UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **MDL 11-2302-GW(CWx)** Date May 31, 2012

Title ***In re: A-Power Energy Generation Systems Ltd Securities Litigation***

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Wil Wilcox	
Deputy Clerk	Court Reporter / Recorder	Tape No.

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PROCEEDINGS: **DEFENDANT ROBERT B. LECKIE'S MOTION TO DISMISS (filed 04/02/12);**

DEFENDANT A-POWER ENERGY GENERATION SYSTEMS, LTD.'S MOTION TO DISMISS (filed 04/02/12);

DEFENDANT MSCM, LLP'S MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT (filed 04/16/12);

DEFENDANT DILIP LIMAYE'S MOTION TO DISMISS (filed 05/03/12)

Court hears oral argument. The tentative circulated and attached hereto, is adopted as the Court's final ruling. Defendants' motions are **GRANTED WITH LEAVE TO AMEND.** Plaintiffs will have until July 16, 2012 to **manually** file a First Amended Complaint.

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Initials of Preparer JG

In re A-Power Energy Generation Sys., Ltd. Secs. Litig., Case No. 2:11-ml-2302

Tentative Rulings re: (1) Defendant A-Power Energy Generation Systems, Ltd.'s Motion to Dismiss, (2) Defendant MSCM, LLP's Motion to Dismiss Consolidated Class Action Complaint, (3) Defendant Robert B. Leckie's Motion to Dismiss, and (4) Defendant Dilip Limaye's Motion to Dismiss

I. Background

On March 1, 2012, lead plaintiff A-Power Investor Group[1] ("Plaintiff") filed a Consolidated Class Action Complaint ("Complaint") in this securities fraud action brought against defendants A-Power Energy Generation Systems, Ltd. ("A-Power"), Jinxiang Lu, Kin Kwong (Peter) Mak, Edward Meng, Michael Zhang, Zhenyu Fan, Dilip R. Limaye, Robert B. Leckie, Remo Richli, Jianmin Wu, and MSCM LLP ("MSCM").[2] The Complaint contains three claims for relief: 1) for violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder, against all but MSCM; 2) for violation of Section 20(a) of the Exchange Act, against all of the natural-person defendants, and 3) for violation of Section 10(b) and Rule 10b-5, against only MSCM. Included in the putative class are all persons or entities that purchased or otherwise acquired A-Power's publicly-traded securities beginning March 21, 2008 through June 27, 2011. *See* Complaint ¶ 1.

A-Power is a British Virgin Islands holding company that "conducts most of its business and operations through its subsidiaries in China." *Id.* ¶ 31. Through its subsidiaries, it "is primarily engaged in the design, construction and installation of distributed power generation ("DG") systems and micro power grids as stand-alone facilities and for various customers in the steel, chemical, ethanol, cement, and food industries." *Id.* It "designs projects, subcontracts its construction and installation to approved third-party subcontractors under its project oversight, and conducts testing on completed projects prior to turning them over to its customers." *Id.* In addition to "DG

[1] The group consists of plaintiffs Paolo Bechini, William J. Rooney, Terry W. Shaw, Matthew J. Sprunger and Robert C. Treadwell, Jr.

[2] The summary of the allegations herein concerns only those allegations relevant to the four defendants who have filed motions to dismiss set for this day: *i.e.* A-Power, MSCM, Leckie and Limaye.

systems," it also "designs, installs and constructs related facilities for industrial companies," produces wind turbines and, in 2010, entered the solar energy market through a corporate acquisition. *Id.* It became a publicly-traded company by way of a "reverse merger." *See id.* ¶ 33; *see also id.* ¶¶ 45-55.[3]

Lu was, and still is, A-Power's Chairman of the Board and CEO, owns approximately 24.8% of A-Power's outstanding common shares and became eligible to receive additional shares (*i.e.*, additional shares beyond those he first acquired when A-Power first went public) each year for six years beginning in fiscal 2007 "if, on a consolidated basis, A-Power generated pre-determined minimum net operating profits each year." *Id.* ¶¶ 34, 157. A-Power met those targets in 2007, 2008 and 2009. *See id.* ¶ 157. Lu also signed A-Power's Form 20-F annual reports for the years ending December 31, 2007, 2008, and 2009, in addition to related Sarbanes-Oxley certifications. *See id.* ¶¶ 34, 61, 71, 74, 77, 149.

Limaye and Leckie served as independent directors of A-Power from, respectively, January and March 2008 until their resignations in June 2011. *See id.* ¶¶ 7, 11, 39-40. MSCM was A-Power's independent auditor through the time of its own resignation in June 2011. *See id.* ¶¶ 10, 44, 161.

As at least one defendant has summarized it, Plaintiff identifies three general categories of misrepresentations in its case: 1) misrepresentations concerning A-Power's reported revenues, net income, assets and liabilities, and that its financial results conformed with Generally Accepted Accounting Principles ("GAAP") and Public Company Accounting Oversight Board ("PCAOB") standards, *see id.* ¶¶ 57-84, 115-23, 240-42; 2) misrepresentations concerning "related party transactions," *see id.* ¶¶ 96-114; and 3) general optimistic statements, *see id.* ¶¶ 64-65, 67, 75, 78, 82.

The first category concerns what Plaintiff characterizes as "markedly inconsistent financial results" between A-Power's numbers reported to the SEC and those reported to

[3] According to the Complaint's allegations, "reverse mergers" are a way for foreign companies to gain immediate access to the U.S. public securities market without the normal scrutiny employed with respect to an initial public offering of stock and have, recently, come under increased suspicion as a means of avoiding SEC scrutiny. *See* Complaint ¶¶ 45-48, 51-52, 54. Suspicions have also come to rest on the auditors of Chinese reverse merger companies. *See id.* ¶¶ 47, 49-51.

