, of the institutions included in the NASDAQ Bank Index made the sort of disclosure that Plaintiffs claimed should have been made here." (D.E. 666, p. 27.) Specifically, Defendants sought to introduce evidence that other banks did not disclose the number or amounts of loans on internal watch lists or those rated special mention or substandard. The Court previously articulated its reasons for excluding such testimony at some length, both from the bench and in a written order. (*See* Tr. 3631–33; D.E. 527.) The Court incorporates those rulings here.

In sum, the Court excluded such evidence because of its limited probative value and its potential to confuse the Jury. Plaintiffs did not claim that Defendants had an independent duty to disclose loans on internal watch lists; rather, they contended that Bancorp intentionally misrepresented the true quality and performance of its land loans, as reflected in the volume of land loans downgraded to special mention or

substandard risk grades. Accordingly, evidence of what other banks disclosed would be irrelevant in the absence of a full presentation to the Jury of the types of loans made by those banks, how the loans were performing, and what representations those banks made regarding those assets, which would have required no less than a trial within a trial regarding the practices of unrelated banking institutions. The Court rightly excluded such evidence in light of its potential to confuse and mislead the jury. *See* Fed. R. Evid. 401 & 403.

Moreover, the evidence and testimony Defendants sought to introduce on this subject was incompetent. Defendants failed to lay a proper foundation for the testimony of any BankAtlantic employee who could have testified to a "consensus" among financial institutions regarding disclosure requirements. (*See* D.E. 526-3 & 527.) And Defendants sought to introduce a letter concerning regulatory disclosure requirements issued years after the end of the class period. (*See* D.E. 474, pp. 15–16 & Tr. 3631–33.) The Court committed no error in excluding this evidence.

(3) *Perry Alexander Emails*

Defendants argue that the Court erroneously allowed the

introduction of statements contained in eight email exchanges sent by a BankAtlantic employee, Perry Alexander, and that the admission of such evidence warrants a new trial. Defendants contend that the statements were inadmissible hearsay and Plaintiffs did not meet their burden of showing that they fell within an exclusion or exception to the general rule against hearsay.[38]

Hearsay evidence is generally inadmissible, except as provided by the Federal Rules of Evidence. Fed. R. Evid. 802. Rule 801(d) excludes several categories of statements from the definition of hearsay. A statement is not hearsay if it is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. Fed. R. Evid. 801(d)(2)(D). Whether a statement falls under Rule 801(d)(2)(D) depends not on whether the statement was made in the scope of the declarant's agency or employment but on

[38] Defendants do not articulate their objections to specific emails in their Motion for New Trial nor do they specify the basis for their objection; rather, they incorporate by reference the arguments they raised in a pretrial Motion *In Limine* to exclude the emails of Alexander. In that Motion, Defendants argued that the emails were neither business records excepted from the hearsay rule under Federal Rule of Evidence 803(6) nor admissions by a party-opponent under Federal Rule of Evidence 803(d)(2)(D). (D.E. 298.) The Court denied the Motion without prejudice, as it failed to indicate which of Alexander's emails were the subject of the Motion. (D.E. 457.)

whether the statement concerns matters within the scope of the agency or employment. *Wilkinson v. Carnival Cruise Lines*, 920 F.2d 1560, 1565 (11th Cir. 1991).

The statements in question were admissible against Bancorp as admissions by a party-opponent. Alexander's statements concerned the credit quality and performance of various land loans coming before BankAtlantic's Major Loan Committee for approval, review, or modification. Alexander was employed as a loan officer and market manager for BankAtlantic from 1995 through 2008 and served on the committee from the second quarter of 2004 through June 2007. (Tr. 1389–90, 1395 & 3525–26.) His position as a member of that committee required him to review the details of the loans that came before it for approval or modification. (Tr. 1396–1400.) Alexander's service on the committee covered the period when many of the land loans in question were first approved and the period when the committee approved extensions and term modifications of many of those loans. His contemporaneous comments on the performance of those land loans as well as the processes by which they were approved and reviewed, thus, concerned matters within the scope of his employment. *See Wilkinson*,

920 F.2d at 1565–66.

Though Alexander was employed by BankAtlantic rather than Bancorp, the statements in the subject emails were nonetheless admissible against Bancorp. Statements made by employees of a subsidiary may be attributed to its corporate parent when the parent dominates the activities of the subsidiary. *Big Apple BMW, Inc. v. BMW of N. Am.*, 974 F.2d 1358, 1372 (3d Cir. 1992). There was no dispute before or during trial that BankAtlantic is the wholly owned subsidiary of Bancorp and that Bancorp is a holding company, the primary asset of which is BankAtlantic. (*See* DX 3, pp. 1 & 7–8.) And Plaintiffs laid a sufficient foundation for the Court to find that Bancorp dominates BankAtlantic's activities.[39] (D.E. 358.)

