

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

*IN RE* BANKATLANTIC BANCORP, INC.  
SECURITIES LITIGATION

---

**OMNIBUS ORDER**

\_\_\_\_\_ THIS CAUSE is before the Court upon Defendants' Motion to Exclude the Proposed Expert Testimony of Candace L. Preston (D.E. 296), filed June 16, 2010; Defendants' Motion for Summary Judgment and Corrected Memorandum in Support of their Motion for Summary Judgment (D.E. 249 & 261), filed on June 3 and 4, 2010; and Plaintiffs' Motion for Partial Summary Judgment (D.E. 237), filed on June 1, 2010. The parties have briefed the Motions and the matters are now ripe for review. (D.E. 329, 335, 345, 350, 364 & 389.)

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

**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 period").<sup>1</sup> Plaintiffs contend that Defendants misrepresented the value of certain assets in violation of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78a *et seq.* (2006), thereby inflating Bancorp's stock price and causing Plaintiffs to suffer a loss when the truth was revealed.

---

<sup>1</sup> 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 BankAtlantic Bancorp during the class period and to have suffered over \$1.8 million in losses. (D.E. 45.)

**A. Parties**

Bancorp is the publicly traded parent company of BankAtlantic, a federally chartered bank offering consumer and commercial banking and lending services throughout Florida.<sup>2</sup> (D.E. 80, *hereinafter* “Compl.,” ¶ 2.) In addition to Bancorp, Plaintiffs name the following current and former officers and directors of Bancorp as Defendants: (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;<sup>3</sup> (4) Jarett S. Levan (“J. Levan”), the President of BankAtlantic, and from January 16, 2007, the President of Bancorp and the Chief Executive Officer (“CEO”) of BankAtlantic; and, (5) Alan B. Levan (“A. Levan”), the former Chairman of the Board and CEO of Bancorp and former Chairman of the Board and President and CEO of BankAtlantic. (Compl. ¶¶ 30–34.)

**B. Claims**

On January 12, 2009, Plaintiffs filed the First Amended Consolidated Complaint (the “Complaint”) seeking damages under §§ 10(b), 20(a), and 20A of the Exchange Act in Counts I through III, respectively. 15 U.S.C. §§ 78j(b), 78t(a) & 78t-1.

In Count I of the Complaint, Plaintiffs bring claims against all Defendants under § 10(b)

---

<sup>2</sup> Though BankAtlantic is not a party to this action, its business dealings are the subject of the Complaint. The Court refers to the holding company as “Bancorp” and the subsidiary bank as “BankAtlantic” or the “Bank” throughout this Order. However, for purposes of the instant discussions the two are largely interchangeable.

<sup>3</sup> Prior to becoming the Executive Vice President and CFO of BankAtlantic, Toalson served as Senior Vice President and CFO of BankAtlantic during the Class Period. (Compl. ¶ 32.)

of the Exchange Act, alleging that, throughout the class period, Defendants knowingly made materially false and misleading statements regarding the credit quality of certain loans in its portfolio.

The alleged misrepresentations and omissions are variously stated but fall into three categories. First, Plaintiffs allege that Defendants made misleading statements about the credit quality of various land loans in its commercial real estate (“CRE”) portfolio. They contend that BankAtlantic failed to follow conservative lending practices, as articulated in its underwriting policies, and that, as a result, the portfolio was exposed to a higher level of risk than was represented by Defendants to investors. Second, Plaintiffs allege that Defendants failed to timely disclose that the credit quality of its CRE portfolio had deteriorated. This category of claims includes Plaintiffs’ allegations that Defendants made misleading statements about the value of one particular land loan—the Steeplechase loan—as well as Plaintiffs’ allegations that Defendants failed to disclose the deteriorating credit quality of the portfolio as a whole beginning in the first quarter of 2007. Third, Plaintiffs allege that Defendants misrepresented that BankAtlantic’s reserves for loan losses were adequate and accurately reflected in Bancorp’s financial statements.

Plaintiffs allege that Defendants made the alleged misrepresentations in order to shore up investor confidence and that, as a result, Bancorp’s stock price was artificially inflated during the class period. Plaintiffs allege that they purchased or otherwise acquired Bancorp stock in reliance upon Defendants’ misleading statements. Finally, Plaintiffs contend that the revelation of the truth regarding the loans in issue in April and October of 2007 caused Bancorp’s stock price to fall, thereby causing Plaintiffs to incur monetary losses.

In Count II of the Complaint, Plaintiffs bring claims against all of the individual Defendants under § 20(a) of the Exchange Act, alleging that they were control persons with respect to Bancorp and are therefore liable for its violations of § 10(b).

Finally, in Count III, Plaintiffs bring insider trading claims against individual Defendants A. Levan and Abdo under § 20A of the Exchange Act, alleging that they profited from the sale of BankAtlantic stock while in the possession of the material, non-public information which is the subject of Plaintiffs' § 10(b) claims.

**C. *Pending Motions***

Both Defendants and Plaintiffs now move for summary judgment. Plaintiffs seek partial summary judgment with respect to the falsity of several statements made by Defendant A. Levan in a July 25, 2007 conference call. Defendants seek summary judgment as to all of Plaintiffs' claims. Importantly, Plaintiffs concede Defendants are entitled to summary judgment as to the following claims: (1) all claims arising out of the period from November 9, 2005 through October 18, 2006; (2) all of the §20A claims in Count III; and, (3) all claims arising from BankAtlantic's alleged misstatements regarding its loan loss reserves. Accordingly, summary judgment in favor of Defendants will be entered with respect to these claims.

Additionally, Defendants move to exclude the proposed testimony of Plaintiffs' materiality, damages, and loss causation expert, Candace L. Preston. Because the resolution of Defendants' Motion to Exclude is relevant to Defendants' Motion for Summary Judgment, the Court discusses the merits of that Motion before addressing the Motions for Summary Judgment below. However, the Court begins with a description of the relevant undisputed facts as they relate to both Motions for Summary Judgment.

## II. Factual Background<sup>4</sup>

### A. *BankAtlantic's Commercial Real Estate Portfolio*

Bancorp is a holding company that depends upon dividends from its subsidiary, BankAtlantic, for a significant portion of its cash flow. (See Bancorp 2005 10-K.<sup>5</sup>) As noted above, BankAtlantic is a federally chartered, federally insured savings bank that provides traditional retail banking services and a wide range of commercial banking products. (D.E. 252-5, p. 1.) A significant source of BankAtlantic's liquidity is repayments and maturities of loans and securities. (Bancorp 2005 10-K, p. 55.) The alleged misstatements and misrepresentations at issue in this action relate to loans in the Bank's CRE loan portfolio.

A CRE loan is a mortgage loan secured by real property, the purpose of which is to finance or refinance the acquisition, development, or construction of real property. (D.E. 338-2, p. 42186.) According to Defendant Bancorp's 10-K for the period ended December 31, 2005, BankAtlantic had about \$2.4 billion in commercial real estate, construction and development loans outstanding which, in turn, amounted to approximately 45% of its total loan portfolio. (Bancorp 2005 10-K, p. 21.)

A large portion of the loans in BankAtlantic's CRE portfolio were made for the acquisition and development of land for residential building. These "land loans" fall into three

---

<sup>4</sup> Because Plaintiffs do not oppose Defendants' Motion for Summary Judgment as to all claims arising out of the period from November 9, 2005 through October 18, 2006, the Court discusses only the facts that pertain to the remaining portion of the class period: October 19, 2006 through October 25, 2007.

<sup>5</sup> Though neither party included Bancorp's 2005 10-K in the exhibits attached to their respective filings, the Court takes judicial notice of this public record pursuant to Federal Rule of Evidence 201.

categories.<sup>6</sup> Land acquisition and development loans (“LAD loans”) are extended to investors to purchase land for horizontal development, which includes the development of infrastructure such as water lines, sewage, or other utilities, before selling the land to a developer. (D.E. 335, p. 4 n.7; D.E. 338-6, pp. 55:5–56:9.) Land acquisition, development, and construction loans (“LADC loans”) are extended to developers to purchase land and develop the property both horizontally and vertically through the building of structures. (*Id.*) Builder land bank loans (“BLB” loans) are extended to investors who used loan proceeds to purchase land for horizontal development and sale—generally through option contracts—to national and regional developers for further development. (*Id.*)

BLB loans share many of the same characteristics as BankAtlantic’s LAD loans; however, BLB loans were made to investors who had option contracts with developers in place at the time the loan was made. (*Id.* p. 56:10–25.) In some instances, a letter of credit from the developer with whom the borrower had contracted served as the equity component of these loans. (D.E. 252-7, p. 25.)

**B. *BankAtlantic’s Lending Practices***

BankAtlantic is exposed to the risk that its borrowers will default on their obligations. (D.E. 252-5, p. 16.) Bancorp stated in its 2006 10-K, that, as a result of such risk, BankAtlantic attempts to manage credit exposure by analyzing the creditworthiness of individual borrowers

---

<sup>6</sup> The Court notes that the parties dispute when BankAtlantic began using the following designations for the various types of land loans in its CRE portfolio. That issue, however, is not relevant to the following discussion. The Court uses the following terms simply to identify the various types of loans in the portfolio; neither party disputes that these categories of land loans existed in the CRE portfolio throughout the period in issue or that Defendants began identifying the BLB loans, as such, to the public after the first quarter of 2007.

and by limiting the total credit exposure to any one borrower. (*Id.*) With respect to BankAtlantic's lending practices, Defendant Bancorp stated, *inter alia*, in its 2006 10-K :

BankAtlantic believes it has put in place strong underwriting standards and has instituted credit training programs for its banking officers which emphasize underwriting and credit analysis. It has also developed systems and programs which it believes will enable it to offer sophisticated products and services without exposing BankAtlantic to unnecessary risk.

\* \* \*

Commercial real estate loans are originated in amounts based upon the appraised value of the collateral or estimated cost that generally have a loan to value ratio of less than 80%, and generally require that one or more of the principals of the borrowing entity guarantee these loans.

(D.E. 252-5, p. 3.)

BankAtlantic has policies for the underwriting, approval, maintenance, and monitoring of its CRE loans, which, during the class period, were set forth in a document titled BankAtlantic Commercial Real Estate and Commercial Loan Policy ("Commercial Loan Policy"). (D.E. 338-2.) The policy recognizes that "certain [lending] practices are inherently of unsafe and/or unsound variety while other practices become unsound and unsafe due to laxity in diligence and supervision." (*Id.* p. 42172.) Among the practices identified as potentially unsafe and unsound are: deviations from stated lending policies without adequate evaluation and approval; poor/inadequate credit analysis; release of loan proceeds before loan documentation is completed; lack of borrower's equity in projects financed; lending on the basis of nonexistent or unidentifiable collateral; failure to follow appraisal policies, guidelines, and requirements; and extensions/renewals of loans to individuals far in excess of any realistic estimate of their ability to repay. (*Id.*)

The lending officer with primary responsibility for the administration of a loan has the duty to investigate the creditworthiness of the borrower, to determine that the loan is of acceptable quality and that no violation of Bank policy exists, except as disclosed and approved, and to insure that required credit and financial information from the borrower is obtained, maintained, and analyzed in an up-to-date credit file. (D.E. 38-2, p. 42174.) Any exceptions to the Bank's underwriting policy must be approved by the appropriate loan committee or individual authorized to approve the loan; exceptions must be noted in the loan's file. (*Id.*)

BankAtlantic's Major Loan Committee ("MLC") must approve the grant or modification of any loan in excess of \$5 million and must ratify the approval of loans for \$1 million to \$5 million. (D.E. 338-2, p. 42176.) Members of the MLC are appointed annually by the Chairman of the Board and "include the Chairman of the Board, Vice Chairman of the Board, and appointed executive and senior level officers." (*Id.*) Defendants A. Levan and Abdo were members of the MLC during the class period. (D.E. 338-103, p. 24:14-20.) J. Levan began attending MLC meetings as early as January 23, 2007 as a non-voting observer and became a member of the MLC by March 1, 2007. (D.E. 338-12-15.)