China's Administrations of Industry and Commerce ("SAIC")[4]. *Id.* ¶ 85. In particular, Plaintiff alleges that A-Power reported "ten times more revenue on its SEC filings for 2008 than the SAIC filings for the comparable period" and "reported negative net income to the SAIC, while claiming significant positive net income in its SEC filings." *Id.* ¶ 86. Substantial differences again occurred in connection with the SAIC and SEC 2009 filings. *See id.* ¶ 87. Plaintiff also admits, however, that the SAIC figures it presents are the compilation of reports filed with the SAIC by either five (for 2008) or six (for 2009) different A-Power subsidiaries (three of which Plaintiff asserts provide for the "vast majority of A-Power's revenues"), along with the information and belief allegation that A-Power's remaining subsidiaries "do not contribute significantly to the Company's financial results." Complaint at 32 n.18, 33 n.20. Plaintiff asserts that the SAIC/SEC discrepancies cannot be explained by differences in U.S. and Chinese accounting standards. *See id.* ¶¶ 88-95, 215. This is true at least "so long as the same methods...were used for reporting to the SAIC in China and for reporting in the U.S." *Id.* ¶ 90.

MSCM issued Audit Reports concerning (1) A-Power's financial statements for the periods ending December 31, 2007, 2008, and 2009, and (2) A-Power's internal controls over financial reporting as of December 31, 2008 and December 31, 2009. *See id.* ¶¶ 44, 115-23. Those Audit Reports were included in A-Power's 2008 and 2009 Form 20-Fs and 2008 Form 20-F/A. *See id.* A-Power's 2007 Form 20-F included Audit Reports MSCM had issued concerning financial statements for Chardan South China Acquisition Corporation and Head Dragon Holdings as of December 31, 2007 – respectively, a shell company employed in the course of A-Power's reverse merger process and a holding company that holds A-Power's DG business through three of A-Power's subsidiaries. *See id.* ¶¶ 33, 44, Complaint at 42 n.29. MSCM's audits were purportedly false and/or misleading because: a) the audits were not conducted in accordance with PCAOB standards, b) A-Power's financial statements did not fairly present A-Power's financial position and results of operations in conformity with GAAP, and c) the audits, having not been conducted in accordance with PCAOB standards, did

[4] Plaintiff asserts that Chinese companies are "required to file financial statements with the SAIC as part of [an] annual examination" which the SAIC conducts. Complaint at 31 n.17.

not provide a reasonable basis for MSCM's opinions. *See id.* ¶¶ 121-22, 277. Plaintiff asserts that MSCM acted with knowledge of or reckless indifference to its false statements. *See id.* ¶ 123.

The related party transactions that A-Power either allegedly misrepresented or failed to disclose "accounted for hundreds of millions of dollars of A-Power's reported revenues." *Id.* ¶ 96. Plaintiff asserts that details of certain related party loan transactions were inexplicably changed between A-Power's 2007 and 2008 Forms 20-F. *See id.* ¶ 97-98. Plaintiff also asserts that A-Power was trading cash with two or three related companies that were owned or operated by Lu, which it characterizes as loan arrangements that were non-interest bearing with no fixed terms of repayment, merely serving as a conduit to enrich Lu. *See id.* ¶ 99-100.

Plaintiff also identifies six companies that Lu owned or operated that A-Power failed to disclose, two of which were A-Power's customers accounting for hundreds of millions of dollars in potential revenues. *See id.* ¶¶ 101-09, 111-14. Lu had "actual knowledge" of the "related party nature" of these two transactions "because he served as a director of these companies, and his wife had an ownership interest in and was the legal representative of" one related company's parent company. *Id.* ¶ 154. A-Power acquired a 70% ownership interest in one of the companies, Lu and other "high-ranking employees" of A-Power served as directors and supervisors of that related company and also had "ownership interests" in the other related company. *See id.* ¶ 156.

Plaintiff alleges that the market began to learn of the wrongful conduct addressed herein with a March 28, 2011, press release, and points to a series of follow-on announcements by A-Power or statements made by third parties that Plaintiff asserts collectively revealed the truth. *See id.* ¶¶ 3-10, 236-39. First, on March 28, A-Power announced it had postponed its 2010 earnings conference call to "allow the Company and its independent auditors to complete their work on the financial statements and audit," though the public was assured that the postponement was "not due to any accounting irregularities." *Id.* ¶¶ 3, 124. Then, some ten days later, A-Power announced a delay in the release of its 2010 financial results, but again the public was assured that the "delay was not the result of any accounting irregularities or investigation of accounting errors,

nor do we expect any restatement of A-Power's previously audited financial statements as a result of the ongoing audit processes for 2010." *Id.* ¶¶ 4, 125.

On June 17, 2011, what the Complaint characterizes as "a research investment firm," Prescience Investment Group ("Prescience"),[5] published a report on a financial blog that revealed, among other things, "that A-Power had filed financial reports with regulatory authorities in China that showed substantially lower revenues than what it had reported in its filings with the SEC" – in fact, less than one-tenth what it had reported to the SEC. *Id.* ¶¶ 5, 127. The Prescience report also raised allegations that A-Power had "failed to disclose the identity of numerous related parties and salient facts concerning related parties that it had disclosed." *Id.* ¶¶ 6, 127. On June 20, 2011, A-Power issued a release to indicate that it was reviewing the claims Prescience raised in its report and would provide answers as soon as possible. *See id.* ¶ 129. Yet, A-Power never in fact responded to the issues. *See id.*

According to a press release A-Power issued June 17, 2011 (the same day as the Prescience report), Leckie resigned from A-Power's Board of Directors on June 14, 2011 "as a result of concerns that his views on process and best practices were not necessarily shared throughout the Company." *Id.* ¶¶ 7, 40, 126. Then, on June 27, 2011, A-Power announced that MSCM resigned as A-Power's independent auditor effective June 26, 2011, stating in its resignation letter that it had done so because "the Company had not retained a qualified independent forensic accounting firm to evaluate certain business transactions that MSCM stated was necessary for MSCM to complete its audit of the Company's financial statements for the year ended December 31, 2010 on a timely basis." *Id.* ¶¶ 10, 130.[6] Limaye, who served as Chair of the Board's Compensation Committee, resigned effective June 27, 2011, according to a June 28, 2011, announcement by A-Power. *See id.* ¶¶ 11, 39, 132. Limaye's decision was "prompted by the events of the last several weeks about which he communicated his concerns and views on actions that should be taken." *Id.*

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[5] Prescience admits in its report that it was a short-seller of A-Power stock. *See* Docket No. 43-2, Exh. 9, at 175 ("**Disclosure:** I am short APWR.").