Defendants contend that Alexander's emails include "profanity, slang, gossip, and every other indication of unreliability imaginable." (D.E. 666, p. 29.) The admissibility of statements by party-opponents as non-hearsay under Rule 801(d)(2) is the product of the adversary system, rather than the satisfaction of the conditions of the hearsay

[39] Though the statements in issue may only have been admissible against Bancorp and not against the individual Defendants, no Defendant requested a limiting instruction from the Court to that effect.

rule, such as the reliability of the statement. Fed. R. Evid. 801(d)(2)(D) advisory committee's note. Thus, no guarantee of trustworthiness is required in the case of an admission. *Id.* That Alexander's out-of-court statements may have included profanity and slang does not affect their admissibility under Rule 801(d)(2)(D).

Defendants' arguments that the statements should have been excluded as irrelevant and unduly prejudicial also fail. Alexander's statements concerned the underwriting, credit quality, and deterioration of land loans in BankAtlantic's portfolio, matters relevant to the Jury's determination of whether the alleged misstatements constituted material misrepresentations. And though he used colorful and sometimes profane language in expressing his observations and opinions, his manner of expression did not render the statements unduly prejudicial or confusing to the Jury. *See* Fed. R. Evid. 403. In any event, the Court required the redaction of several of Alexander's email exchanges to prevent the introduction of irrelevant and prejudicial material. (*See* Tr. 1376–85.)

Finally, even were Alexander's statements improperly admitted, Defendants fail to demonstrate that they are entitled to a new trial on

this basis. Plaintiffs presented sufficient evidence, independent of Alexander's emails, for the Jury to find Alan Levan (and therefore Bancorp) liable for violating Rule 10b-5 with respect to Statement 10. The introduction of Alexander's statements was, thus, not vital to Plaintiffs' case and any error in admitting the statements was harmless. *Cf. Wilkinson*, 920 F.3d at 1564.

C. ***Jury Instructions***

Defendants argue that the Court's failure to give several of their requested jury instructions constituted prejudicial error warranting a new trial. Specifically, Defendants argue that the Court should have submitted to the Jury a special interrogatory regarding Preston's assumptions and that the Court improperly instructed the Jury on: causation in a collapsing market; corrective disclosure and length of inflation; disaggregation and damages; and, the claimed amount of damages.

The failure of a court to give a requested instruction is error only if the requested instruction is correct, is not adequately covered by the charge given, and deals with a point so important that the failure to give the instruction seriously impaired the defendant's ability to

present an effective defense. *See Adams v. Sewell*, 946 F.2d 757, 767 (11th Cir. 1991). A litigant is entitled to have the jury instructed on its theory of the case, so long as there was competent evidence to support the theory and the instruction is properly requested. *Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp.*, 849 F.2d 1336, 1349 (11th Cir. 1987). However, the Court need not give the requested instruction in the exact language requested. *Id.*

If the jury charge, as a whole, correctly instructs the jury on the law, no reversible error has been committed, even if a portion of the charge is technically imperfect. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. Jul. 23, 1981). So long as the instructions accurately reflect the law, the court has wide discretion as to the style and wording. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996).

(1) *Preston's Assumptions*

Defendants argue that the Court should have submitted to the Jury a question as to whether Plaintiffs proved by a preponderance of the evidence the factual assumptions on which Preston premised her testimony. Defendants provide no legal support for the proposition that

a jury must ratify an expert's assumptions via special findings in order to consider that expert's testimony.[40]

(2) *Causation in a Collapsing Market*

Defendants contend that the Court's instruction to the jury on corrective disclosures and materialization of the risk failed to make clear that "Defendants' argument was that the collapsing Florida real estate market severed the causal link." (D.E. 666, p. 10.) Defendants' proposed instruction read, in relevant part:

> ... if the loss coincides with a market-wide phenomenon causing comparable losses to other investors, the prospect that the Plaintiffs' loss was caused by the alleged fraud decreases. Plaintiffs must prove that its loss was caused by the alleged fraud as opposed to intervening events.