BankAtlantic monitors its loan portfolio, in part, through the use of an internal loan grading system. Loans are graded 1 through 13; grades 1 through 9 are passing grades, while grade 10 loans are "specially mentioned assets," which have "potential weaknesses that deserve management's close attention," and grade 11 loans are "substandard," meaning that the "asset is inadequately protected by the current sound worth and paying capacity of the obligor or the

collateral pledged, if any.”<sup>7</sup> (*Id.* p. 5669.) The loan’s sponsoring officer assigns a quality grade to a CRE loan at the time the loan is made. (D.E. 338-2, p. 5668.) After closing, the loan officer, the Bank’s Chief Credit Officer and/or Loan Administration may change loan grades due to substantive changes in the borrowing relationship. (*Id.*)

According to BankAtlantic’s policy, loans are placed on “non-accrual” status “immediately upon determination that the collection of both principal and future interest is in doubt.” (D.E. 338-2, p. 5672.) And according to the same policy, with some exceptions, all loans should be placed on non-accrual status “upon reaching ninety-days delinquency as to past due principal and/or interest.” (*Id.*)

BankAtlantic maintains a Loan Watch List (“LWL”) to apprise management of the status of its loan portfolios. (D.E. 338-2, p. 5671.) The LWL is generated monthly and includes all commercial loans that are “past due 90 days or greater, on non-accrual status,” or graded a 10 or higher. (*Id.*) The Bank’s Commercial Loan Policy further provides that “loans should be placed on the LWL as soon as a problem, which might affect repayment, is uncovered.” (*Id.*) Reports on all loans on the LWL are included in a Senior Loan Discussion Book and distributed to members of the Senior Loan Discussion Committee; that committee meets monthly and reviews delinquency and charge-off trends and discusses CRE loans graded 10 or higher. (D.E. 338-9, pp. 52:15–53:20.) The distribution list for the Senior Loan Discussion Book included Defendants A. Levan, Abdo, White, and Toalson during all relevant periods and also included J.

---

<sup>7</sup> There is some conflict in the record as to what constitutes a “classified” loan. Jeff Mindling, BankAtlantic’s Chief Risk Officer testified that loans graded at 10 or 11 are “classified loans,” while the Bank’s underwriting policy states that grade-10 loans are not adversely classified. (D.E. 338-9, pp. 54:24–55:2; D.E. 338-2, p. 42208.) To avoid confusion, the Court will refer to loans by grade, as there is no dispute as to what the respective grades connote.

Levan as of April 25, 2007. (D.E. 338-47–58.)

BankAtlantic reserves funds as allowances for loan losses. The Bank's policy requires every real estate loan with an outstanding balance of \$500,000 or more with a grade of 11, every real estate loan with an outstanding balance of \$1 million with a grade of 10, and every loan on non-accrual status to be evaluated to determine whether that loan is impaired and whether it warrants an increased loan loss provision. (D.E. 252-34, p. 87687.) In addition to loan loss provisions for specific loans, BankAtlantic also takes loan loss reserves for its loan portfolios based on the historical performance of each portfolio and an assessment of factors that affect each portfolio as a whole. (*Id.*) Defendants White and Toalson, as CFOs of BankAtlantic and Bancorp during the class period, were responsible for determining, reviewing, and monitoring loan loss reserves. (Compl. ¶¶ 31, 33; D.E. 100 ¶¶ 31, 33.)

**C. *Risk and Credit Quality of the Land Loan Portfolio***

BankAtlantic made various land loans, the conditions of which included exceptions to BankAtlantic's lending policy; for instance, BankAtlantic extended several lines of credit to one borrower for the acquisition and development of a parcel of land; one of the lines of credit was a \$10 million revolving construction loan. (D.E. 331-5, p. 56078.) BankAtlantic approved this loan despite the fact that the appraisals used to underwrite it did not meet standards set by the Office of Thrift Supervision. (D.E. 331-5, p. 56081.) BankAtlantic also recognized that the lack of a borrower's equity in a project was a potentially unsafe lending practice. (D.E. 338-2, p. 42172.) However, as noted above, the Bank granted BLB loans for projects in which the borrower did not have his own equity; rather, the equity component was a letter of credit provided by a third-party homebuilder. (D.E. 252-7, p. 25.)

From October 2006 through the end of the class period, the credit quality of various land loans in the CRE portfolio declined. For example, one of the loans in the portfolio in October 2006 was a \$28,570,000 land development loan to Steeplechase Properties (the “Steeplechase loan”). (D.E. 338-93, p. 31404.) The Steeplechase loan was made for the purchase and development of land for upscale residences in Manatee County, Florida. (*Id.*) In June 2006, the borrower came under scrutiny for his involvement in a “flip” sale to artificially inflate the value of the land to secure financing for more than the land was worth. (*Id.*)

On October 10, 2006, the Bank downgraded the Steeplechase loan to a grade of 10, or “special mention,” indicating that the loan had “potential weaknesses that deserve management’s close attention.” (D.E. 338-94; D.E. 338-2, p. 5669.) On November 6, 2006, the Steeplechase Loan was regraded to a grade of 11, or substandard, and placed on non-accrual status, back-dated to September 30, 2006. (D.E. 338-98.) In lieu of pursuing judicial foreclosure proceedings after the borrower ceased making payments on the loan, BankAtlantic took a deed to the property and transferred the property to its “Real Estate Owned” (REO) account. (D.E. 252-4, p. 23; D.E. 252-3, p. 5.) BankAtlantic charged down \$7.0 million from the value of the property, to what it represented was the “collateral value less cost to sell” of the land. (D.E. 252-3, pp. 5–6.)

As of October 31, 2006, four land loans were on the LWL because they were either graded 10 or higher or were non-accruing. (D.E. 338-48, pp. 11609–18.) On November 29, 2006, after J. Levan publicly commented that BankAtlantic was comfortable with its borrowers and that “there were no upcoming credit quality trends that gave the thrift any concerns,” A. Levan responded in an email, “I wouldn’t be so bold on the credit front—I think Marcia is going to have problems with her land portfolio.” (D.E. 338-5.)

During the class period, the loan officers responsible for various large land loans requested loan modifications and extensions of their maturity dates; from January to March, 2007, the MLC granted several such requests. (D.E. 336 ¶ 30 n. 4; D.E. 338-14, 15, 16, 17, 18, 83, 84, 104.) On March 14, 2007, Defendant A. Levan wrote in an email to members of the MLC, including Defendants Abdo and J. Levan, “There seems to be a parade of land loans coming in for extentions [*sic*] recently. It’s pretty obvious the music has stopped. In most cases, the presold contract to a builder has either gone away or is in dispute or being modified.... I believe we are in for a long sustained problem in this sector.” (D.E. 338-19.)

Several days later, Marcia Snyder, the BankAtlantic executive in charge of the land loan portfolio, wrote in an email to the Bank’s land loan officers, “The MLC members spent a great deal of time discussing our residential land exposure.... This includes those loans that are presold to builders as well as land loans without a presale but being held for future sale. Obviously, there is significant concern about these loans given the current state of the market.” (D.E. 336 ¶ 34; D.E. 338-25.) And Defendant White testified that, by April 2007, he was concerned about the credit quality of all the land loans in the CRE portfolio. (D.E. 338-26, pp. 73–75.)

As of April 16, 2007, the Bank had downgraded two LADC loans to a grade of 11, or substandard. (D.E. 336 ¶ 34; D.E. 338-22.) And several days later, on April 25, 2007, the Bank downgraded an additional \$41.3 million in land loans to a special mention grade of 10. (D.E. 338-61.) By July 30, 2007, twenty-two land loans were on the LWL and graded 10 or 11—this included seven BLB loans and fifteen non-BLB. (D.E. 338-28.) And during the third quarter of 2007, BankAtlantic placed eleven additional land loans totaling almost \$150 million on non-accrual status. (D.E. 252-12, p. 2.)

**D. Public Statements and Events During the Period in Issue**

Throughout the class period, Defendants made statements regarding the nature of BankAtlantic's lending practices and the credit quality of its CRE portfolio; on various occasions, Defendants represented their lending practices as "conservative," "cautious," or "prudent" or made reference to the Bank's strong underwriting standards. (*See, e.g.*, D.E. 252-3, pp. 5-6; D.E. 252-5, pp. 2-3, 12.) On October 19, 2006, for example, Bancorp held a conference call to discuss its financial results from the third quarter of 2006. (*See* D.E. 338-1.) During that call, Defendant White discussed the land loans in the CRE portfolio. He noted that the residential real estate market was softening in Florida and, as a result, developers were slowing down development schedules. He continued:

But in our situation and because of our insistence on hard equity in projects, we believe we're dealing with borrowers with staying power that will enable them to ride through this if indeed that trend does manifest.

(*Id.* p. 559703.) In response to a question from an analyst regarding BankAtlantic's "commercial real estate growth," White noted that BankAtlantic was "very comfortable with credit quality." (*Id.* p. 559711.)

After the first quarter of 2007, Bancorp released information regarding credit problems in a segment of the land loan portfolio; on April 25, 2007, Bancorp issued a press release announcing its financial results for the first quarter of 2007 and reporting a loss from continuing operations of \$2.2 million. (D.E. 252-6.) The announcement attributed the loss to net interest margin compression, combined with an increased loan loss provision, which was, in turn, attributed to an increase in non-accrual loans in the CRE portfolio. (*Id.*) Bancorp also stated that

net income was negatively impacted by the expenses associated with opening new branches.

*(Id.)*

The following day, on a conference call with analysts and investors, A. Levan commented on the loans that were placed on non-accrual status in the preceding quarter. He stated:

In this particular non-accrual – this \$19.6 million – there’s two loans in that bucket.... Both of these loans relate to what we call our land banking portfolio. And 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....

And so what’s happening—what happened in these cases, as well as pretty much through many of these types of land banking arrangements is that the homebuilders have either walked away from their deposits, have sued to get their deposits back, or are renegotiating contracts.

(D.E. 338-7, p. 19677.) A. Levan also noted that the downturn in the real estate market, particularly in Florida, could affect the loans in the BLB portfolio, which totaled \$140 to \$160 million. (*Id.* pp. 19677–78.) A. Levan stated during that call that, because the equity component of some of the BLB loans was comprised of a letter of credit or a deposit from the homebuilders, rather than the borrower, these loans had “a different element of risk.” (*Id.* 19698.) And, during the same call, on the subject of the CRE portfolio, Defendant White stated:

As Alan said, the sector that gives us the largest concern is this land-development-lending portfolio in the range of \$140 million to \$160 million. And given the slowdown in sales, builder takedowns will be significantly slowed from what we had anticipated when these credits were underwritten.

And the quality of the credits, these land loans, will remain soft for a considerable time. And we expect to be addressing impact delays in takedowns due to builder slowdowns for at least the balance of this year.

(*Id.* p. 19683.)

On April 26, 2007, the day of the conference call announcing first quarter 2007 financial results, Bancorp's share price fell to a closing price of \$9.99, down from a closing price of \$10.55 on April 25, 2007. (D.E. 338-68, p. 45.)

On July 25, 2007, Bancorp held a conference call to discuss second quarter financial results announced July 24, 2007. (*See* D.E. 338-20.) During the call, an analyst asked: "[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." (*Id.* p. 22.) In response, A. Levan answered as follows:

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.) A. Levan later testified that he was referring to the BLB loan portfolio in this comment as the “loan builder portfolio.” (D.E. 338-11, p. 250:10–14.)