[6] In that same announcement, A-Power indicated that its annual report on Form 20-F for the year ending December 31, 2010, would be delayed. *See id.* A-Power still has not filed its 2010 Form 20-F. *See id.* ¶ 23.

After the close of the class period, departures amongst A-Power's independent directors and corporate executives continued. *See id.* ¶¶ 12-13, 133-34. In addition, on August 18, 2011, A-Power announced that the SEC had launched a formal investigation into whether A-Power or its personnel violated the federal securities laws. *See id.* ¶¶ 15, 136. On September 6, 2011, A-Power announced that it had received a letter from NASDAQ "de-listing letter," which was followed, on September 26, 2011, with the suspension of A-Power's shares from trading on NASDAQ. *See id.* ¶¶ 16-17, 137, 139. The company's shares thereafter began trading "over the counter," on the "pink sheets." *See id.* ¶¶ 17, 139. The Complaint recounts still further announcements (including another by Prescience) in October and November 2011, and yet another resignation in January 2012. *See id.* ¶¶ 18-21, 138, 141, 143-44, 146.

Plaintiff alleges that the defendants acted with scienter – and thus the safe harbor provision of the Private Securities Litigation Reform Act ("PSLRA") does not apply – because they each knew or recklessly disregarded the fact that such statements were materially false and misleading or omitted material facts. *Id.* ¶¶ 255, 258. Plaintiff also asserts that none of the statements are "forward-looking" and that, in any event, no cautionary statements were issued which specifically identified important factors that could cause actual results to differ from those contained in any "putatively forward-looking statements." *See id.* ¶ 257.

Plaintiff asserts that MSCM was "aware of numerous obvious red flags that, in the absence of deliberate recklessness, would have alerted it to A-Power's fraud," and/or "failed to conduct basic [required] accounting procedures...such that its audits of the 2007, 2008, and 2009 financial statements constituted 'no audit at all,'" whereas had it properly performed those accounting procedures "it would have been aware that such red flags existed." *Id.* ¶¶ 163-64. These included: the discrepancies between A-Power's financial results reported to the SEC and SAIC; A-Power's undisclosed related party transactions with major customers; A-Power's prepayment of suppliers in excess of advance payments from customers; A-Power's commitment of money to suppliers in excess of expected revenue from existing contracts; A-Power's loans to its customers; A-Power's amortization over an unreasonably-long 74-year period; the absence of effective internal controls over A-Power's financial reporting as of December 31, 2008, and

December 31, 2009; and the fact that A-Power had gone public by way of a reverse merger. *See id.* ¶¶ 165-206, 210. Plaintiff asserts that certain of this evidence was (with respect to, for example, the SAIC filings) "available to" or (with respect to, for example, the "related party" nature of certain transactions) "should have been readily available to MSCM." *See, e.g., id.* ¶¶ 166, 170, 211-14. MSCM itself admittedly uncovered the problems with A-Power's internal controls. *See id.* ¶¶ 116, 118-19, 200-01. It was also allegedly aware of the fact that A-Power had gone public by way of a reverse merger. *See id.* ¶ 205. As a result of all this, MSCM allegedly violated multiple PCAOB standards. *See id.* ¶¶ 207-34.

A-Power, MSCM, Leckie and Limaye now each move separately to dismiss the Complaint.

II. Analysis

A. Governing Legal Standards – Section 10(b)/Rule 10b-5/Rule 12(b)(6)

Section 10(b) of the Securities Exchange Act of 1934 forbids the "use or employ, in connection with the purchase or sale of any security..., [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). SEC Rule 10b-5 implements § 10(b) by declaring it unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) 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...not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. Thus, to make out a claim for securities fraud, a plaintiff must allege a material misrepresentation or omission in connection with the purchase or sale of a security, scienter, reliance, economic loss and loss causation. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

Each statement alleged to have been misleading must be specified, along with

"the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1); *see also Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1161 (9th Cir. 2009) ("[T]he complaint must 'set forth what is false or misleading about a statement, and why it is false.'") (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)); *id.* at 1164. "[A] statement that is literally true can be misleading and thus actionable" at least where it as an omission that "affirmatively create[s] an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).

Like falsity, scienter must also be pled with particularity under the PSLRA. *See* 15 U.S.C. § 78u-4(b)(2); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007); *Rubke*, 551 F.3d at 1164; *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 974 (9th Cir.), *reh'g & reh'g en banc denied*, 195 F.3d 521 (1999). In the Ninth Circuit that requires deliberate recklessness or conscious misconduct, and deliberate recklessness itself means "some degree of intentional or conscious misconduct." *Silicon Graphics*, 183 F.3d at 974, 979; *see also SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003) (defining recklessness as "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it").

The scienter requirement obligates securities fraud plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). In *Tellabs*, the Supreme Court took on the "task...to prescribe a workable construction of the 'strong inference' standard" required by section 78u-4(b)(2). *See* 551 U.S. at 322. In so doing, it laid out the following analytical construct.

As with any motion to dismiss for failure to plead a claim on which relief can be granted, the court must accept all factual allegations in the complaint as true. *See id.* The court must consider the complaint in its entirety, "as well as other sources courts

ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.* The question "is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* at 322-23 (emphasis in original).

In determining whether a "strong" inference of scienter exists, "the court must take into account plausible opposing inferences." *Id.* at 323. This includes both "plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Id.* at 324. However, "[t]he inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even the 'most plausible of competing inferences." *Id.* But the inference of scienter must be more than merely "reasonable" or "permissible" – "it must be cogent and compelling." *Id.* A complaint survives "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* Elsewhere, the Court summarized this "strong inference" analysis as follows:

> It does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind. Rather, to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff...but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as 'strong' within the intendment of § 21D(b)(2)...an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

Id. at 314; *see also id.* at 328 ("A plaintiff alleging fraud in a § 10(b) action...must plead facts rendering an inference of scienter at least as likely as any plausible opposing inference."). In making this determination, the Ninth Circuit indicates that the court is obligated to take a "holistic" approach. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 992 (9th Cir. 2009).