(D.E. 627.) The Court did not give Defendants' proposed instruction, but its instruction on corrective disclosures and materialization of the risk stated the following:

> Defendants contend that the Plaintiffs' losses were solely due to deteriorating conditions in the Florida real estate market, about which investors were forewarned. Defendants do not have the burden of proving this contention by a preponderance of the evidence; rather, it is Plaintiffs' burden, as stated above, to prove that

[40] The only legal support Defendants cite in their Motion is *Brooke Grp.*, 509 U.S. 209, which has no bearing on the issue.

> the corrective disclosures and/or materialization of concealed risks, and not other factors, were significant contributing causes of their damages.

(D.E. 635, pp. 21–22.) The Court's instructions adequately covered the law and Defendants' argument on causation in a collapsing market. *See Adams*, 946 F.2d at 767.

(3) *Corrective Disclosure & Length of Inflation*

Defendants contend that the Court's failure to give their requested instruction titled "Corrective Disclosure and Length of Inflation" warrants a new trial. Defendants' proposed instruction included the following:

> If you find by a preponderance of the evidence that an alleged misrepresentation or omission artificially inflated the price of BankAtlantic Bancorp stock, you will also have to determine the length of time during which the inflation existed. To make this determination, you must decide the date on which information curing or correcting the alleged misrepresentation or omission was publicly announced or otherwise effectively disseminated to the market. Dissemination of the allegedly withheld or misrepresented information through a public announcement, a press release, or a press report will correct the previous misrepresentation or omission and terminate the period during which purchasers can seek to hold Defendants liable under the securities laws for the misrepresentation or omission. At that point, subsequent purchasers are charged with knowledge of the true state of affairs and the stock's market price is

presumed to reflect its true value.

(D.E. 593-1, p. 14.)

The legal principle embedded in Defendants' requested instruction was sufficiently covered in the Court's instruction on corrective disclosures and the materialization of the risk. The Court instructed the Jury, in relevant part, that "Plaintiffs must prove by a preponderance of the evidence that a corrective disclosure or materialization of the concealed risk revealed the truth concealed by the misrepresentation or omission to the market *for the first time*." (D.E. 635, p. 20) (emphasis added). The instruction further informed the jury that the alleged revelations of the truth occurred on April 25 and 26, 2007 and October 25 and 26, 2007. (D.E. 635, pp. 20–21.)

The Court's instruction accurately and adequately advised the Jury that, if they found the Company revealed the truth concealed in the alleged misrepresentations prior to dates of the alleged revelations, they could not find that the misrepresentations caused the share price declines on April 26, 2007 and October 25, 2007. The Court, thus, committed no error in refusing to give the instruction in the language Defendants requested. *See Adams*, 946 F.2d at 767.

(4) *Disaggregation & Damages*

Defendants argue that the Court failed to make clear in its instructions that the Jury "needed to disaggregate non-fraud factors from any supposed loss...." (D.E. 666, p. 12.) During the charge conference, Defendants proposed the following instruction to be added "to the end of the Court's proposed instructions":

> Defendants contend that the stock price declines that occurred were not caused as a result of any alleged misrepresentations or omissions, but were, instead, caused by deteriorating conditions in the Florida real estate market about which investors were forewarned. Any award of damages must subtract from the price declines the losses caused by such factors, and Plaintiffs carry the burden of proof to eliminate from their damage claim losses cause by non-fraud factors.

(D.E. 628.)

The first sentence of Defendants' requested instruction pertains more specifically to loss causation than to damages. And, in fact, this sentence was included almost verbatim in the Court's instruction to the Jury on loss causation. (D.E. 635, p. 21.) The second part of the requested instruction relates to damages. The Court's instruction to the Jury on damages read, in pertinent part:

> There may be factors other than the alleged fraudulent statements and/or omissions that affected

> Bancorp's stock price on any given day. For example, market or industry conditions or bad news disclosed by Bancorp that was unrelated to the alleged fraud could have affected Bancorp's stock price. Defendants are not liable for any share price decline resulting from those other non-fraud related events. Plaintiffs bear the burden of disaggregating (or separating out) any share price declines that were caused by non-fraud related events or establishing that the entire share price decline was caused by the alleged fraud.
>
> Plaintiffs claim that the alleged fraud caused damages in the amount of 37 cents per share on April 26, 2007. Plaintiffs also claim that the alleged fraud caused damages in the amount of $2.93 per share on October 26, 2007.
>
> Defendants claim that Plaintiffs have failed to separate out price declines caused by market conditions, the conditions of the real estate market, and other conditions not related to the alleged fraud.