Finally, on October 25, 2007, Bancorp announced its financial results for the third quarter of 2007; it reported a loss from continuing operations of \$29.6 million for the quarter. (D.E. 252-12, p. 1.) Bancorp attributed the loss to increased loan loss provisions in the amount of \$48.9 million for the quarter, impairments of real estate owned, and the costs associated with opening new branches. (*Id.* p. 1–2.) On the subject of “Credit Quality,” the press release announced an increase in non-performing loans from “\$21.8 million at June 30, 2007 to \$165.4 million at September 30, 2007 resulting primarily from the placement of eleven commercial real estate loans totaling \$148.7 million on non-accrual status.” (*Id.* p. 2.) With respect to “Commercial Loans,” the press release noted that the Bank’s CRE portfolio totaled \$1.3 billion at quarter’s end and that the categories within the portfolio that Bancorp believed to “have exposure to the declines in the real estate market” included the BLB, LAD, and LADC loans. (*Id.* p. 3.)

On October 26, 2007, Bancorp held a conference call to discuss third quarter results. (D.E. 252-13.) During the call, Defendant Toalson stated that the quarter’s loss was “almost entirely attributable to the increase in the loan loss provisions and the impairments of real estate as well as evaluation of our Stifel Warrant.” (*Id.* p. 11.) With respect to the loan loss provision, she explained that the \$48.9 million increase was “driven by both a \$27.9 million in specific reserves associated with those loans we placed on non accrual during the quarter as well as increased general reserves due materially to the increased risk surrounding these residential land

acquisition development and construction loans....” (*Id.* p. 12.)

On October 26, 2007, Bancorp’s share price fell to a closing price of \$4.72, down from \$7.65 on October 25, 2007. (D.E. 338-68, p. 48.) Following the October 25, 2007 announcement, various market analysts commented negatively on the credit quality and prospects of BankAtlantic’s land loan portfolio. (D.E. 338-68, pp. 48–51.) On October 26, 2007, the Fitch Ratings company downgraded its rating outlook for Bancorp stock to “negative” and its issuer default rating from BB+ to BB. (D.E. 338-68, p. 50.) The next trading day, October 29, 2007, Bancorp’s stock price closed at \$4.13 per share, a 12.5 percent decline from its closing price of \$4.72 on October 26, 2007. (D.E. 338-68, p. 50.)

### **III. Defendants’ Motion to Exclude Expert Testimony**

Plaintiffs offer Candace L. Preston as an expert on the issues of market efficiency, materiality, loss causation, and damages.<sup>8</sup> Defendants move to exclude portions of her testimony on the grounds that it does not meet the standards of admissibility for expert testimony under Federal Rule of Evidence 702.

#### **A. *Expert Testimony Standard of Review***

Federal Rule of Evidence 702 states: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” The Supreme Court set forth the criteria for the admissibility of scientific expert testimony under Rule 702 in *Daubert* by instructing trial judges

---

<sup>8</sup> When asked if she considered herself “an expert economist,” Preston replied, in her deposition, that “I’m here as a damage, materiality, causation and efficiency expert—Those are the things I’m an expert in.” (D.E. 302, p. 51.)

to “determine at the outset, pursuant to Rule 104(a),<sup>9</sup> whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue,” which includes “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and or whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993). In *Kumho Tire*, the Supreme Court subsequently held this standard to be applicable to all expert testimony, holding that “*Daubert*’s general holding—setting forth the trial judge’s general ‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

In *Rink v. Cheminova, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit established a three-part test to determine whether expert testimony should be admitted under *Daubert*, explaining that all of the following elements must be established prior to the presentation of expert testimony to the jury:

- (1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

400 F.3d 1286, 1291–92 (11th Cir. 2005). The party seeking to introduce expert testimony bears the burden of satisfying these criteria by a preponderance of the evidence. *Allison v. McGhan*

---

<sup>9</sup> Rule 104(a) provides: “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.”

*Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

With respect to the qualification of an expert, the Court of Appeals has recognized that “[w]hile scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status.” *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004). To determine whether a witness is qualified to testify as an expert regarding the matters he intends to address, this Circuit’s and other Courts of Appeals have held that a witness who possesses general knowledge of a subject may qualify as an expert despite lacking specialized training or experience, so long as his testimony would likely assist a trier of fact. *See, e.g., Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (finding—in a civil RICO claim involving fraudulent real estate transactions—that a witness with “a Ph.D. in economics, extensive experience as a professional economist, and a substantial background in estimating damages” was qualified as an expert witness in assessing the loss suffered by the plaintiff even though he had no real estate development experience).

Even if a witness is qualified as an expert regarding a particular issue, the process used by the witness in forming his expert opinion must be sufficiently reliable under *Daubert* and its progeny. *See Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1342 (11th Cir. 2003) (stating that “one may be considered an expert but still offer unreliable testimony”). The Court of Appeals in *Frazier* quoted the advisory committee’s note to the 2000 amendments of Rule 702, which explains that “[i]f the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word

for it.” *Frazier*, 387 F.3d at 1261 (quoting Fed. R. Evid. 702 advisory committee’s note (2000 amends.)). Thus, the *Frazier* court observed, “it remains a basic foundation for admissibility that “[p]roposed [expert] testimony must be supported by appropriate validation—*i.e.*, ‘good grounds,’ based on what is known.” *Id.* (quoting *Daubert*, 509 U.S. at 590).

The final requirement for admissibility of expert testimony is that it “assist the trier of fact.” *Frazier*, 387 F.3d at 1244. In other words, “expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person.” *Id.* (citing *United States v. Reno*, 765 F.2d 983, 995 (11th Cir. 1985)). Expert testimony “is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves.” *Hibiscus Assocs. Ltd. v. Bd. of Trs. of Policemen & Firemen Ret. Sys.*, 50 F.3d 908, 917 (11th Cir. 1995) (citations omitted).

#### **B. Discussion of Preston’s Proposed Testimony**

The substance of Preston’s proposed testimony is found in her Expert Report dated April 16, 2010. (D.E. 365, Ex. B.) In her Report, Preston assumes that at the beginning of and throughout the class period, Bancorp misrepresented the quality of the assets in the land loan portion of BankAtlantic’s CRE portfolio.<sup>10</sup> (D.E. 365, Ex. B ¶ 10.) Assuming these

---

<sup>10</sup> More specifically, Preston assumes several forms of misrepresentation:

from the beginning of the class period, the failure to disclose the credit quality of their borrowers and the quality of the loans (including such information necessary to make other statements concerning the quality, underwriting, and collateral securing such assets not misleading);

from November 26, 2006, the failure to disclose the increase of problem loans generally and the identification of certain problem loans; and,

from April 26, 2007, the failure to disclose the distribution of problematic loans

misstatements (and omissions), Preston opines: (i) that the misrepresented information was material; (ii) that a significant decline in stock-price was proximately caused by what she characterizes as the revelations in April and October 2007 (loss causation); and, (iii) on the extent of the resulting damages.<sup>11</sup> Defendants argue these opinions should be excluded primarily because Preston's methodology in forming them is either unstated or unreliable.<sup>12</sup>

The Court discusses Preston's challenged opinions, beginning with materiality.<sup>13</sup>

1. Materiality

In the Report, Preston opines that information regarding the credit quality and performance of the land loan portion of BankAtlantic's CRE portfolio is material. (D.E. 365, Ex. B ¶ 59.) Preston bases her opinion on a discussion of: the importance of such information to the valuation of the bank; Bancorp's internal recognition of the materiality of the information as

---

beyond the [BLB] loans and throughout the land loan portfolio, the number and dollar value of problematic and potentially problematic land loans, and the negative trends of land loan performance.

<sup>11</sup> Preston also opines that the market for Bancorp common stock is efficient, which Defendants do not challenge.

<sup>12</sup> Defendants do not challenge Preston's general qualifications as an expert. Preston received her MBA from Wharton School of Finance, University of Pennsylvania and is a Certified Financial Analyst, and the Court sees no reason to question her qualifications. Indeed, other Courts have both allowed and excluded her testimony in similar circumstances, but her qualifications were apparently never at issue. *See, e.g., Morgens, Waterfall, Vintiadis & Co. v. Donaldson, Lufkin & Jenerette Securities Corp.*, 198 F. Supp. 2d 432, 433 (S.D.N.Y. 2002) (excluding); *Rmed Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 2000 WL 420548 (S.D.N.Y. Apr. 18, 2000) (affirming magistrate's order denying motion to exclude).

<sup>13</sup> To be sure, Preston's Report is no model of organizational clarity, but Defendants' Motion to Exclude only makes things worse. The Motion re-characterizes, re-labels, and re-structures the substance of Preston's Report to the point where it is difficult to align its arguments with any of her actual opinions. The better practice would have been to address Preston's opinions as they come.

reflected in its underwriting policies and internal emails; and recognition by market analysts of the materiality of the information as reflected in their reports and conference calls. (D.E. 365, Ex. B ¶¶ 59–115.)

Defendants first argue that Preston cannot, as a matter of law, testify as to “materiality” because it is a legal conclusion, and the Court agrees. Rule 704(a) states: “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” However, notwithstanding that an expert’s testimony may embrace an ultimate issue to be decided by the jury, “[i]n general, testimony about a legal conclusion, or the legal implications of evidence is inadmissible.” 4 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 704.04[1] (2d ed. 2010).

An expert may testify as to his opinion on an ultimate issue of fact.  
An expert may not, however, merely tell the jury what conclusion to reach. A witness also may not testify as to the legal implications of conduct; the court must be the jury’s only source of law.

*Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (citations omitted) (holding district court abused its discretion in allowing expert to testify as to scope of insurer’s duty).

Here, Preston’s opinion that the subject of the alleged misstatements was “material to investors in that they disguised and hid risks from investors which directly affected the total mix of information available” amounts to an inadmissible legal conclusion. *See id.*; *Hoefler & Arnett, Inc. v. Lehigh Press, Inc.*, 1988 WL 12505, \*1 (E.D. Pa. Feb. 16, 1988) (“[P]laintiffs’ experts are precluded from testifying to legal conclusions of “materiality.”). And none of the cases Plaintiffs cite support a conclusion otherwise. *See Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 543

(S.D. Fla. 1988) (approving class settlement); *S.E.C. v. Todd*, 2006 WL 5201386, \*\*2–3 (S.D. Cal. Oct. 17, 2006) (holding that expert testimony offered on the issue of materiality was not a legal conclusion, but not describing the testimony); *S.E.C. v. Koenig*, 2007 WL 1074901, \*3 (N.D. Ill. Apr. 5, 2007) (holding expert testimony as to market value impact of statement created issue of fact as to materiality). Thus, the Court will exclude Preston’s opinion as to the legal conclusion of “materiality” and any other opinion which tracks the language of the legal standard for materiality.

Further, the Court agrees with Defendants that, even if not a pure legal conclusion, much of Preston’s testimony as to the materiality of the information is inadmissible because it is not demonstrably reliable or helpful to the trier of fact. Although Preston explains that she reviewed BankAtlantic’s Commercial Real Estate and Commercial Loan Policy and internal emails, as well as transcripts of investor conference calls and analyst reports, she makes no effort to explain how her experience guided her in opining that the information discussed is material (or important). *See Frazier*, 387 F.3d at 126. And more importantly, Plaintiffs make no effort to explain why a jury could not review the same policies, emails, and investor reports and conclude the obvious—*i.e.*, if BankAtlantic’s employees and outside analysts believed credit quality is important, it is probably important. *See Hibiscus*, 50 F.3d at 917.