Loss causation, meanwhile, may not be pled by way of euphemism alone, even if it need not necessarily be pled with "particularity." *See Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1062-64 (9th Cir. 2008); *see also Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 989 (9th Cir. 2008) (assuming, but not deciding, that Rule 9(b) governs pleading of loss causation in 10b-5 case); *Sparling v. Daou (In re Daou Sys., Inc.)*, 411 F.3d 1006, 1025 (9th Cir. 2005) ("[T]o prove loss causation, the plaintiff must demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the plaintiff."). However, a misrepresentation need only be "one substantial cause of the investment's decline in value," meaning that "other contributing forces will not bar recovery." *Sparling*, 411 F.3d at 1025; *see also No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 935-36 (9th Cir. 2003).

Rule 12(b)(6) review is "generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of which [the court] may take judicial notice." *Berson*, 527 F.3d at 989. In undertaking this review, (except as disproven by other material permissibly considered) the court is to "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs" and will not dismiss unless the complaint fails to "state a claim to relief that is plausible on its face." *Id.* (quoting *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir.2002), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. Motion 1

As noted in the summary of allegations above, A-Power views Plaintiff's allegations as divided up into three general categories: 1) misrepresentations concerning A-Power's reported revenues, net income, assets and liabilities, and that the financial results conformed with GAAP and Public Company Accounting Oversight Board ("PCAOB") standards, *see id.* ¶¶ 57-84, 115-23, 240-42; 2) misrepresentations concerning "related party transactions," *see id.* ¶¶ 96-114; and 3) general optimistic statements, *see id.* ¶¶ 64-65, 67, 75, 78, 82. With respect to that last category of misrepresentations (most of which reference multi-sentence statements), however, Plaintiff has failed to sufficiently identify what, in particular, about those statements is

allegedly false, whether it is the choice of a single word or phrase or otherwise. Although Plaintiff has alleged *why* those statements are alleged to be false or misleading, *see id.* ¶ 84 ("[B]ecause, among other things, A-Power grossly misstated its revenue, income, total assets and total liabilities[.]"), the Court cannot take up A-Power's invitation to engage in a meaningful "puffery"-based analysis of the allegedly false statements until Plaintiff specifies what, *in particular*, about those statements is allegedly false.[7] In addition, with respect to the financial forecasts present in paragraphs 76 and 82 of the Complaint, although the Court could engage in a safe-harbor analysis with respect to those financial forecasts contained within paragraphs 76 and 82 of the Complaint, it is conceivable that application of the exceptions to safe-harbor protection may change depending on whether Plaintiff is able to cure the defects in its SAIC/SEC allegations mentioned below. *See* 15 U.S.C. § 78u-5(c)(1)(B)(i) & (ii)(II); *In re Cutera Secs. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). Thus, the motion to dismiss would be granted with respect to the third general category of statements A-Power perceives in Plaintiff's Complaint.[8] Therefore, the following analysis will consider further only the first two categories of alleged misrepresentations.

As it concerns the alleged falsehoods/misrepresentations Plaintiff asserts are contained within A-Power's financial statements, reports and other statements reflecting the company's performance (including MSCM's auditing-related statements), A-Power raises a number of arguments for why those allegations are insufficiently pled at this stage. At least one of those reasons is sufficient to require that the case be dismissed, and allegations amended, in connection with this general topic.

Plaintiff's allegations in this regard are founded upon the belief that figures reported to the SEC are drastically different from figures A-Power (by way of its primary revenue-generating subsidiaries) reported to the SAIC in China. Even if the Court were

[7] Even if the Court could address the aspects of the statements that A-Power argues constitute puffery, until it is clear that those words/phrases are the *only* aspect of those statements that Plaintiff alleges are false or misleading, the Court would seemingly simply be attempting to determine whether A-Power has sufficiently struck a moving or amorphous target. The PSLRA is obviously an attempt to avoid that result.

[8] If the false aspect of any of the statements recounted in paragraphs 64-65, 67, 75, 78, 82 of the Complaint is something *less* than the entire statement(s) – *i.e.*, particular words or phrases – Plaintiff should endeavor to employ some manner of emphasizing those aspects (for instance, using bold type).

satisfied that: it was sensible and accurate to compare the compiled SAIC filings of six different A-Power subsidiaries against the consolidated financials A-Power filed with the SEC; that the parties had presented sufficient information to enable the Court to be assured that it was even considering the true filings with the SAIC[9]; and the People's Republic of China's ("PRC") version of GAAP is the same or effectively the same for current purposes as the version of GAAP in force in this country, there is still one glaring omission from the allegations in the Complaint. Plaintiff does not appear to have alleged that compliance with PRC's GAAP is even required when filing with the SAIC or that A-Power's subsidiaries prepared their filings in compliance with GAAP.[10] *See, e.g.*, Complaint ¶ 90. Absent *at least* that allegation, it is not clear to the Court that Plaintiff has adequately pled falsity with respect to the SEC/SAIC filings because the Court would have no way of knowing whether it was comparing apples-to-apples or instead apples-to-oranges. Moreover, until at least that allegation, Plaintiff would not have satisfactorily alleged why the *SEC* filings were false as opposed to the *SAIC* filings.

As to the related party transactions, however, with the possible exception of one potential problem, the Court would agree that Plaintiff has satisfactorily pled falsity at least due to A-Power's failure to disclose A-Power's and Lu's connections to those entities. *See* Complaint ¶¶ 103-14.[11] That problem would be whether the Court believes

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[9] Plaintiff has given the Court good reason to question whether the documents A-Power presents are worthy of the Court's judicial notice, *see* Shiang Decl. (Docket No. 44) ¶¶ 3-5 (indicating SAIC filings A-Power submits in connection with this motion are documents that A-Power – not the SAIC – provided to A-Power's counsel), whereas A-Power persuasively indicates that Plaintiff has not sufficiently explained the origins of the documents it contends represent A-Power's subsidiaries' SAIC filings and why it believes they represent the actual SAIC filings. *See* 15 U.S.C. § 78u-4(b)(1).