(D.E. 635, pp. 23–24.)

In line with the Defendants' requested instruction and the applicable law, the Court explicitly instructed the Jury that Plaintiffs could only recover damages actually caused by the misrepresentations and not by non-fraud related events. The instruction also placed the burden squarely on Plaintiffs to disaggregate from Bancorp's share price decline on the days in question the effect of any non-fraud events. And the Court informed the Jury of Defendants' theory, namely that

Plaintiffs failed to disaggregate from the price decline the effect of market conditions. The Court committed no error in substituting language substantially equivalent to Defendants' proposed instruction. *See Adams*, 946 F.2d at 767.

(5) *$2.93 Damage Instruction*

Defendants argue that the Court's instruction that the Plaintiffs were seeking $2.93 per share in damages warrants a new trial.[41] Defendants correctly point out that Plaintiffs' damages expert testified that, in her opinion, Bancorp stock was artificially inflated by $3.15 in the second part of the class period. Defendants contend that the Court's instruction on Plaintiffs' claimed damages, by not holding them to the $3.15 figure presented by Preston, relieved Plaintiffs of the burden of disaggregating non-fraud factors from their damages claim. Defendants argue that the $2.93 figure was based on speculation and conjecture and amounted to an unsupportable basis for a jury verdict.

The Court's instruction on Plaintiffs' damages claim was not error. The $2.93 instruction was merely a recognition that, under the

[41] The Court instructed the Jury in relevant part: "Plaintiffs claim that the alleged fraud caused damages in the amount of $2.93 per share on October 26, 2007." (D.E. 635, p. 24.)

Exchange Act, damages in a securities fraud case are limited to those actually caused by the misrepresentation. *See* § 78bb; *Robbins*, 116 F.3d at 1447 n.5. Expectation damages are generally not available to a prevailing plaintiff. Though Bancorp's residual decline on October 26, 2007 was, according to Plaintiffs' expert, $3.15 per share, all of which was caused by the revelation of the alleged fraud, the actual decline was $2.93. (Tr. 2596.) Plaintiffs were thus limited to that amount of per-share damages. The Court's instruction as to the amount Plaintiffs claimed in damages was not error.

D. ***Instruction on the Falsity of Alan Levan's Statements***

Defendants argue that the Court committed prejudicial error by instructing the Jury on its pretrial ruling that four statements made by Alan Levan in the July 25, 2007 conference call were false. Defendants argue that the Court erred in its pretrial ruling, that the subject statements were protected by the Reform Act's safe harbor, and that the question of liability regarding those statements should not have been submitted to the Jury because Plaintiffs failed to prove scienter, loss causation and damages with respect to the statements. Accordingly, Defendants argue that the Court erred in instructing the

Jury as to its finding and that such error warrants a new trial.

(1) *Summary Judgment: Falsity*

Defendants argue that the Court erred in granting Plaintiffs' Motion for Partial Summary Judgment, and, accordingly, its instruction to the Jury on that ruling was prejudicial error. Prior to trial, Plaintiffs moved for partial summary judgment as to the falsity of four statements Alan Levan made during the July 25, 2007 earnings conference call discussing Bancorp's second-quarter 2007 financial results.[42] The exchange that produced those statements proceeded as follows:

> [ANALYST]: [I]s the $135 million in the land loans that you guys are concerned about, are there other portfolios (unintelligible) focus you on the construction portfolio that you feel there might be some risk down the road as well.

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[42] Plaintiffs' motion had an extremely narrow focus. They stated:

> As noted above, to establish Defendants' liability under Section 10(b) and Rule 10b-5, Plaintiffs must prove that Defendants issued: "(1) a misstatement or omission, (2) of a material fact, (3) made with scienter, (4) on which plaintiff relied, (5) that proximately caused his injury." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2002).... Plaintiffs seek partial summary judgment only as to the first element—falsity—of Levan's July 25, 2007 earnings call statements.