However, Preston may offer her opinion as to the importance of loan credit quality and performance to the valuation of a bank as evidence of the materiality of the information. Preston explains in her report why credit quality is among the primary factors which affect the valuation of a bank; specifically she explains both the relationship between future income and valuation and the relationship between credit quality and future income. (D.E. 365, Ex. B ¶¶ 60–62.)

Further, in her deposition, Preston explains how her reasoning was guided by her experience both rating of loans and valuating businesses. (D.E. 302, pp. 16 – 20.) Thus, the Court is satisfied that Preston’s opinion regarding the importance of a bank’s credit quality to its valuation is reliable and otherwise admissible. *See Frazier*, 387 F.3d at 1262.

Accordingly, with respect to materiality, the Court will admit only Preston’s opinion as to the importance of information regarding a bank’s credit and borrower quality to its valuation.

2. *Loss Causation*

In the Report, Preston opines that: “The materialization of the previously undisclosed information and the disclosures of April 25 and 26, 2007 and October 26 and 29, 2007 caused Bancorp stock to decline and investors to suffer losses.” (D.E. 365, Ex. B ¶ 116.) Defendants challenge the admissibility of both Preston’s characterization of these events as disclosures and materializations of previously undisclosed information and Preston’s opinion that these events caused investors’ to suffer losses. The Court discusses each part of Preston’s opinion separately.

a. *Preston’s Characterization of the April and October 2007 Press Releases and Conference Calls Regarding Credit Quality as Disclosures and Materializations of the Previously Undisclosed Information.*

With respect to April 2007, Preston explains that, in the April 25, 2007 press release, Bancorp reported a loss of \$0.04 per share as compared to an analyst estimate of \$0.07 earnings per share and an increase in non-performing loans of \$19.6 million. (D.E. 365, Ex. B ¶¶ 48, 95–101.) Preston also explains that, in the April 26, 2007 conference call, Bancorp “for the first time ... distinguished the [BLB] portfolio from the rest of the land loan portion of the CRE portfolio.” (D.E. 365, Ex. B ¶¶ 95–101.)

According to Preston, during the conference call, analysts struggled “to discern the

difference between the CRE portfolio and the newly identified [BLB] portfolio” ... and asked questions about “credit quality, loan-to-value ratios and collateral.” (D.E. 365, Ex. B ¶ 97.) Preston states that: “[a]s a result of the disclosures in the April 25, 2007 press release and the April 26, 2007 conference call, the price of Bancorp stock dropped from a closing price on April 25, 2007 of \$10.55 to a closing price of \$9.99 on April 26, 2007.” (D.E. 365, Ex. B ¶ 101.)

Defendants argue the characterization of these announcements as a disclosure (or materialization) of previously undisclosed information is inadmissible because Preston makes no attempt to link the disclosure back to any misrepresentation. The Court agrees that the characterization is inadmissible but for somewhat different reasons. Preston’s opinion is inadmissible because it requires no expertise. Preston simply summarizes certain portions of the press release and conference call and then states the obvious—*i.e.*, the first-time disclosure of a category of loans with a particular credit and borrower quality relates to a previous misrepresentation of credit and borrower quality.<sup>14</sup> A jury would be perfectly capable of reviewing the same information and reaching the same conclusion without Preston’s opinion that these events amounted to disclosures of the previously concealed risk. *See Hibiscus*, 50 F.3d at 917.

With respect to October 2007, Preston explains that, in the October 25, 2007 press release, Bancorp reported a \$26.9 million loss for the quarter, a single-quarter increase in non-performing loans from \$21.8 million to \$165.4 million, and \$11.3 million in net charge-offs and that, in the October 26 2007 conference call, Bancorp “revealed the materialization of the

---

<sup>14</sup> Moreover, to some extent, these characterizations are entirely a function of Preston’s assumption that the information regarding credit quality was previously misrepresented.

previously known and undisclosed risks associated with the company's violation of its own loan standards."<sup>15</sup> (D.E. 365, Ex. B ¶¶ 51 & 108.) Preston states that:

the market reaction to the materialization of the risks associated with the alleged lax lending standards was swift and sustained. BankAtlantic BankAtlantic [*sic*] stock dropped precipitously, from a closing price of \$7.65 on October 25, 2007 to a closing price of \$4.72—a decline of 38.3%.

(D.E. 365, Ex. B ¶ 109.)

Preston also explains that, on October 26, 2007, “Fitch Ratings downgraded BankAtlantic’s issuer default rating from BB+ to BB and revised its rating outlook from ‘Stable’ to ‘Negative,’” noting that “the Fitch press release stated that the downgrade reflected ‘weak operating performance and rapid credit deterioration.’” (D.E. 365, Ex. B ¶ 114.) Preston opines that this was a further materialization of previously undisclosed information. (D.E. 365, Ex. B ¶ 116.)

Defendants argue that Preston offers no basis for her opinion that the October 2007 announcements were the materialization of the previously undisclosed risk, and the Court agrees.<sup>16</sup> In her Report, Preston states that the financial losses which were the subject of the October 2007 disclosures and rating downgrades were the materialization of the previously undisclosed risk, but does not explain how or why this is so. Although, Preston explains that

---

<sup>15</sup> As explained above, Bancorp also reported a \$48.9 million increase in loan loss reserves.

<sup>16</sup> Defendants also argue that “Preston’s ‘materialization’ theory is fundamentally inconsistent” with the leading Supreme Court precedent on loss causation, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342 (2005). As explained in more detail in this Court’s summary judgment discussion, the Court disagrees, but does not reach the issue on the Motion to exclude.

when “the alleged misstatement conceals a condition or event which then occurs and causes the plaintiff’s loss, it is the materialization of the undisclosed condition or event which causes the loss,” Preston does not explain what, in her opinion, was the actual occurrence which constituted the materialization, and she does not explain how her experience or expertise leads her to that opinion. (D.E. 365, Ex. B ¶¶ 108–17.) In short, Preston’s opinion as to materialization amounts to nothing more than inadmissible say-so on her part. *See, e.g. Cook v. Sheriff of Monroe Cnty. Fla.*, 402 F.3d 1092, 1111 (11th Cir. 2005). Accordingly, the Court will not allow Preston to testify as to the character of the April and October announcements as disclosures or materializations of any previous misrepresentations.

b. *Company-Specific Price Declines Caused by the April and October 2007 Press Releases and Conference Calls*

Separable from Preston’s opinion as to the character of the April and October 2007 press releases and conference calls, is Preston’s opinion that those announcements—whatever their relationship to the alleged misrepresentations—caused a company-specific drop in share price.

Having determined the efficiency of the market for Bancorp common stock, Preston determined the company-specific (or residual) return of Bancorp common stock for the one-day period following each event by comparing the actual return of the stock against a predicted normal return for that day using the statistical method of linear regression (an “Event Study”). (D.E. 365, Ex. B ¶¶ 41–45.) In generating a predicted normal return, Preston employed a market model which factored in the relevant returns of both the Standard & Poor’s 500 Index (the “SPX”) and the NASDAQ Bank Stocks Index (the “CBNK”) in order to remove *both* market- and industry-wide effects on the price of Bancorp common stock. (D.E. 365, Ex. B ¶¶ 41 – 45.)

Preston calculated the following residual returns:

<b>Date</b>	<b>Price</b>	<b>Actual Return</b>	<b>Residual Return</b>
4/25/2007	\$10.55		
4/26/2007	\$9.99	-5.3%	-5.2%
10/25/2007	\$7.65		
10/26/2007	\$4.72	-38.3%	-41.1%
10/29/2007	\$4.13	-12.5%	-11.9%

(D.E. 365, Ex. B ¶ 45.) Importantly, Preston calculated that these residual returns were statistically significant (and not the product of normal volatility) with a 95% confidence level.

(D.E. 365, Ex. B ¶ 45.)

Defendants argue that Preston's opinions as to the company-specific decline in stock price as a result of the October and April 2007 announcements is inadmissible because Preston compared Bancorp's stock-price movements to a national banking index, the CBNK, which does not account adequately for the Florida-specific banking industry. The Court disagrees.

Defendants do not challenge Preston's overall methodology, but only her use of the CBNK as opposed to some other index. Defendants' challenge goes to the weight of opinion, not to its admissibility.<sup>17</sup> See *Maiz*, 253 F.3d at 666 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking debatable but admissible evidence.") (citations omitted).

Nonetheless, the Court will not allow Preston to offer testimony relating to the loss caused by the October 26, 2007 Fitch downgrade, including the resulting residual return of

---

<sup>17</sup> Moreover, Defendants' own expert, Michael A. Keable, testified that he was unable to develop a workable Florida-specific bank index. (D.E. 303 Ex. E, p. 141.)

October 29, 2007, because, as discussed below, Plaintiffs cannot demonstrate the existence of a genuine issue of fact as to whether the downgrade was the revelation of a previously undisclosed risk.

Accordingly, with respect to loss causation, Preston may only testify to the company-specific returns of Bancorp stock attributable to the April and October 2007 press releases and conference calls.

c. *Disaggregation of Factors Contributing to the Company-Specific Price Declines*

In the last section of her Report, Preston opines on what portions of the company-specific declines identified above “can be attributed to materialization of the alleged misstatements and their effects.”<sup>18</sup> (D.E. 365, Ex. B ¶¶ 121.) Specifically, Preston opines on what portions of the April 26, 2007 company-specific declines are attributable to negative information regarding the BLB loans and what portion of the October 26, 2007 decline are attributable to negative information regarding the broader land loan portfolio, including the LAD, LADC, and BLB loans.<sup>19</sup> (D.E. 365, Ex. B ¶¶ 121 & 129.)

Preston begins by calculating the residual declines of Bancorp’s stock price and concludes that a company-specific decline of \$0.55 per share can be attributed to the April 25 and 26, 2007 announcements and a company-specific decline of \$3.15 per share can be attributed

---

<sup>18</sup> Preston included these opinions in the “damages” section of her Report; they are relevant to both damages and loss causation.

<sup>19</sup> Preston also opines on the October 29, 2007 residual declines, but as previously indicated, the Court is not admitting Preston’s loss causation or damages testimony regarding the Fitch ratings downgrade.

to the October 25 and 26, 2007 announcements.<sup>20</sup> (D.E. 365, Ex. B ¶¶ 121 & 129.) Preston then sets about opining about what portions of those residual declines are attributable to the information in question. Of course, this endeavor assumes (or at least acknowledges the possibility) that the April and October 2007 announcements may have constituted bundles of bad news, only some of which relates to the relevant information (*i.e.*, the alleged misrepresentations.)

With respect to the company-specific decline of \$0.55 per share on April 26, 2007, Preston opines that \$0.37 per share is attributable to the revealed problems with the BLB loans. (D.E. 365, Ex. B ¶¶ 121 & 122.) Preston relies primarily on what she describes as her “analysis of the market perception of the causes of differences in the announced earnings and the consensus expectations of analysts before the announcement as well as the changes in analysts’ forecasts for the fiscal year of 2007.” (D.E. 365, Ex. B ¶ 122.) Essentially, Preston opines that the residual decline is directly related to the reduction in Bancorp’s earnings estimates as a result of the announcements. Accordingly, Preston first determines what percentage of the earnings-estimate reductions was related to the BLB loans and then applies that same percentage to the residual decline to arrive at the \$0.37 figure.

Preston explains that Bancorp’s announced earnings for the first quarter of 2007 missed the consensus analysis estimates by \$0.09 per share and that analysts, on average, lowered their 2007 fiscal year earnings estimates by \$0.15 per share (*i.e.*, projected an further \$0.06 reduction

---

<sup>20</sup> To do this, Preston simply multiplies the residual declines times the beginning share-prices.

in earnings for the remainder of the year).<sup>21</sup> (D.E. 365, Ex. B ¶¶ 124 & 125.) In determining what percentage of the \$0.15 reduction was attributable to the BLB loans, Preston separately examined the \$0.09 first-quarter realized reduction and the \$0.06 projected further reduction. (D.E. 365, Ex. B ¶¶ 124 & 125.)