[10] In its Opposition, Plaintiff argues that its use of the single word "applicable" – presumably referring to paragraph 95 of the Complaint – satisfies this requirement. *See* Docket No. 64, at 4 n.6. The Court would reject the contention that this is sufficient.

[11] The Complaint also recounts what it describes as "related party loans." *See* Complaint ¶¶ 97-100. A-Power notes, however, at least two problems with (at least certain of) these allegations: that they were disclosed (indeed, disclosed outside the applicable statute of limitations period), *see id.* ¶ 98; and that Plaintiff is attempting to compare financial disclosures from two different entities, *see id.* ¶¶ 33, 44, 97-98. Plaintiff responds that Prescience's June 17, 2011 report revealed "previously undisclosed details" about these loans, but does not indicate what those "details" were. Docket No. 64, at 12:3-5. With respect to the apples-to-oranges element, Plaintiff argues that any problem that might cause "does not change the amount of the loan balances with other related parties alleged in the Complaint," *id.* at 12:17-18, but it is unclear what, specifically, Plaintiff is referring to here. If its reference is to the loans referenced in paragraphs 99-100 of the Complaint, the Court might indeed ask A-Power to clarify what deficiency it finds with respect

that Plaintiff has sufficiently pled "all facts" supporting Plaintiff's information and belief that A-Power and Lu actually are related to the customers identified in those paragraphs. *See* 15 U.S.C. § 78u-4(b)(1).[12]

Plaintiff has sufficiently pled a "cogent and compelling" case for scienter in connection with the related party transactions as well. As pled thus far, Plaintiff's strongest case for scienter would concern Lu. He is alleged to have had direct ties to the alleged related parties (which represented a substantial amount of revenue for A-Power) and had financial incentives based upon the company's having met particular performance-related goals, which the company met.[13] *See* Complaint ¶¶ 34, 154, 157. Lu's scienter in this regard can be employed in connection with A-Power itself. *See, e.g., W.R. Grace & Co., Inc. v. W. U.S. Indus., Inc.*, 608 F.2d 1214, 1218-19 (9th Cir. 1979).

Finally, Plaintiff has also pled loss causation in connection with the related party transactions. The related parties issue was one of the specific subjects addressed by the June 17, 2011 Prescience report. *See* Docket No. 43-2, Exh. 9, at 168 (noting "a large number of related parties that have not been disclosed" and that "numerous additional

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to the allegations concerning "cash trading" between A-Power and two related companies owned or operated by Lu which, Plaintiff alleges, "merely served as a conduit to enrich Lu." Complaint ¶¶ 99-100.

[12] The same defect would apply to paragraphs 93 and 144 of the Complaint, which highlight Prescience's November 9, 2011 statement (after the close of the class period – though the class period only defines when a putative class member *purchased* A-Power stock) that Prescience "was not able to contact and/or verify the existence of dozens of A-Power's purported customers" in order to support Plaintiff's allegation that "many of A-Power's purported customers appear to be non-existent." Before the Court would accept that allegation as demonstrating that all of A-Power's financial statements, filings and reports were false, it would require Plaintiff to present more "particularized facts" or a more complete description of "all facts" supporting that allegation. Even confidential witnesses who are corporate insiders require a detailed description concerning how those witnesses would be in a position to know what they purport to know. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009) (indicating that, in order to determine whether a confidential witness "would possess the information alleged," the court is to consider "the level of detail provided by the confidential sources, the corroborative nature of the other facts alleged (including from other sources), the coherence and plausibility of the allegations, the number of sources, the reliability of the sources, and similar indicia") (quoting *Sparling v. Daou (In re Daou Sys., Inc.)*, 411 F.3d 1006, 1015 (9th Cir. 2005)); *Sparling*, 411 F.3d at 1015 (requiring that "personal sources of information relied upon in a complaint should be described in the complaint with sufficient particularity to support the *probability* that a person in the position occupied by the source would possess the information alleged") (emphasis added) (omitting internal quotation marks).

[13] That A-Power disclosed Lu's financial incentives is somewhat irrelevant to the question of whether the existence of those disclosed incentives could be indicative of scienter on Lu's (and therefore A-Power's) part.

undisclosed companies owned and/or operated by A-Power's CEO" have been "uncovered"); *United States ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (allowing consideration, on a Rule 12(b)(6) motion, of "unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document"); *see also, e.g.*, *Snellink v. Gulf Resources, Inc.*, No. CV 11-03722-ODW (MRWx), 2012 U.S. Dist. LEXIS 67839, *27-28 (C.D. Cal. May 15, 2012) ("A short seller report may be used to establish loss causation."); *Henning v. Orient Paper, Inc.*, CV 10-5887-VBF (AJWx), 2011 U.S. Dist. LEXIS 79135, *18-19, 21-22 (C.D. Cal. July 20, 2011).

The Court is presently inclined to dismiss so that Plaintiff can plead further details with respect to the basis for its belief that the related parties mentioned in paragraphs 103-14 of the Complaint are, in fact, related[14]; and also to allow Plaintiff to address the other issues raised above. Thus, A-Power's motion would be granted in its entirety, with leave to amend.

C. Motion 2

Whatever may be said of the Complaint's falsity allegations, Plaintiff has not sufficiently pled the scienter element with respect to MSCM. In *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385 (9th Cir. 2002), the Ninth Circuit rejected an attempt to state a securities fraud claim where the plaintiff alleged that an auditor "egregiously failed to see the obvious – that according to [GAAP], millions of dollars in revenue from software sales reflected in a financial statement should not have been recognized." *Id.* at 387. The court concluded that the complaint "set[] out a compelling case of negligence – perhaps even gross negligence – but [did] not give rise to a strong inference that the auditor acted with an intent to defraud, conscious misconduct, or deliberate recklessness, as is required in a securities fraud case." *Id.*; *see also Merck & Co., Inc. v. Reynolds*, 130 S.Ct. 1784, 1796 (2010) ("A plaintiff cannot recover without

[14] That Plaintiff does not allege A-Power improperly recognized revenue from these contracts nor that the accounting performed in connection with those transactions was in any way improper does not mean that the failure to disclose the related party nature of those transactions is not itself actionable, at least in the absence of any argument that the failure to disclose was not material. No defendant makes a materiality-based argument in connection with these motions.

proving that a defendant made a material misstatement *with an intent to deceive* – not merely innocently or negligently."); *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000) ("[T]he failure of a non-fiduciary accounting firm to identify problems with the defendant-company's internal controls and accounting practices does not constitute reckless conduct sufficient for § 10(b) liability.").