(D.E. 237.)

> ALAN LEVAN: **There are no asset classes that we are concerned about in the portfolio as an asset class.** You know, we've reported all of the delinquencies that we have, which actually I don't think there are any other than the ones that we've, you know, that we've just reported to you.
>
> **So, the portfolio has always performed extremely well, continues to perform extremely well.** And that's not to say that, you know, from time to time there aren't some issues as there always have, even though we've never taken losses in that—we've not taken—I won't say ever taken any losses, because that's probably never going to be a correct statement, **but that portfolio has performed extremely well.**
>
> **The one category that we just are focused on is this land loan builder portfolio because, you know, just from one day to the next, the entire homebuilding industry, you know, went into a state of flux and turmoil and is impacting that particular class. But to our knowledge and in—just thinking through, there are no particular asset classes that we're concerned about other than that one class.**

(D.E. 338-20, pp. 22–23) (emphasis in original.) Plaintiffs argued that no genuine issue of fact existed as to the falsity of the four highlighted statements, and the Court granted summary judgment in their favor on that narrow issue.[43] (*See* D.E. 411.)

The Court did not err in granting summary judgment on this

[43] These four statements were listed as Statements 13 through 16 on the verdict form.

issue. As discussed above, to prevail on a Rule 10b-5 claim, a plaintiff must show that a statement was false or misleading. *Basic Inc.*, 485 U.S. at 238. For a statement to be an actionable misrepresentation, it must be of a definite factual nature. *See Va. Bankshares*, 501 U.S. at 1095. Statements of opinion or belief can be actionable misrepresentations if the plaintiff shows that the speaker falsely stated his belief and shows the factual justification for the statement to be false. *Id*. at 1092. Though Plaintiffs alleged that four separate statements by Alan Levan on July 25, 2007 were false, the Court examined the statements in two categories because of the near identity of the statements. Specifically, the Court assessed the falsity of Alan Levan's statements that the portfolio had always performed and continued to perform extremely well and his statements that he was not concerned with any class of assets in the construction loan portfolio other than the BLB loans.

As to the first category, Plaintiffs presented undisputed evidence of the falsity of Alan Levan's statement that the land loans other than the BLB loans had been and were performing extremely well.[44] First,

[44] Defendants argued in their Motion for Reconsideration and again in their Motion for New Trial that when Alan Levan stated in the July 25, 2007 conference

within BankAtlantic, Alan Levan had undisputedly expressed that the land loan portfolio as a whole, including the non-BLB loans, was not performing extremely well, thus demonstrating the falsity of his public assessment regarding their performance. (D.E. 338-19.)

Moreover, Plaintiffs presented undisputed evidence of the falsity of the justification for Alan Levan's statements. His internal assessment of the poor performance of the BLB and non-BLB loans was based on the many requested extensions of those loans' maturity dates to the Major Loan Committee, indicating poor performance and possible repayment problems. (D.E. 338-14, 15, 16, 17, 18, 83, 84, 104.) Also, by July 25, 2007, two non-BLB loans and one BLB loan were on non-accrual status; four more non-BLB and one more BLB loan had been downgraded to risk grade 11, indicating that the "asset [was] inadequately protected by the current sound worth and paying capacity of the obligor or collateral pledged"; and six more non-BLB and four more BLB loans had been downgraded to risk grade 10, indicating that

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call that the other loans in the portfolio were "performing extremely well," he was actually using a banking term of art, referring to loans that are "performing" as opposed to "non-performing," which is akin to non-accrual status. (D.E. 471, p. 6; D.E. 666, pp. 20–21.) However, at summary judgment (and even in connection with their Motion for Reconsideration), Defendants presented no evidence in support of this argument, let alone evidence that raised a genuine issue of material fact.

they had "potential weaknesses.... If left uncorrected, these potential weaknesses may result in the deterioration of the repayment prospects for the asset...." (D.E. 338-27 & D.E. 338-2, p. 5669.) Defendants presented no evidence that raised a genuine issue of fact as to the whether the land loans in the portfolio apart from the BLB loans had been and were continuing to perform extremely well as of July 25, 2007.