With respect to the first-quarter realized reduction, Preston explains that, from her review of their reports, analysts were uniform in attributing \$0.07 to the negative information regarding the BLB loan portfolio.<sup>22</sup> (D.E. 365, Ex. B ¶ 124.) With respect to the projected further reduction, Preston explains that there were two primary issues with which analysts were concerned—credit quality and net interest margin compression, but that credit quality was clearly the more negative surprise. (D.E. 365, Ex. B ¶ 124, Ex. C ¶¶ 11–15.) Preston provides three bases for this conclusion: the “anecdotal evidence” of what analysts were most concerned about in their reports; the evidence that at least some of the net interest margin compression had been previously anticipated by the market, based upon pre-announcement analysts reports and previous company statements; and, the fact that Bancorp attributed at least some of the net interest margin compression to the increase in non-performing assets. (D.E. 365, Ex. C ¶¶ 12–14.) And although she was “not able to determine precisely” how much of the \$0.06 was attributed to BLB loan credit quality issues, Preston, in her words, “conservatively” attributes half (or \$0.03) of the projected future reduction to it. (D.E. 365, Ex. B ¶ 124, Ex. C ¶¶ 11–15.)

---

<sup>21</sup> In her affidavit, Preston cites to the revised analyst earnings estimates she used to calculate her \$0.15 average reduction figure. (D.E. 365, Ex. C ¶ 9.)

<sup>22</sup> In her affidavit, Preston cites to two analyst reports attributing the negative information regarding the BLB loans to specifically \$0.07 of the first-quarter reduction in earnings. (D.E. 365, Ex. C ¶ 8.)

Preston’s final step is to combine the two figures (\$0.07 and \$0.03) to arrive at a \$0.10 as the portion of the total \$0.15 per share earnings estimate reduction for fiscal year 2007 attributable to problems in the land bank loan portfolio—or 66.6%.<sup>23</sup> (D.E. 365, Ex. B ¶¶ 124 & 125.)

Defendants argue Preston’s disaggregation opinion is inadmissible because she did not arrive at the 66.6 % multiplier “through any sort of scientific analysis or methodological study; she simply deemed it to be so as an approximation.”<sup>24</sup> The Court agrees that Preston’s opinion is to some extent an approximation, but disagrees that it is an inadmissible one. Clearly, admissible expert opinion is not limited to scientific or statistical analysis. *See* Fed R. Evid. 702; *Frazier*, 387 F.3d at 1262 (holding expert testimony may be based on experience). Not only does Preston adequately explain how her experience as a financial analyst guided her opinion, she supports her method with citations to academic textbooks explaining the importance of analyzing (or “dissecting”) reported earnings and earnings forecasts in evaluating stock value. (D.E. 365, Ex. C ¶¶ 8–10.) Accordingly, Preston has demonstrated the reliability of her method and her opinion is admissible. *See Frazier*, 387 F.3d at 1262.

With respect to the company-specific declines 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. (D.E. 365, Ex. B ¶¶ 129–131.) Essentially, Preston’s opinion is that there was no other bad news to disaggregate from the information regarding the credit

---

<sup>23</sup> 66.6% = \$0.10 ÷ \$0.15.

<sup>24</sup> Defendants do not challenge Preston’s opinion regarding the direct relationship between earnings and stock price.

quality of the land loan portfolio and, therefore, that 100% of the residual decline is attributable to the negative land loan information.<sup>25</sup> (D.E. 365, Ex. C ¶ 35.)

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.” (D.E. 365, Ex. C ¶¶ 27 & 30.) 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.<sup>26</sup> (D.E. 365, Ex. B ¶¶ 129–131.) With respect to the remaining factors, Preston explains that the loss related to general reserves was caused by poor land loan credit quality and cites to statements made by Toalson in the October 26, 2007 conference call attributing the increase in loan loss reserves to problems with the land loans.

---

<sup>25</sup> Thus, in this sense, Preston’s proposed testimony is distinguishable from that excluded by Judge Selna of the U.S. District Court for Central District of California in *Miller v. Cane International, Inc.*, 2005 WL 5957833, \* 6 (C.D. Cal. Mar. 3, 2005), upon which Defendants rely; in that case, Preston “did not even attempt to factor out the effect of other events which could have accounted for a portion of the decline”—here she opines it is not necessary.

<sup>26</sup> 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.

(D.E. 365, Ex. C ¶ 29.) Further, Preston explains that there is no need to disaggregate market forces because her calculation of the residual decline, *i.e.*, the Event Study, controlled for market and industry factors. (D.E. 365, Ex. C ¶¶ 33–34.) Thus, the Court is satisfied that Preston has adequately explained the basis of her reasoning and that it is reliable—Defendants’ challenge goes to the weight of Preston’s opinion, not its admissibility. *See Maiz*, 253 F.3d at 666.

Accordingly, with respect to loss causation (and damages) Preston may testify only to the amount of the April 26, 2007 residual decline she believes is attributable to negative information regarding the BLB loans and the fact that she believes the entire October 26, 2007 residual decline is attributable to negative information regarding the broader land loan portfolio.

### 3. Damages

What remains of Preston’s Report is her opinion as to the level of stock-price inflation resulting from Bancorp’s alleged misrepresentations. Preston’s general method for calculating the inflation is unremarkable—Preston simply opines that the level of inflation resulting from a misrepresentation is equal to the amount of residual decline attributable to the disclosure (or materialization) of the truth of that misrepresentation. And Defendants apparently do not take issue with this general concept; in their Motion, Defendants state: “The market reaction to ‘the truth’ is ... typically offered as the measure of price inflation caused by the fraud.”

However, Defendants take issue with the manner in which Preston applies this methodology, and the Court agrees that much of Preston’s testimony is inadmissible. First, Preston’s opinion relating to the level of inflation revealed on October 29, 2007 by the Fitch downgrade is inadmissible because, as explained below, Plaintiffs’ claims relating to this price drop do not survive summary judgment. Second, Preston’s opinion regarding the inflation

caused by “the failure of BankAtlantic to make additional disclosures regarding the NatureWalk and Priority loans” is inadmissible because Preston has offered no opinion on the residual decline attributable to the ultimate disclosure of such information; Preston simply states—in two sentences—that the amount of these loans was twice the face value of the problem loans disclosed in April 2007 and that, therefore, inflation must have existed that was twice the April 26, 2007 residual decline attributable to the BLB loan information. (D.E. 365, Ex. B ¶ 134.) Preston offers absolutely no further explanation for this out-of-the-blue conclusion and the Court will not admit it. *See Cook*, 402 F.3d at 1111.

Finally, Preston opines on the price inflation relating to the misrepresented credit quality and performance of the BLB loans and broader land loan portfolio. Although Preston offers admissible opinions on the residual price declines attributable to the announced information relating to the BLB loans and broader land loan portfolio (\$0.37 and \$3.15, respectively), in order to opine on inflation, Preston must assume that this information was previously misrepresented. And that is exactly what Preston does. She assumes the information regarding the BLB loans which caused the residual decline on April 26, 2007 was misrepresented as of October 19, 2006, and she assumes the information regarding the broader land loan portfolio was misrepresented as of April 26, 2007. (D.E. 365, Ex. B ¶¶ 133 & 135.) Based on these assumptions, Preston opines that the price was consistently inflated by at least \$0.37 beginning October 19, 2006 through April 26, 2007 and by at least \$3.15 beginning April 26, 2007 through October 26, 2007.<sup>27</sup>

---

<sup>27</sup> Preston includes with her Report a table of the amount of inflation on every day from October 19, 2006 through October 25, 2007, which includes for certain days amounts of inflation previously excluded, *i.e.*, \$0.74 for the Nature Walk loans and \$0.56 for the Fitch downgrade, but otherwise indicates a consistent level of inflation throughout the period.

The Court will allow Preston's opinion with respect to the \$3.15 inflation beginning on April 26, 2007 because, as explained below, Plaintiffs submit sufficient evidence to create a genuine issue of fact as to whether Defendants misrepresented the credit quality and performance of the land bank portfolio as of April 26, 2007 and this evidence supports Preston's underlying assumption. However, Plaintiffs have not submitted similar evidence in support of Preston's assumption that Defendants misrepresented the credit quality and performance of the entire BLB loan portfolio as of October 19, 2006,<sup>28</sup> and the Court is not convinced that Plaintiffs will be able to do so at trial.<sup>29</sup> Thus, only to the extent Plaintiffs ultimately put forth sufficient evidence to support this assumption at trial, will the Court allow Preston to opine that the level of inflation from October 19, 2006 through April 26, 2007 was \$0.37. The Court will not allow this opinion if Plaintiffs fail to do so.<sup>30</sup> *See Evans v. Mathis Funeral Home*, 996 F.2d 266, 268 (11th Cir. 1993) (affirming trial court's exclusion of expert testimony based on unsupported assumptions); *see generally* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 703.04[4] (2d ed. 2010) (collecting Court of Appeals opinions in which expert opinions relying on "unsubstantiated facts, data, or assumptions" were held unreliable).

---

<sup>28</sup> As explained below, Defendants did not challenge the allegation on summary judgment.

<sup>29</sup> Even if Plaintiff could demonstrate some level of inflation as of October 19, 2006, the Court is not convinced they could demonstrate a full amount of inflation equal to the April 26, 2007 residual decline existed as of October 19, 2006 and consistently thereafter until the announcement.

<sup>30</sup> To be sure, Plaintiffs must put forth sufficient evidence to support a finding that the information was misrepresented as of the *exact* dates Preston assumes it was—October 19, 2006. Evidence of some misrepresentation on a later date will not suffice because the Court will not allow Preston to change her opinion at trial.

Accordingly, with respect to damages, the Court will only allow Preston to testify as to the stock-price inflation evidenced by the April 26, 2007 and October 26, 2007 residual declines and only to the extent her underlying assumptions are supported by the evidence at trial.

#### **IV. Defendants' Motion for Summary Judgment**

##### **A. *Summary Judgment Standard***

Summary judgment is authorized only when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56. The Supreme Court explained in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), that when assessing whether the movant has met this burden, the court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion.

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

If the record presents factual issues, the court must not decide them; it must deny the

motion and proceed to trial. *Env'tl. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).<sup>31</sup> Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Elecs. Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“[T]he dispute about a material fact is ‘genuine,’ ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”).

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611–12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 255.

### **B. Plaintiffs’ § 10(b) Claims**

Defendants argue that they are entitled to summary judgment as to Plaintiffs’ § 10(b) claims. Section 10(b) of the Exchange Act makes it unlawful “to use or employ, in connection

---

<sup>31</sup> Decisions of the United States Court of Appeals for the Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

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, Commission Rule 10b-5 (“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) (2009).

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.” *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005) (citations omitted); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). With respect to 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.*

*Dura*, 544 U.S. at 341–42 (citations omitted).

Defendants argue no genuine issue of fact exists as to whether their class period statements were material misrepresentations or omissions. Further, even if these statements were

material misrepresentations, Defendants argue that the statements were forward looking, and thus, subject to the statutory safe harbor provision. Defendants also argue no genuine issue of fact exists as to the second element of Plaintiffs' § 10(b) claim, scienter. And lastly, Defendants argue no genuine issue of material fact exists as to loss causation. The Court addresses each argument in turn.

1. Material Misrepresentations or Omissions

Defendants state that Plaintiffs cannot produce evidence sufficient to raise a genuine issue of fact about any material omissions or misrepresentations, while Plaintiffs contend that substantial evidence supports this element of their claims, which raises genuine issues of fact and thereby precludes summary judgment in Defendants' favor.