The violation or unreasonable application of GAAP can demonstrate scienter. *See Sparling*, 411 F.3d at 1016 (9th Cir. 2005). However, in order to allege scienter against an auditor, a plaintiff must show "more than a misapplication of accounting principles." *DSAM Global*, 288 F.3d at 390 (quoting *In re Software Toolworks Inc.*, 50 F.3d 615, 628 (9th Cir. 1994)). The plaintiff must allege with particularity that the auditor's "accounting practices were so deficient that the audit amounted to no audit at all, or an egregious refusal to see the obvious, or to investigate the doubtful, or that...no reasonable accountant would have made the same decisions if confronted with the same facts." *Id.*; *see also Ponce v. SEC*, 345 F.3d 722, 729-30 (9th Cir. 2003) ("Auditors violate Section 10(b) and Rule 10b-5 by preparing and certifying publicly filed financial statements that they know, or are reckless in not knowing, are false.").

Plaintiff admits that A-Power's 2008 Form 20-F (which included MSCM's May 31, 2009, Auditor Report), 2008 Form 20-F/A and 2009 Form 20-F (which included MSCM's March 31, 2010, Auditors' Report) all noted – by way of the Auditor Reports – several material internal control weaknesses such that A-Power "did not maintain effective control over financial reporting as of December 31, [2008 or 2009] due to pervasive control deficiencies and material weaknesses," thereby "impair[ing] the effectiveness of other controls by rendering their design ineffective or by keeping them from operating effectively." *See id.* ¶¶ 116, 118-19. It is difficult to envision a scienter allegation sufficient to state a securities fraud claim against an auditor who explicitly issued negative internal control findings in connection with the same company whose financial results it is alleged to have manipulated or purposefully ignored in order to fool the investing public (the same investing public to whom the negative internal control findings were announced). Plaintiff has not alleged, for instance, that MSCM had some reason, based on past practice, to know that a particular aspect of A-Power's (or some other company for whom MSCM served as auditor) accounting was wrong or flawed and

that MSCM then later ignored evidence, that it unquestionably knew about, of that practice occurring *again*. Nor has it alleged that MSCM had some reason to view an incredibly risky short-term gain as somehow more valuable to it than the kind of reputational advantage auditors must rely on to attract continued business. *See Reiger v. PricewaterhouseCoopers LLP*, 117 F.Supp.2d 1003, 1007 (S.D. Cal. 2000) ("[A] large independent accountant will rarely, if ever, have any rational economic incentive to participate in its client's fraud... The accountant's success depends on maintaining a reputation for honesty and integrity, requiring a plaintiff to overcome the irrational inference that the accountant would risk its professional reputation to participate in the fraud of a single client."), *aff'd*, *DSAM Global*, 288 F.3d 385 (2002).

That an auditor *should have been aware* of certain information about A-Power speaks most "cogently and compellingly" to negligence, nothing more. Of similar effect is the argument that MSCM might have had *access* to particular information. *See In re Van Wagoner Funds, Inc. Secs. Litig.*, 382 F.Supp.2d 1173, 1186 (N.D. Cal. 2004) ("[S]imply because an accountant had access to documents that revealed the company's fraud when it conducted its audit, it does not strongly compel an inference of intentional or deliberately reckless conduct as opposed to ordinary carelessness."). Indeed, much more than access was present in *DSAM Global*, and it made no difference.[15] *See also N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1097 (9th Cir. 2011) ("Typically, pleading sufficient facts to support a strong inference of scienter by an outside auditor is difficult because outside auditors have more limited information than, for example, the company executives who oversee the audit."). At best, Plaintiff has painted a picture of a negligent or grossly negligent auditor. But, a compelling case for negligence or gross negligence does not amount to stating a claim for securities fraud. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) ("If all that is involved is a dispute about the timing of the writeoff, based on estimates of the probability that a particular debtor will pay, we do not have fraud; we may not even have negligence."); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 281 (3d Cir. 1992); *Ciresi v. Citicorp*, 782

[15] The allegations against MSCM are not comparable to those targeting the auditor in question in *N.M. State Investment Council v. Ernst & Young LLP*, 641 F.3d 1089, 1093, 1095-1102 (9th Cir. 2011), although in that case the auditor likewise "knew" that the internal controls of the corporation in question "were weak" (though there is no mention of whether the auditor actually opined to that effect).

F.Supp. 819, 821 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 1161 (2d Cir. 1992).

MSCM's motion would be dismissed with leave to amend.

D. Motions 3 and 4

As pled, Plaintiff's allegations against Leckie and Limaye are plainly deficient, with respect to at least the elements of falsity and scienter. This is largely due to the fact that Plaintiff has alleged only very limited facts particular to either of these defendants. For much of the Complaint, Plaintiff has employed the pleading tactic of referencing all of the individual defendants in this case by the group term "Individual Defendants." *See* Complaint ¶ 43. Even then, the allegations are largely conclusory.

For instance, Plaintiff asserts that

- "[t]hrough their positions of control and authority, as well as their stock ownership, the Individual Defendants were in a position to, and did, control all of [A-Power's] false and misleading statements and omissions, including the contents of" the forms filed with the SEC and company press releases. *Id.* ¶¶ 147-48.
- The "Individual Defendants" also "controlled the issuance of [A-Power's] SAIC filings, and were aware of the contradictory financial results reported by A-Power in China." *Id.* ¶ 152.
- The "Individual Defendants" also "were provided with copies of [A-Power's] reports and press releases alleged herein to be materially false and misleading prior to, or shortly after, their issuance and had the ability and opportunity to prevent their issuance or cause them to be corrected." *Id.* ¶ 148.
- Each of the "Individual Defendants" "knew and/or recklessly disregarded that [A-Power's] public statements concerning its financial results were false and misleading when made." *Id.* ¶ 150.
- Knowledge of the key facts concerning A-Power's "key performance metrics" can be attributed to the "Individual Defendants." *Id.* ¶ 151.