As to the second category of statements, Plaintiffs presented undisputed evidence that Alan Levan's professed concern with the BLB portion of the construction portfolio, to the exclusion of the balance of the land loan portfolio, was false. First, they presented undisputed evidence that Alan Levan was concerned with the entire land loan portfolio, because he had expressed undifferentiated concern with the performance of the land loan portfolio in its entirety, including both BLB and non-BLB loans, prior to the July 25, 2007 conference call. (*See* D.E. 338-5 & 338-19.)

Plaintiffs also presented undisputed evidence of the falsity of the factual justification for such statements. Alan Levan stated during the conference call that his concern with the performance of the BLB loans was due to the effects of turmoil and flux in the homebuilding industry.

(D.E. 338-20, p. 23.) However, turmoil in the homebuilding industry was having the same effect on all the loans in the land loan portfolio, as evidenced by the negative performance trends and deterioration identified above, which were spread throughout the BLB and non-BLB portions of the land loan portfolio.

In response, Defendants argued that the statements in issue were not material and that they were subject to the protections of the Reform Act's safe harbor, neither of which were in issue in Plaintiffs' motion. As to falsity, Defendants argued that the BLB loans were subject to higher levels of risk than the other land loans and that, months after the July 2007 statements, the BLB loans ultimately suffered greater losses than the non-BLB land loans. These arguments, and the evidence offered in support thereof, failed to meet and rebut Plaintiffs' arguments that the statements were false. That the BLB loans were, perhaps, exposed to greater risk than the non-BLB loans did not raise a genuine issue of fact as to whether Alan Levan was, in fact, concerned with the poor performance of all the land loans. Likewise, the higher losses caused by the BLB loans in the third quarter of 2007 failed to raise a genuine issue of fact as to whether the non-BLB loans were

performing poorly and causing concern as of July 2007.

In their Motion for Reconsideration, Defendants argued that the four statements were statements of opinion and Plaintiffs, thus, should have and failed to adduce evidence that Alan Levan knew his statements were false. In denying the motion, the Court noted that Alan Levan's state of mind was not relevant to the inquiry, in that whether he acted with scienter was a separate inquiry left to the Jury. The Court also noted that, though the statements contained an evaluative component, they were not statements of pure opinion, but rather were tethered to objective factual justifications. Insofar as these were statements of belief, the falsity of his belief—though not his intent to deceive—was relevant to the falsity inquiry. *See Va. Bankshares*, 501 U.S. at 1092–96. And because, as discussed above, Plaintiffs had presented undisputed evidence to meet that requirement, in the form of emails by Alan Levan expressing his concern with the poor performance of the entire land loan portfolio, Defendants' argument did not warrant reconsideration.

For these reasons, as well as the additional reasons set forth in the Omnibus Order and Order on Reconsideration, the Court did not

err in granting summary judgment to Plaintiffs on the narrow issue of the falsity of these statements. Plaintiffs were entitled to the benefit of the Court's ruling and an appropriate instruction to the Jury, as discussed below.

(2) *Safe Harbor*

Defendants argue that the four statements that were the subject of the Court's partial summary judgment for Plaintiffs were protected by the Reform Act's safe harbor and, thus should not have been submitted for the Jury's consideration. They further argue that, because the statements were immunized by the safe harbor, the Court's instruction on its partial summary judgment finding was unduly prejudicial.

Section 27A of the Reform Act provides a safe harbor from Rule 10b-5 liability for certain forward-looking statements. § 78u-5(c)(1). Corporations and individuals may avoid liability under Rule 10b-5 for forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." § 78u-5(c)(1)(A)(I). Forward-looking statements include

projections of revenues, income, or other financial items; statements of the plans and objectives of management for future operations; statements of future economic performance; or, any statement of the assumptions underlying or relating to such statements. § 78u-5(i)(1).

Defendants argue that the statements in issue were forward-looking statements. They contend that Alan Levan's answer to the analyst's question was, on the whole, forward-looking, and all statements of historical fact included in his answer also fall within the safe harbor as "assumptions underlying forward-looking statements." (D.E. 666, p. 19.) Defendants broadly assert that "[s]tatements that include both forward-looking and factual factors must be treated as forward-looking." *Id.*

Defendants' contention that the safe harbor applies to all statements which include both forward-looking and non-forward-looking components misinterprets the law in this circuit. In *Harris v. Ivax*, 182 F.3d 799 (11th Cir. 1999), the Eleventh Circuit assessed the applicability of the safe harbor to a variety of allegedly false and misleading statements made by an issuing corporation. One of the allegedly misleading statements was a list of factors that the company

stated "will influence [its] third quarter results." *Id.* at 805. The plaintiffs alleged that the list was misleading in that it did not include the possibility of a goodwill writedown, a circumstance which eventually came to pass and allegedly caused the company's stock price to plummet. The district court ruled that the list was entitled to the protection of the safe harbor.