To establish the first element of a Rule 10b-5 claim, Plaintiffs must point to a *factual* statement or omission—*i.e.*, one that is demonstrable as being true or false. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091–96 (1991). The statement must also be *false*, or the omission must render a statement *misleading*. A statement is misleading if it omits a fact necessary to make the statements made, in the light of the circumstances in which they were made, not misleading.<sup>32</sup> 17 C.F.R. § 240.10b-5. Finally, any statement or omission of fact must be *material*; a statement or omission is material if a “reasonable shareholder would consider it

---

<sup>32</sup> As the Court of Appeals for the Eleventh Circuit recently emphasized, Rule 10b-5 does not require the disclosure of all nonpublic information—even nonpublic material information—about a security. *Badger v. So. Farm Bureau Life Ins. Co.*, 2010 WL 2990009, at \*5 (11th Cir. July 30, 2009) (citing *Chiarella v. United States*, 445 U.S. 222, 235 (1980)). Rather, in order to be held liable for its failure to disclose a material fact, an entity must have a prior duty to disclose that fact. *Ziembra v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1206 (11th Cir. 2001). Such a duty arises both when the law imposes a special obligation, as for accountants, brokers, issuers, and others, as well as when a defendant's failure to speak would render the defendant's own prior speech misleading or deceptive. *Id.*

important” in making a decision of whether to invest, or if “there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quotation and citation omitted).

In their Motion, Defendants do not address whether Bancorp misstated or concealed BankAtlantic’s allegedly risky lending practices, its failure to follow its underwriting policies, and the consequently elevated level of risk to the land loans in the CRE portfolio; nor do they address whether Bancorp made misstatements pertaining to the Steeplechase loan. Rather, Defendants only challenge the alleged misstatements and omissions, beginning in April 2007, regarding the deteriorating credit quality of the non-BLB portion of the CRE portfolio. And even as to these claims, Defendants only challenge whether their statements disclosing the deteriorating credit quality of the BLB loans were misleading in light of their failure to discuss the credit quality of the non-BLB loans.

Defendants argue that their failure to reveal the credit quality of the non-BLB loans when discussing the credit quality of the BLB loans was not misleading because of the unique risk associated with the BLB loans. Defendants argue that the BLB loans were riskier because the borrowers of BLB loans generally had option contracts with national homebuilders and that many of those homebuilders were walking away from their contracts in 2006 and 2007, as the housing market began to sour. However, regardless of any particular risk characteristics of the BLB loans, Defendants’ argument is unavailing.

In the statements at issue, Defendants spoke about the inherent risk to BLB loans and about the accelerating credit and repayment problems BankAtlantic was experiencing with those

loans at the time the statements were made.<sup>33</sup> However, Plaintiffs have raised a genuine issue of fact as to whether the non-BLB loans were experiencing a substantially similar acceleration of credit and repayment problems and, therefore, whether Defendants' statements were misleading.

From January through March, 2007, numerous non-BLB borrowers requested extensions of their loans' maturity dates, which were approved by the MLC. (D.E. 338-14, 15, 16, 17, 18, 83, 84, 104.) And on March 14, 2007, A. Levan sent an email to Abdo, J. Levan, and others on the subject of land loans; he noted that "there seems to be a parade of land loans coming in for extensions [*sic*] recently.... I believe we are in for a long sustained problem in this sector." (D.E. 338-19.) And Plaintiffs have presented evidence that many of this "parade of land loans" were non-BLB land loans. Nonetheless, in the April 26, 2007 conference call, A. Levan stated: "The portfolios that are borrowers that are buying land for their own development, those are proceeding in the normal course." And Levan disclosed only that BLB loans were "coming in for extensions for a period of time in order to give the builders more time to ultimately take down the lots."<sup>34</sup>

---

<sup>33</sup> For example, in the April 26, 2007 conference call, A. Levan informed investors that the homebuilders who had contracted with BLB borrowers had slowed their rate of development, causing the borrowers to request extended maturity dates of their loan obligations. (D.E. 252-7, pp. 5-8.)

<sup>34</sup> Further, on March 20, 2007, Marcia Snyder, the Bank executive in charge of the CRE portfolio, sent an email to the Bank's loan officers stating that the MLC "spent a great deal of time discussing our residential land exposure.... This includes those loans that are presold to builders as well as land loans without a presale but being held for future sale. Obviously, there is significant concern about these loans given the current state of the market." (D.E. 336 ¶ 34; D.E. 338-25.) And Plaintiffs have also presented evidence that, as of April 16, 2007, the Bank downgraded two LADC loans to grade 11, or substandard, indicating that the Bank believed those loans were inadequately protected by the current sound worth and paying capacity of the obligor or the collateral pledged.

Thus, the evidence raises a genuine issue of fact as to whether Defendants' statements, beginning in April of 2007, focusing solely on the credit and repayment problems with BLB loans and omitting mention of the problems the non-BLB land loans were contemporaneously experiencing, were misleading. *See Ziembra*, 256 F.3d at 256. Accordingly, Defendants are not entitled to summary judgment regarding the false or misleading nature of these statements.

\_\_\_\_\_ 2. Safe Harbor

Defendants contend that the allegedly misleading statements that form the basis for Plaintiffs' claims were non-actionable forward-looking statements that warrant the protection of the statutory safe harbor provision of the Exchange Act.

The Private Securities Litigation Reform Act (the "PSLRA"), Pub. L. No. 106-67, 109 Stat. 737 (1995), provides for a safe harbor in § 10(b) claims for some forward-looking statements. With some exceptions not pertinent here, where a "private action ... is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading," a defendant "shall not be liable with respect to any forward-looking statement ..." if and to the extent that-

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial....

15 U.S.C. § 78u-5(c).

A statement is "forward-looking" when it contains a projection of revenues, income, or

other financial items; a statement of the plans and objectives of management for future operations; a statement of future economic performance; or any statement of the assumptions underlying or relating to such statements. 15 U.S.C. § 78u-5(i)(1). Further, a material and misleading omission may fall within the forward-looking safe harbor if the statement rendered misleading by the omission was itself forward looking. 15 U.S.C. § 78u-5(c); *Harris v. Ivax Corp.*, 182 F.3d 799, 805 (11th Cir. 1999).

At the outset, the Court notes that Defendants fail to identify any particular statement that falls within the protection of the safe harbor. This is essentially a failure to file an adequate memorandum of law in support of their Motion. *See* Fed. R. Civ. P. 56; S.D. Fla. L. Rules 7.1 & 7.5. For this reason alone, the Court would deny Defendants' Motion as to the protections of the safe harbor.

Even if the Court were to overlook this failure, Defendants' bare claim that they are entitled to the protection of the safe harbor would fail. Without identifying any specific forward-looking statements, Defendants cannot satisfy their initial burden to demonstrate the absence of a genuine issue of fact as to whether the statements fall within the safe harbor. *See Celotex*, 477 U.S. at 323 ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.").

Defendants' sole argument on this point is that Plaintiffs' concession that the Bank adequately reserved for loan losses in connection with its land loans leads to the necessary

conclusion that any statements Defendants made regarding those loans were forward looking. The Court is unconvinced.

The mere fact that Plaintiffs concede they have no claim based on the adequacy of the Bank's loan loss reserves does not, in itself, render all the allegedly fraudulent statements made by Defendants forward looking. Indeed, the record is replete with statements by Defendants that are neither forward looking nor do they touch upon the Bank's loan loss reserves in any way. By way of example, A. Levan's January 31, 2007 statement—"We believe that our credit process has remained conservative and consistent with our practices over the past several years during which our credit experience was excellent"—is neither forward looking nor does it relate to Plaintiffs' concession regarding the loan loss reserves. (D.E. 252-3, p. 6.) Moreover, even if this argument was correct, Defendants would still need to demonstrate the absence of a genuine issue of fact as to the remaining elements of the safe harbor for each statement, which they have failed to do. Accordingly, Defendants are not entitled to summary judgment based on the safe harbor.

### 3. Scienter

Defendants argue that no genuine issue of fact exists as to the element of scienter because, during the class period, Defendants made extensive disclosures, their independent auditor approved BankAtlantic's allowance for loan loss provisions, the OTS found BankAtlantic's loan loss provisions to be adequate, Bancorp's financial statements were accurate, and Defendants increased their holdings of Bancorp stock.

A private cause of action cannot exist under § 10(b) and Rule 10b-5 without proof of scienter, which the Supreme Court has defined as "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The Court

expressly declined to address whether a showing of recklessness is sufficient to support a claim under § 10(b). However, the Court of Appeals for the Eleventh Circuit has held that, to prove scienter, a plaintiff must prove either an “intent to deceive, manipulate, or defraud,” or “severe recklessness.” *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1284 (11th Cir. 1999). The Court of Appeals for the Eleventh Circuit has described severe recklessness as follows:

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.

The Court is unpersuaded by Defendants’ brief argument on scienter. As discussed above, the allegedly misleading statements at issue fall into two broad categories: (1) that Defendants misrepresented the nature of their underwriting practices and the consequent level of risk to the land loan portfolio; and (2) that Defendants misrepresented and failed to disclose the accelerating deterioration of credit quality throughout the land loan portfolio as it became apparent.<sup>35</sup>

---

<sup>35</sup> The Court notes that in the Complaint, Plaintiffs attribute materially false or misleading statements to Defendant Bancorp and to individual Defendants A. Levan, J. Levan, White, and Toalson. Plaintiffs do not allege that Defendant Abdo personally made a materially false or misleading statement during the class period. Whether, on such allegations, Plaintiffs will be able to adduce sufficient evidence for a jury to find Defendant Abdo *primarily* liable for a violation of § 10(b) is an open question. *See Ziembra*, 256 F.3d at 1205 (holding that, in order for a defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff’s investment decision was made). However, because the parties do not raise this issue in their Motions and because Defendants argue the issue of scienter as to all Defendants, the Court reviews Defendants’ Motion on the issue of scienter as to all Defendants.

With respect to the first category of misrepresentations, there is evidence before the Court that, when approving and extending land loans, BankAtlantic engaged in practices identified by its Commercial Loan Policy as potentially unsafe or unsound. For example, the Bank identified as a potentially unsafe or unsound practice the approval of a loan for a project in which the borrower lacks equity. BankAtlantic routinely engaged in this practice, insofar as the equity component of BLB loans sometimes consisted of a letter of credit from a national homebuilder rather than equity from the borrower. Defendants A. Levan, J. Levan, and Abdo, as members of the MLC, would have would have been apprised of this practice in connection with the approval or modification of loans for amounts in excess of \$1 million.<sup>36</sup> And there is evidence that Defendants Toalson and White either knew or should have known of this potentially unsafe practice, because their positions required them to review the credit quality of BankAtlantic's loans in order to reserve appropriate loan loss allowances. This evidence raises an issue of fact as to whether Defendants knew their class period statements presented a danger of misleading investors, in that they identified BankAtlantic's lending practices as conservative and omitted to disclose the true credit quality of the land loan portfolio. *See Bryant*, 187 F.3d at 1282 n.18.

With respect to the second category of misrepresentations, the Court likewise finds that an issue of fact exists as to whether Defendants knew that their statements presented an obvious danger of misleading investors for their failure to disclose the accelerating deterioration of credit quality throughout the land loan portfolio. In their respective positions as officers of

---

<sup>36</sup> Further evidence of A. Levan's and J. Levan's knowledge of the misleading nature of their statements on the credit quality of the portfolio is presented in the form of November 2006 email from A. Levan to J. Levan. After J. Levan made an optimistic statement regarding the credit quality of the Bank's loan portfolio, A. Levan wrote, "I wouldn't be so bold on the credit front—I think Marcia is going to have problems with her land portfolio."