- They also "received and/or had access to monthly construction progress reports" which alerted them "to the fact that several DG projects were significantly delayed and that the revenues reported in A-Power's SEC filings were grossly overstated." *Id.* ¶ 153; *see also id.* ¶ 110 (noting analyst's report that progress at one construction site appeared to be non-existent over approximate six-month period between October 2008 and April 2009).

- The magnitude of the transactions between A-Power and the two related companies referenced in paragraphs 103-14 of the Complaint "raises the strong inference that the...Individual Defendants...knew, or recklessly disregarded, their related party nature." *Id.* ¶ 155.

- Plaintiff asserts that the Individual Defendants either personally made the false statements at issue herein or were responsible for those statements made by A-Power because "each of those statements was 'group-published' information, and resulted from the collective actions of these Defendants." *Id.* ¶ 244; *see also id.* ¶ 262.

- The "Individual Defendants," "by virtue of their high-level positions at A-Power, directly and actively participated in the management and operations of [A-Power], and were privy to confidential non-public information concerning the business and operations of A-Power." *Id.* ¶ 245; *see also id.* ¶¶ 256, 263-64, 270.

- They were also allegedly "involved in drafting, reviewing and/or disseminating the materially false and misleading statements issued by A-Power and approved or ratified those statements, and, therefore, adopted them as their own." *Id.* ¶¶ 246, 272-73.

Thus, the Complaint attempts to assign blame for any alleged securities fraud to both Leckie and Limaye without actually identifying their specific connection to or

responsibility for any of the alleged false statements at issue[16] and without making plain any reason, specifically tied to them, why they would have the necessary mental state for any false statements (with which they, again, have not yet been sufficiently linked). This Court does not believe that so-called "group pleading" is permissible under either the Private Securities Litigation Reform Act or 9(b), and is arguably impermissible even under Rule 8, given the Supreme Court's opinion in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Redondo Waste Sys., Inc. v. Lopez-Freytes*, 659 F.3d 136, 140 (1st Cir. 2011) (indicating that, in order to draw plausibility inference, as required by *Iqbal*, the complaint "must allege facts linking each defendant to the grounds on which that particular defendant is potentially liable").

In *Tellabs*, the Supreme Court noted that the Seventh Circuit, in that same case, had concluded that "allegations of scienter made against one defendant cannot be imputed to all other individual defendants." 551 U.S. at 326 n.6. The Court then noted the disagreement among the Circuits on that point and that the plaintiffs in that case did not "contest" that determination in arguing the case to the Court, before announcing that it would not "disturb" the Seventh Circuit's conclusion. *Id.* In the years since *Tellabs*, the Ninth Circuit has repeatedly indicated that Rule 9(b) plainly does not allow "lumping" of defendants, but instead "requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Lee*, 655 F.3d at 997-98 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)). "'In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum identify the role of each defendant in the alleged fraudulent scheme.'" *Id.* (quoting *Swartz*, 476 F.3d at 764-65). "Everyone did everything" allegations are – in most cases at least – simply insufficient. *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011).

Yet, in *Glazer Capital Management, LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008), the Ninth Circuit had indicated that its earlier precedent did not "foreclose the possibility

[16] In its Opposition brief, Plaintiff attempts to argue that Leckie's resignation statement itself was a fraudulent statement. There is no allegation to that effect in the Complaint, meaning that the Complaint would be deficient for that reason alone, *see* 15 U.S.C. § 78u-4(b)(1), and Plaintiff may not amend through an opposition brief. To the extent Plaintiff can base a viable securities fraud claim off of that statement (and it is not at all clear that it can – but the Court will not reach a "futility"-based determination now), it will have to do so by way of amending the Complaint.

that, in certain circumstances, some form of collective scienter pleading might be appropriate." *Id.* at 744. Of course, *Glazer* – which ultimately concluded that the Ninth Circuit did not have to definitively decide the viability of the "group pleading" doctrine in the Circuit, *see id.* at 745 – was decided *before* the Supreme Court's opinion in *Iqbal*. Although *Glazer*'s commentary is not *necessarily* inconsistent with *Iqbal* (or at least no Ninth Circuit decision has yet announced that conclusion), this Court still believes that Plaintiff's pleading tactic is improper.[17] This Court's conclusion that the group pleading doctrine is no longer viable is consistent with numerous decisions from this District. *See Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 793 F.Supp.2d 1138, 1145 (C.D. Cal. 2011); *In re New Century*, 588 F.Supp.2d 1206, 1223-24 (C.D. Cal. 2008); *In re Impac Mortg. Holdings, Inc. Secs. Litig.*, 554 F.Supp.2d 1083, 1092-93 (C.D. Cal. May 19, 2008); *In re Amgen Inc. Secs. Litig.*, 544 F.Supp.2d 1009, 1035-37 (C.D. Cal. 2008); *In re Hansen Natural Corp. Secs. Litig.*, 527 F.Supp.2d 1142, 1153-55 (C.D. Cal. 2007); *In re Wet Seal, Inc. Secs. Litig.*, 518 F.Supp.2d 1148, 1156-57 (C.D. Cal. 2007); *see also In re Am. Apparel, Inc. Shareholder Litig.*, No. CV 10-06352 MMM (RCx), 2012 U.S. Dist. LEXIS 47026, *60-61 & n. 154 (C.D. Cal. Jan. 13, 2012); *Petrie v. Elec. Game Card Inc.*, No. SACV 10-00252 DOC (RNBx), 2011 U.S. Dist. LEXIS 6203, *9-11 (C.D. Cal. Jan. 12, 2011); *Crosbie v. Endeavors Techs., Inc.*, No. SA CV 08-1345 AHS (SSx), 2009 U.S. Dist. LEXIS 100244, *22-23 (C.D. Cal. Oct. 22, 2009); *In re Int'l Rectifier Corp. Secs. Litig.*, No. CV 07-02544-JFW (VBKx), 2008 U.S. Dist. LEXIS 44872, *35 (C.D. Cal. May 23, 2008).