The Eleventh Circuit affirmed the district court, holding that the list was a "mixed bag," including some sentences that were forward looking and some that were not, but concluding that the list, in its entirety, was to be treated as a forward-looking statement. *Id.* at 806. The court held that "when the factors underlying a projection or economic forecast include both assumptions and statements of known fact, and a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement." *Id.* at 807. The *Harris* court, however, made clear that its holding pertained only to alleged omissions of material risk factors. *Id.* (noting that "treating mixed lists as forward-looking may open a loophole for *misleading omissions*") (emphasis added). The court further clarified that, "of course, if any of the individual sentences describing known facts ... were

allegedly false, we could easily conclude that the smaller, non-forward-looking statement falls outside the safe harbor." *Id.* at 806.

Plaintiffs allege that the statements in issue were affirmative misrepresentations, not that Alan Levan's answer to the analyst's question was, on the whole, misleading because it omitted a material piece of information. (*See* D.E. 237.) Accordingly, each allegedly false statement must be evaluated to determine whether it is forward looking. *See Harris*, 182 F.3d at 806.

None of the four statements in issue was forward looking. In two of the subject statements, Alan Levan stated that Bancorp was not concerned with any class of loans in the construction portfolio other than the BLB loans. (DX 8, pp. 20–21.) These statements are assertions regarding the absence of *known* risk in the balance of the construction portfolio apart from the BLB portion. Statements regarding the *known* risk of an investment based upon observed facts, the truth of which are discernable at the time they are made, are not forward looking though they touch upon the future. *See Harris*, 182 F.3d at 805–06. The concept of risk touches upon the future, but whether management *knows* of a certain risk at a given time is

ascertainable at that time.

The other two statements concern the past and present performance of the construction portfolio; Alan Levan stated that the portfolio had always performed extremely well and "continues to perform extremely well." (DX 8, p. 20.) These statements, too, are expressions of observed facts, rather than assumptions or any kind of prediction. *See Harris*, 182 F.3d at 806. And the truth of these statements was also discernable at the time the they were made. Accordingly, these statements do not fall under the protection of the Reform Act's safe harbor.

(3) *Scienter*

Defendants argue that Plaintiffs failed to satisfy their burden of proof as to whether Alan Levan acted with scienter in making the four statements in issue. Accordingly, these statements could not support a finding of liability and should not have been submitted to the Jury.

To prove scienter, a plaintiff must show that the defendant made the alleged misrepresentations with "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). It is not enough for plaintiffs to prove that the

defendant acted negligently. *Id.* at 214. A plaintiff must prove either that the defendant acted with the "intent to deceive, manipulate, or defraud," or that he acted with "severe recklessness." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1284 (11th Cir. 1999). Severe recklessness is

> limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that defendant must have been aware of it.

Id. at 1282 n.18. Due to the difficulty of proving a defendant's state of mind in fraud cases, circumstantial evidence of scienter may be sufficient to support the inference that he acted with the requisite intent. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 391 n.30 (1983).

Though Defendants contend that Plaintiffs "failed to satisfy their burden of showing scienter" with respect to these statements, that question was for the Jury to resolve, because Plaintiffs presented sufficient evidence to support a finding of scienter. For example, Plaintiffs presented evidence that Alan Levan was aware of the

significant deterioration of the land loan portfolio—including the non-BLB loans—before the July 2007 conference call, but chose to disclose only the issues with the BLB segment of the portfolio. Alan Levan also acknowledged the importance of investor conference calls as an opportunity for analysts to get information directly from management. (Tr. 3312.) Defendants' contention that the Court's instruction on the falsity of the July 25, 2007 statements was in error because of a failure of proof as to scienter, thus, fails.

(4) *Loss Causation and Damages*

Defendants argue that Plaintiffs failed to present evidence linking Statements 13 through 16 to a loss. Because Plaintiffs failed to prove loss causation and damages with respect to these statements, they should not have been submitted for consideration to the Jury and the Court's instruction regarding their falsity was prejudicial error.