BankAtlantic and Bancorp, Defendants knew or should have known that loans in all segments of the land loan portfolio were requesting extended maturity dates in the first quarter of 2007 and that several land loans had been downgraded to a grade of 10 or 11 after the end of the first quarter of 2007. In March 2007, A. Levan emailed members of the MLC regarding the many requests for extensions on land loans. And as recipients of the Senior Loan Discussion Book, which included reports on all loans graded 10 or higher, all Defendants arguably were apprised of the accelerating trend of loan downgrades.<sup>37</sup> This evidence raises an issue of fact as to whether Defendants knew that their statements disclosing worsening credit and repayment problems with the BLB loans were misleading for their failure to reveal similar problems throughout the land loan portfolio. Accordingly, Defendants are not entitled to judgment as a matter of law in their favor on the issue of scienter.

4. Loss Causation

Defendants argue that they are entitled to summary judgment as to all of Plaintiffs' claims, because no genuine issue of fact exists on the question of loss causation. Specifically, Defendants argue that the declines in Bancorp share price on April 26, 2007, October 25, 2007 and October 29, 2009 were not proximately caused by the alleged fraud, because the alleged fraud was not revealed to the market in Bancorp's April and October 2007 announcements and because Plaintiffs have no evidence linking the price declines to those announcements.<sup>38</sup>

---

<sup>37</sup> Even more direct evidence is in the record regarding Defendant White's knowledge of the misleading nature of the statements made in April 2007 and beyond. White has testified that, prior to the April 26, 2007 conference call, he had concern regarding the asset quality of all of the categories of land loans.

<sup>38</sup> Defendants' argument on loss causation is based, in large part, on a challenge to the proposed testimony of Plaintiffs' expert witness Candace L. Preston, the admissibility of which is

Loss causation is the causal “link between the defendant’s misconduct and the plaintiff’s economic loss.” *Rousseff v. E.F. Hutton Co., Inc.*, 843 F.2d 1326, 1329 n.2 (11th Cir. 1988).<sup>39</sup> Proof of loss causation is mandated by statute for actions under § 10(b) and Rule 10b-5. 15 U.S.C. § 78u-4(b)(4) (“In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.”)

To prove loss causation, a plaintiff must show that the alleged misrepresentation or omission was in some reasonably direct or proximate way responsible for his loss. *Robbins v. Koger*, 116 F.3d 1441, 1447 (11th Cir. 1997) (citations omitted). Due to the similarities between actions brought under Rule 10(b) and common law tort actions for fraud, many courts characterize loss causation as similar to the common law concept of proximate causation. See *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 157 (2d Cir. 2007); *Rousseff v. E.F. Hutton Co., Inc.*, 867 F.2d 1281, 1284 n.5 (11th Cir. 1989) (“The terms loss causation and proximate causation are often used interchangeably in rule 10b-5 cases.”).

In *Dura Pharmaceuticals*, the Supreme Court settled a conflict between the courts of appeals as to what a plaintiff must show to establish the requisite causal link. The Court held that “an inflated purchase price alone will not itself constitute or proximately cause the relevant economic loss.” *Dura*, 544 U.S. at 342. Plaintiffs must identify a “causal connection” between

---

discussed in detail above.

<sup>39</sup> Loss causation stands in contrast to transaction causation, another way of describing reliance, which is established by a showing that the misrepresentations or omissions cause the plaintiff to engage in the transaction in question. *Robbins v. Koger*, 116 F.3d 1441, 1447 (11th Cir. 1997) (internal quotation and citation omitted). Transaction causation is not at issue in the Motions at bar.

the misrepresentation and a subsequent decline in share value. *Id.* at 347. As in the common law fraud context, that connection must be established by a showing that the depreciation in share value was the result of the revelation of the risk previously concealed by the defendant's misrepresentation. *Id.* at 344–46. Absent the revelation of the risk to the market, a decline in share price cannot be attributed to a prior misstatement or omission. *See id.*; *Lentell v. Merrill Lynch, Inc.*, 396 F.3d 161, 173 (2d Cir. 2005) (“[T]o establish loss causation, a plaintiff must allege ... that the misstatement or omission concealed something from the market that, *when disclosed*, negatively affected the value of the security.”) (emphasis added).

The revelation of the concealed risk may take more than one form. A “corrective disclosure” specifically reveals the alleged fraud; it is an admission or revelation, often by the defendant, of the previous misstatement or omission and is accompanied by a corrected version of those statements. *Lentell*, 396 F.3d at 175 n.4. When a corrective disclosure is made, the necessary link between the previously concealed risk and the revelation of that risk is generally apparent.

However, the revelation of the concealed risk need not take the form of a corrective disclosure; a plaintiff may also prove loss causation by proving that the concealed risk materialized in a foreseeable way and that this “materialization of the risk,” led to a decline in share price.<sup>40</sup> *Id.* at 173; *see also In re Omnicom*, 597 F.3d 501, 511 (2d Cir. 2010); *McAdams v.*

---

<sup>40</sup> Defendants state—correctly—that the Court of Appeals for the Eleventh Circuit has neither adopted nor rejected the materialization of the risk approach to establishing loss causation and urge the Court to reject the doctrine. The Court notes, however, that the wholesale rejection of the materialization theory can lead to an untenable result. If loss causation could only be proven by showing that a defendant made a traditional corrective disclosure, defendants could escape liability under § 10(b) simply by avoiding corrective disclosures. Consider, for example, a corporate officer who falsely informs investors that his company is pursuing a conservative

*McCord*, 584 F.3d 1111, 1114 (8th Cir. 2009); *In re Williams Sec. Litig.—WCG Subclass*, 558 F.3d 1130, 1138 (10th Cir. 2009). The adverse outcome that is revealed to the market must be within the foreseeable zone of risk that is the subject of the prior concealment to be considered a materialization of that risk. *Lentell*, 396 F.3d at 173.

In addition to proving that the truth regarding the concealed risk made its way into the market—either through a corrective disclosure or through the materialization of the risk—a plaintiff must also prove that it was this revelation that caused the subsequent price drop. Therefore, the plaintiff must prove that it was the revelation of the concealed risk, rather than one or more of a “tangle of other factors,” that caused the subsequent decline in the price of a security. *Dura*, 544 U.S. at 343. That tangle of factors may include “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.” *Id.* at 343. However, a plaintiff need not show that the defendant’s act was the sole and exclusive cause of the decline in price; he need only show that it was a substantial or significant contributing cause. *See id.*; *Robbins*, 116 F.3d at 1447.

Here, Plaintiffs demonstrate a genuine issue of fact as to loss causation regarding the April 26, 2007 and October 26, 2007 price declines, but not as to the October 29, 2007 price decline. The Court separately discusses the three relevant price declines below.

---

course of action when he is, in fact, wagering the company’s coffers at the racetrack. The officer bets on the wrong horse; the company loses everything and must file for bankruptcy. If the company were to announce its bankruptcy without disclosing that it was caused by the concealed risk—here, the officer’s wayward conduct—there would be no corrective disclosure. And if a court did not recognize the foreseeable materialization of the concealed risk—here, the bankruptcy—as sufficient to prove loss causation, the officer’s fraudulent misrepresentation would escape liability. Surely, such a glaring loophole to § 10(b) liability was never intended.

a. *April 26, 2007*

Plaintiffs demonstrate a genuine issue of fact as to whether the April 2007 announcements amount to the materialization of a previously undisclosed risk. In the April 25 and 26, 2007 press release and conference call, Defendants announced the deteriorating credit quality of the BLB loans. A genuine issue of fact, therefore exists as to whether this result was within the foreseeable zone of the alleged previously concealed risk, *i.e.*, the Bank's failure to follow conservative lending practices and the consequent credit quality of its land loans.<sup>41</sup> *See Lentell*, 396 F.3d at 173. Indeed, the evidence reflects that the Bank itself recognized in its credit policy that deviations from its guidelines could result in unsafe and unsound lending. (D.E. 338-2, p. 42172.)

Plaintiffs also demonstrate a genuine issue of fact as to whether the April 25 and 26 announcements substantially or significantly contributed to the April 26, 2007 price decline. Plaintiffs' expert, Preston, proposes to testify that the announcements caused a residual decline in stock price of \$0.55 per share and that \$0.37 of the residual decline is specifically attributable to the disclosures regarding the BLB loans. Further, in the April 25, 2007 press release, Bancorp stated that its reduction in net income was caused primarily by net interest margin compression, combined with an increased loan loss provision, which Bancorp tied to the increase in non-

---

<sup>41</sup> As discussed above, Defendants do not challenge whether the statements and omissions concerning this risk were materially false and/or misleading. Accordingly, the Court does not reach any conclusions regarding the sufficiency of the evidence concerning the concealed risk in question, and the analysis as to loss causation is limited to the foreseeability of the result. To be sure, the allegedly concealed risk—namely, the Bank's failure to engage in "conservative" lending practices and the consequent credit quality of the land loan portfolio—is a broad one. Nonetheless, the Court must assume that such statements and omissions were, in fact, materially false and/or misleading.

accrual loans. And in the April 26, 2007 conference call, Bancorp attributed the increased loan loss provision to the placement of two BLB loans on non-accrual status. This evidence raises a genuine issue of fact as to whether the April 26, 2007 share price decline was caused, at least in significant part, by Defendants' April 25 and 26 statements regarding the deterioration of credit quality in the BLB portfolio. *See Robbins*, 116 F.3d at 1447.

b. *October 26, 2007*

Plaintiffs demonstrate the existence of a genuine issue of fact as to whether the announcements made in Bancorp's October 25 and 26, 2007 press release and conference call amount to a disclosure of the previously undisclosed risk. The alleged undisclosed risk in issue is the accelerating deterioration of credit quality throughout the land loan portfolio. In the October 25, 2007 press release, Bancorp reported that in the third quarter of 2007, the Bank placed eleven commercial real estate loans totaling \$148.7 million on non-accrual status and announced that the entire land loan portfolio was exposed to risk of loss. A genuine issue of fact exists as to whether this disclosure corrected Defendants' earlier statements which limited the exposure in the land loan portfolio to the BLB loans. *See Lentell*, 396 F.3d at 173.

Plaintiffs also demonstrate a genuine issue of fact as to whether the October 25 and 26, 2007 announcements substantially or significantly contributed to the October 26, 2007 price decline. Plaintiffs' expert proposes to testify that the announcements caused a residual decline in Bancorp stock price of \$3.15 per share and that the entire residual decline is attributable to the information in the announcements regarding the land loans. Further, though Bancorp reported other news that negatively impacted earnings on October 25, 2007—such as costs associated with opening new branches—the announcement of the degradation of credit quality throughout the

land loan portfolio figured prominently in the press release. Finally, as Preston explains in her testimony, analyst reports from the day after the announcement focused on the news related to the land loan portfolio. Considered together, this evidence raises a genuine issue of fact as to whether the October 25 and 26, 2007 announcement of credit deterioration throughout the land loan portfolio was a significant contributing cause of the decline in Bancorp's stock price on October 26, 2007. *See Robbins*, 116 F.3d at 1447.

c. *October 29, 2007*

Plaintiffs fail to raise an issue of fact as to whether the October 29, 2007 decline in share price was proximately caused by the revelation of the alleged fraud. Plaintiffs claim that the October 29, 2007 decline was caused by the October 26, 2007 downgrade of Bancorp stock by the Fitch Ratings company and that the downgrade was a further materialization of the previously concealed risk concerning the land loans.

As discussed above, loss causation can be established either by a showing of a corrective disclosure to the market that reveals the falsity of prior statements or by a reasonably foreseeable materialization of the previously concealed risk. However, the public discussion of information that is already available to the market cannot constitute such a revelation. *In re Omnicom*, 597 F.3d 501, 512 (2d Cir. 2010); *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 187 (4th Cir. 2007) (holding that the revelation of facts previously disclosed in public filings could not have caused stock price to decline); *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 269–70 (same). Even when the subsequent “disclosure” provides further analysis or constitutes a negative characterization of previously disclosed information, it cannot constitute a revelation of the concealed risk to support a finding of loss causation if it does not reveal information previously

unavailable to the public. *In re Omnicom*, 597 F.3d 512.

Here, Plaintiffs do not allege and the evidence does not support a claim that the Fitch downgrade revealed any then-undisclosed facts related to the alleged misrepresentations or omissions. While the ratings change surely amounted to a negative assessment of the news, the downgrade was merely an analysis or negative characterization of already public information. As such, this information does not amount to either a corrective disclosure or the materialization of a risk that was not previously disclosed, and it cannot support a finding of loss causation as a result. *See In re Omnicom*, 597 F.3d at 512.

\_\_\_\_\_ **C. Plaintiffs' § 20 (a) Claims**

Defendants do not separately move for summary judgment as to Plaintiffs' § 20(a) claims; rather, Defendants address Plaintiffs' "securities fraud" claims as a general matter in their Motion.

Claims brought against controlling persons pursuant to § 20(a) are derivative claims that impute liability not on the person who actually commits a securities law violation, but on an entity or individual that controls the violator. *See, e.g., Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 722 (11th Cir. 2008) ("A plaintiff must show that the controlled person (not the controlling person) violated the federal securities law."). Defendants do not contend that the individual Defendants were not controlling persons of the individuals or entities that made the statements that form the basis of Plaintiffs' Complaint. Nor do they raise any other argument as to why they are entitled to judgment as a matter of law as to Plaintiffs' § 20(a) claims. Thus, to the extent that Plaintiffs' § 10(b) claims survive summary judgment, as discussed above, their claims against the individual Defendants pursuant to § 20(a) also survive.

## V. Plaintiffs' Motion for Partial Summary Judgment

In their Motion, Plaintiffs move for partial summary judgment as to the falsity of a series of statements made by A. Levan during a July 25, 2007 investor conference call. During that call, a market analyst referenced Bancorp's July 24, 2007 press release, in which Bancorp noted that additional downgrades and provisions for the Bank's BLB loans might be required as a result of the deteriorating Florida housing market. The market analyst asked: "Basically what I'm trying to - ask you is 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." A. Levan answered as follows:

**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.)

Plaintiffs identify four statements, highlighted above, as false and argue that no genuine

issue of fact exists as to their falsity. The alleged misstatements fall into two categories. First, Plaintiffs argue that A. Levan's statements that Bancorp was solely focused on and concerned with the BLB portfolio were false. The falsity of these statements, Plaintiffs argue, is belied by Defendant White's testimony that by April 2007, he was concerned about the entire land loan portfolio and by internal communications that demonstrate that, at the time these statements were made, Defendants' concern extended to the land loan portfolio as a whole. Specifically, Plaintiffs point to A. Levan's March 14, 2007 email to the members of the MLC indicating, in reference to the land loan portfolio, that the "music had stopped," and Marcia Snyder's March 20, 2007 email, which stated that the MLC had "significant concern" about the BLB and non-BLB portfolios.

Second, Plaintiffs argue that A. Levan's statements that the non-BLB land loan portfolio had always performed well and continued to perform well were false. Plaintiffs argue that the evidence shows that, at the time A. Levan made these statements, the entire land loan portfolio had deteriorated significantly, as evidenced by multiple requests for extended maturity dates by non-BLB borrowers and by the placement of many non-BLB land loans on internal watch lists.

Defendants put forth three arguments in response to Plaintiffs' Motion. First, they argue that A. Levan's July 25, 2007 statements were non-actionable forward-looking statements under the PSLRA's safe harbor. Second, Defendants argue that A. Levan's statements were not *material* misstatements or omissions. Third, Defendants argue that A. Levan's July 25, 2007 statements were not false.

Though Defendants focus the majority of their Response on the first two of the above arguments, those arguments are not relevant to the Court's consideration of Plaintiffs' Motion.

Plaintiffs move for summary judgment only as to the *falsity* of A. Levan's July 25, 2007 statements. Accordingly, whether the alleged misstatements were material or were subject to the safe harbor provision of the PSLRA are not questions properly before the Court upon Plaintiffs' Motion.<sup>42</sup> Thus, the Court will address below only Defendants' argument regarding the falsity of the statements in issue.

Defendants argue that A. Levan's July 25, 2007 statements were not false for two reasons. First, they contend that the BLB loans' unique characteristics subjected them to a higher level of risk than the other land loans in BankAtlantic's CRE portfolio. Second, Defendants argue that the statements in issue were not false in that the BLB loans actually deteriorated more than the other land loans.

Defendants' first argument—that A. Levan's statements were not false because the BLB loans' unique characteristics made them riskier investments than the other land loans—is unsuccessful. As a matter of pure logic, this argument might have justified a statement to the effect that the BLB loans warranted greater concern than did the other land loans, but that is not the nature of the statement that was made. The evidence put forth by Plaintiffs shows that Defendants were, *in fact*, concerned about the entire land loan portfolio at the time the statements in issue were made when they represented, in essence, that they were solely concerned with the BLB loans.

Defendants do not dispute that, in their March 2007 emails, A. Levan and Marcia Snyder

---

<sup>42</sup> Defendants also argue in their Motion for Summary Judgment that the statements at issue in the Complaint deserve the protection of the PSLRA's safe harbor. But, as discussed above in Section IV.B.2, Defendants' argument for judgment as a matter of law in their favor on this basis is unsuccessful.

each expressed concern regarding the state of the land loan portfolio; nor do they argue that any other inference should be drawn from these facts than that argued by Plaintiffs, namely that Defendants were concerned with the entire portfolio.<sup>43</sup> Likewise, Defendants do not dispute White's testimony regarding his concern, as of April 2007, for the entire land loan portfolio or any inferences to be drawn therefrom. And Defendants have not put forth any additional evidence that raises an issue of fact as to whether they were concerned with the entire land loan portfolio at the time of A. Levan's July 25, 2007 statements. Accordingly, no genuine issue of fact exists as to the falsity of A. Levan's July 25, 2007 statements that, at that time, Bancorp was concerned solely with the BLB loans in the land loan portfolio.

Defendants' second argument—that A. Levan's statements were not false because the BLB loans actually deteriorated more than the non-BLBs—is equally unavailing. Plaintiffs have presented undisputed evidence that the non-BLB loans were not performing well in the first two quarters of 2007, in that many non-BLB loans were the subject of requests for extended maturity dates and were being downgraded to failing grades due to suffering credit quality.<sup>44</sup> Defendants

---

<sup>43</sup> The Court notes that, in Defendants' Statement of Facts Submitted in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Defendants "deny" Plaintiffs' statement of facts regarding these communications. However, Defendants merely state in support of this "denial" that the contents of those emails are "as contained therein and must be read in their entirety." (D.E. 329 ¶¶ 20, 22.) They, thus, do not actually controvert the content of those emails, nor do they make any argument regarding an alternate inference to be drawn therefrom.

<sup>44</sup> Defendants do not dispute that several non-BLB loans requested extensions in the first two quarters of 2007; they only contest whether those loans were characterized at that time as LAD or LADC loans. Whether they were so denominated then or at some later date is not relevant to the Court's inquiry. Further, Defendants do not dispute Plaintiffs' evidence that various non-BLB loans were downgraded to grades 10 or 11 in the first and second quarters of 2007. Though Defendants note in their Statement of Facts Submitted in Opposition to Plaintiffs' Motion for Partial Summary Judgment that Plaintiffs' evidence on this issue is "Denied" (*see* D.E. 329 ¶¶ 25–27), they fail to state the basis for such denials or to support these baseless

argue in response that BLB loans accounted for the bulk of non-accruals in the first two quarters of 2007. While that may be true, it does not tend to negate the falsity of A. Levan's statements that the non-BLB loans had always performed well and continued to perform well; that the non-BLB loans may have performed *better* than the BLBs in the first two quarters of 2007 does not raise a genuine issue of fact as to whether they performed *well*, as A. Levan stated in the July 25, 2007 conference call.

The remainder of the evidence Defendants proffer in support of their argument that the BLB loans deteriorated more than the non-BLBs likewise fails to raise a genuine issue of material fact as to the falsity of A. Levan's statements. Defendants offer evidence that, by the end of the third quarter of 2007, BLB loans accounted for a disproportionate share of the land loans placed on non-accrual status and necessitated greater loan loss reserves than did non-BLB loans. However, the relevant inquiry on a § 10(b) claim is not whether future events made the statements in question true or false but whether the statements were false at the time they were made. *In re World Access Inc. Sec. Litig.*, 310 F. Supp. 2d 1281, 1289 n.9 (N.D. Ga. 2004) (finding evidence involving time period after defendants made alleged misstatements to be irrelevant); *see also Badger*, 2010 WL 2990009 at \*3 (holding that plaintiff must show defendant knew *at time it made* the misrepresentation that it was false). Accordingly, Defendants' argument, and the evidence proffered in support thereof, that at the end of the third quarter of 2007, the BLB loans ultimately caused Bancorp to suffer greater losses than did the non-BLB loans does not raise an issue of fact as to whether A. Levan's July 25, 2007 statements discussing

---

denials by reference to any pleadings, depositions, answers to interrogatories, admissions, or affidavits. Accordingly, Defendants' bare "denial" does not substantively controvert Plaintiffs' evidence on this point.

the status of the land loan portfolio were false at the time they were made.

In sum, there is no genuine issue of material fact as to whether A. Levan's July 25, 2007 statements were false at the time they were made. Accordingly, Plaintiffs are entitled to summary judgment as to this issue.

## **VI. Conclusion**

For the reasons discussed above, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for to Exclude the Expert Testimony of Candace Preston (D.E. 296) is GRANTED IN PART and DENIED IN PART.

Preston will only be allowed to testify to the following:

- (1) the efficiency of the market for Bancorp stock;
- (2) with respect to materiality, the importance of information regarding a bank's credit and borrower quality to its valuation;
- (3) with respect to loss causation (and damages):
  - (i) the company-specific returns of Bancorp stock attributable to the April and October 2007 press releases and conference calls;
  - (ii) the amount of the April 26, 2007 residual decline she believes is attributable to negative information regarding the BLB loans and the fact that she believes the entire October 26, 2007 residual decline is attributable to negative information regarding the broader land loan portfolio; and,
- (4) with respect to damages, the price inflation caused by the alleged misrepresentations as evidenced by the April 26, 2007 and October 26, 2007


residual declines, but to the extent Preston's opinion is based on the assumption that the stock was inflated beginning on October 19, 2006 by \$0.37, only to the extent that the assumption is supported by evidence at trial. It is further

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment (D.E. 249) is GRANTED IN PART and DENIED IN PART. Defendants are entitled to summary judgment as to the following:

- (1) Plaintiffs' claims arising out of the period from November 9, 2005 through October 18, 2006;
- (2) Plaintiffs' claims arising from Defendants' alleged misstatements or omissions regarding BankAtlantic's loan loss reserves;
- (3) Plaintiffs' claims against Defendants A. Levan and Abdo for violations of §20A of the Exchange Act; and,
- (4) that the October 29, 2007 decline in Bancorp stock price was not proximately caused by the materialization of the alleged fraud. It is further

ORDERED AND ADJUDGED that Plaintiffs' Motion for Partial Summary Judgment (D.E. 237) is GRANTED. Plaintiffs are entitled to summary judgment regarding the falsity of A. Levan's July 25, 2007 statements identified above.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of August, 2010.

  
\_\_\_\_\_  
URSULA UNGARO  
UNITED STATES DISTRICT JUDGE

Copies provided: Counsel of record