That is not to say, however, that there is no room for any "position-based" inference or "core-operations" inference in pleading a claim of securities fraud. *Centaur Classic*, 793 F.Supp.2d at 1146. However, Plaintiff plainly has not sufficiently pled even that as to Leckie and Limaye, who were independent directors of A-Power only one of whom was apparently on any special Board committee (Limaye, as Chair of the Compensation Committee), and even then not even one that appears to be particularly relevant to the allegations herein.

[17] Even were the pleading tactic still permissible in the wake of the PSLRA, *Tellabs* and *Iqbal*, Plaintiff still would not have pled sufficient facts in order to take advantage of the "group published information" presumption insofar as Leckie and Limaye are concerned. *See Berry v. Valence Tech., Inc.*, 175 F.3d 699, 706 (9th Cir. 1999); *In re Stac Elecs. Secs. Litig.*, 89 F.3d 1399, 1411 (9th Cir. 1996).

Outside of the attempts to simply "lump" Leckie and Limaye together with all of the other individual defendants, there are very few specifics directed at them. Plaintiff argues that Leckie's and Limaye's resignation statements (conveyed by A-Power) should be understood as satisfying the scienter requirement. The first observation that one might make about those resignation statements is that they are exceedingly non-specific, making it difficult to discern what, if anything, Leckie or Limaye are (or A-Power, on their respective behalf is) even referencing therein. Leckie apparently indicated that he was resigning "as a result of concerns that his views on process and best practices were not necessarily shared throughout the Company." Complaint ¶¶ 7, 40, 126. Limaye's decision was "prompted by the events of the last several weeks about which he communicated his concerns and views on actions that should be taken." *Id.* ¶¶ 11, 39, 132. The natural reaction to these statements is to question "What process? What best practices? What events? What concerns? What actions that should be taken?"

In the absence of further details concerning Leckie and Limaye in particular, the conclusion that their resignation statements – unclear as they are – actually revealed their knowledge and nefarious intent is nowhere near as "cogent and compelling" as the conclusion that they had become aware of practices at A-Power with which they disagreed and, understandably, felt the need to cut ties with the company. Beyond their resignation statements, Plaintiff has nothing – no allegation of any suspicious stock sales or other financial motive, or any other reason to conclude that Leckie and Limaye were engaged or complicit in securities fraud. Even a "holistic" view of the Complaint's allegations does not aid Plaintiff in this regard because of the general absence of scienter-related allegations pertaining to Leckie and Limaye.

Plaintiff has also pled a Section 20(a)[18] control person claim against Leckie and

[18] "Section 20(a) provides joint and several liability for controlling persons who aid and abet violations of the 1934 Act absent a finding of good faith and lack of inducement." *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003). Section 20(a), 15 U.S.C. § 78t(a),provides as follows:

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

Limaye. *See No. 84 Employer-Teamster*, 320 F.3d at 945 ("In order to prove a prima facie case under Section 20(a), a plaintiff must prove: (1) a primary violation of federal securities law and (2) that the defendant exercised actual power or control over the primary violator.") (omitting internal quotation marks). Putting aside the question of whether Plaintiff has otherwise pled a viable primary violation, at this point in time Plaintiff has only alleged that Leckie and Limaye were independent directors of A-Power and that Limaye was Chair of the Board's Compensation Committee. The conclusory assertion that they are control persons for purposes relevant to the alleged primary violations involved in this case is thus, in the absence of further facts (or case law recognizing individuals in such positions – and nothing more – as "control persons"), "implausible" to say the least. *See Twombly*, 550 U.S. at 570; *see also Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1067 & n.13 (9th Cir. 2000); *In re GlenFed, Inc. Secs. Litig.*, 60 F.3d 591, 592-93 (9th Cir. 1995); *Burgess v. Premier Corp.*, 727 F.2d 826, 832 (9th Cir. 1984) ("A director 'is not automatically liable as a controlling person. There must be some showing of actual participation in the corporation's operation or some influence before the consequences of control may be imposed.'") (quoting *Herm v. Stafford*, 663 F.2d 669, 684 (6th Cir. 1981)).

Dismissal of the claims against Leckie and Limaye is warranted for the reasons stated above.[19] Plaintiff has not indicated any way in which it can amend its allegations *vis a vis* Leckie and Limaye. Nevertheless, the Ninth Circuit has frequently taken the position that a plaintiff need not even request leave to amend for leave to amend to be granted at least once. *See, e.g.*, *Watison v. Carter*, 668 F.3d 1108, 1117 (9th Cir. 2012); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052-53 (9th Cir. 2003) (indicating that rules normally attending leave to amend question "is especially important in the context of the PSLRA" because of that legislation's requirement for pleading "with an unprecedented degree of specificity and detail"). This is the first time the Court has had occasion to review the sufficiency of the allegations in this case. Although Leckie

[19] The Court need not consider the parties' arguments concerning loss causation or the effect of the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011) on Leckie and Limaye. The effect of that case on this one, if any, may become clearer if/when Plaintiff re-pleads its claims against Leckie and Limaye.

and Limaye strongly question whether Plaintiff can possibly cure its flawed allegations against them given the amount of time it has already had to investigate its allegations,[20] it is not inconceivable that it could do so. For that reason, the Court would grant Plaintiff leave to amend.

III. Conclusion

The Court would grant the motions of MSCM, Leckie and Limaye, with leave to amend. Although it could conclude that at least some part of the related party transaction allegations Plaintiff makes would be sufficient to withstand A-Powers' Rule 12(b)(6) challenge in part, the Court would find that Plaintiff should be given the opportunity to shore up its remaining allegations against A-Power such that A-Powers' motion would be granted with leave to amend.

[20] Considering the seeming uniformity with respect to how courts within this District have treated the group pleading doctrine in recent years, Plaintiff's decision to proceed to rely on that doctrine in pleading its case against Leckie and Limaye might also suggest that it could be reasonable to conclude that Plaintiff has nothing else to add to its allegations against those defendants.