As discussed above, the Court finds that there was insufficient evidence to support the Jury's finding of loss causation and damages with respect to Statement 10. And though the Jury's damages finding was connected only with Statement 10, the Court further clarified that the loss causation problems with Statement 10 similarly afflict

Statements 13 through 16. Thus, should the Court of Appeals reverse the Court's ruling on the sufficiency of the evidence of loss causation and damages as to Statement 10, the same conclusion would follow with respect to Statements 13 through 16. And, accordingly, Defendants would not be entitled to a new trial on this basis.

(5) *Prejudice of Court's Instruction*

Defendants argue that the Court's instruction to the Jury on its partial summary judgment ruling for Plaintiffs prejudiced the Jury such that it could not independently assess other questions of liability. The Court disagrees.

First, the Court precluded disclosure of the pretrial ruling until closing argument. (Tr. 123–26.) Though Plaintiffs mentioned the Court's ruling in connection with the four subject statements, it was not a prominent feature of their closing argument and they made no argument or implication that the Jury should draw inferences as to any other issues from the ruling. (*See* Tr. 4061, 4102–04 & 4255.) Then, the Court read to the Jury, as part of its final instructions, a carefully constructed paragraph explaining the limited nature of the pretrial ruling. The instruction to the Jury on this point read:

> Prior to trial, the Court also made a narrow ruling that four statements made by Alan Levan during a July 25, 2007 conference call were objectively misleading or false. You must also accept that these statements were, in fact, misleading or false. However, the Court has not made any determination regarding whether those statements were material, whether they were made with scienter, or whether they caused Bancorp's share price to decline. The Plaintiffs still must prove, and you will need to decide, the remaining elements of their claims with respect to these statements.
>
> These statements are entries 13, 14, 15, and 16 on the Table that is attached to the Verdict Form.

(D.E. 635, p. 30.)

There is no indication that Defendants suffered undue prejudice as a result of this instruction. The Court clearly instructed the Jury on the narrowness of its ruling, and the Court presumes the Jury followed its instructions as to this and every other matter. *See Johnson v. Breeden*, 280 F.3d 1308, 1319 (11th Cir. 2002). Indeed, the Jury's findings strongly indicate that this presumption is correct. For example, the Jury found no § 10(b) violation as to Statements 8, 9, and 18, all attributed to Alan Levan. (D.E. 665.) So it cannot be said that the instruction prejudiced the Jury against Alan Levan.[45]

[45] In fact, as explained above, the Jury found for Defendants on the majority of the issues.

Further, the Jury's findings regarding Statements 13 through 16 are essentially superfluous to the conditional judgment. As discussed above, the award of damages in the amount of $2.41 per share is tied to Statement 10. A finding of no § 10(b) violation as to Statements 13 through 16 would not have affected the conditional judgment.[46]

For the reasons stated above, in the event the Court's ruling on Defendants' Motion for Judgment as a Matter of Law is vacated or reversed, Defendants should not be entitled to a new trial.

V. Conclusion

Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion for Judgement as a Matter of Law (D.E. 669) is GRANTED. The Court will separately enter its Final Judgment in accordance with this Order and the Jury's Verdict. It is further

ORDERED AND ADJUDGED that Defendants' Motion for a New Trial (D.E. 666) is CONDITIONALLY DENIED. It is further

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[46] By the same token, there would be no prejudice to Defendants even if the Plaintiffs' Motion for Partial Summary Judgment was wrongly decided. Nevertheless, the ruling on Plaintiffs' Motion for Partial Summary Judgment was extremely narrow and, as set forth above, was warranted based on the parties' briefing of the motion and supporting evidence.

ORDERED AND ADJUDGED that all pending motions are DENIED AS MOOT. It is further

ORDERED AND ADJUDGED that, in order for the Court to undertake its mandatory review of the record to determine whether sanctions for abusive litigation are appropriate under Federal Rule of Civil Procedure 11, the parties shall file their respective motions for sanctions, if any, within ten days hereof. The opposing party shall respond within ten days thereafter. Any replies shall be filed no later than five days after the filing of a response.

DONE AND ORDERED in Chambers at Miami, Florida this 25th day of April, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE