20-4268

United States Court of Appeals

for the

Second Circuit

ALTIMEO ASSET MANAGEMENT, ODS CAPITAL LLC,

Plaintiffs-Appellants,

– v. –

JA SOLAR HOLDINGS CO. LTD, BAOFANG JIN, SHAOHUA JIA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellants Altimeo Asset Management and ODS Capital LLC state that neither entity has any parent corporation and that no publicly held corporation owns 10% or more of their respective stock.

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JURISDICTIONAL STATEMENT

This securities class action against JA Solar Holdings Co., Ltd., ("JA Solar" or the "Company") and certain of its former executives arises under Securities Exchange Act of 1934 ("Exchange Act") §§10(b), 20(a), 15 U.S.C. §§78j(b), 78t(a), and SEC Rule 10b-5, 17 C.F.R. §240.10b-5.

The District Court had jurisdiction under Exchange Act §27, 15 U.S.C. §78aa, and 28 U.S.C. §1331. The District Court dismissed Plaintiffs' Amended Complaint ("Complaint") in its November 30, 2020, Opinion and Order ("Order"), SPA-1-31,[1] and judgment was entered that same day, SPA-32. Co-Lead Plaintiffs ODS Capital LLC and Altimeo Asset Management ("Plaintiffs") filed a Notice of Appeal on December 29, 2021. A-840. This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs adequately alleged materially false and misleading statements and omissions regarding JA Solar's relisting.

2. Whether Plaintiffs alleged a sufficient causal connection between their sales of JA Solar securities in the Merger and Defendants' fraud (*i.e.*, "transaction causation").

[1] References to "A-__," refer to pages of the Joint Appendix submitted herewith. References to "SPA-__," refer to pages of the Special Appendix submitted herewith.

3. Whether Plaintiffs adequately alleged loss causation, where they alleged that they sold their JA Solar securities for less than the fair value of those shares in the relevant transactions.

4. Whether Plaintiffs adequately alleged control person claims.

STATEMENT OF THE CASE

JA Solar is a Cayman-incorporated and Chinese-based solar energy company. Defendants executed a brazen scheme to defraud investors in the Company's NASDAQ-listed American Depositary Shares ("ADS"), in order to acquire JA Solar on the cheap in a management buyout (the "Merger").

Defendants issued proxies ("Proxies") that falsely claimed the Merger was fair, while misrepresenting the Company's financial condition. The Order sustained claims that these statements were misleading, since Defendants pitched the Merger using projections that were vastly different from their real forecasts and published false, deflated financial results. SPA-1-31.

Defendants also lied about their plans for the Company. Well before announcing the Merger, Defendant Baofang Jin (JA Solar's CEO) stated during an event in China that JA Solar had plans to list on the Chinese capital markets within a few years. But the Proxies promised "there are no present plans or proposals" for any major transactions, such as a relisting in China. However, ***just three days*** after closing the Merger, JA Solar executed an agreement to conduct a "back door"

relisting, to resell the Company on a stock exchange in China.

Many additional facts confirm that Defendants had planned the relisting all along. Confidential former employees of JA Solar ("CWs") and resumes of employees of JA Solar's advisors show that the Company was preparing for a relisting well before the Merger closed. Furthermore, an expert in Chinese mergers explained that it is inconceivable that Defendants could have executed the agreement initiating the relisting without months of planning, dating back to before even the announcement of the Merger.

Less than four months after closing the Merger, the relisting was in full swing, and it was reported that JA Solar would be relisted at a valuation of ***nearly three times*** the valuation paid to investors in the Merger. In other words, after lying about their plans and buying JA Solar at an unfairly low price, Defendants immediately turned around and proceeded with the process of reselling it at a 300% profit. Defendant Jin alone stood to gain approximately $440 million from the scheme, while investors lost hundreds of millions.

STATEMENT OF FACTS

A. Factual Background

1. The Merger

Defendant Jin, JA Solar's Executive Chairman, CEO, and largest investor, founded the Company in 2005 and listed its ADSs on the NASDAQ in 2007. A-29:¶55; A-17:¶8, A-25:¶¶39, 40. He was also the largest investor in the group that

took JA Solar private (the "Buyer Group"). Defendant Shaohua Jia was a Board member since 2012 and was Chairman of the Committee that recommended the Merger to investors. A-26:¶¶41, 44-45. The Buyer Group initially tried to buy JA Solar in June 2015, proposing a buyout at $9.69 per ADS. A-32:¶67. The Company established the Special Committee to consider the proposal, and the Committee retained Houlihan Lokey as financial advisor. A-32-33:¶¶68, 69.

The buyout lost momentum, until two years later when the Buyer Group renewed their bid, making a reduced offer on June 6, 2017 at the much lower price of $6.80 per ADS, which the Buyer Group justified with gloomy assessments of the Company's prospects. A-33:¶71. The Buyer Group subsequently made a "best and final" offer of $7.55 per ADS on October 27, 2017, which equated to a valuation of $360 million for the whole Company. A-33-34:¶¶72-74.

On November 16, 2017, Houlihan determined that $7.55 per ADS was "fair, from a financial point of view." A-33:¶73. However, in reaching this decision Houlihan relied upon, without independent verification, the financial projections provided by Defendants. On the same day, both members of the Special Committee approved the proposed Merger and recommended that the Company's Board of Directors authorize the transaction. A-34:¶75. The Board approved the transaction, and the Merger agreement was signed on November 17, 2017. A-34:¶¶77-78.

2. Defendants' Misleading Statements and Omissions

Between November 17, 2017 and February 1, 2018, in order to convince JA Solar shareholders to vote for the Merger, Defendants issued materially false and misleading Proxies. A-36:¶¶84, A-49-52:¶¶120-29, A-70:¶173.

First, the Proxies misrepresented the fairness of the merger. A-40-41:¶¶94-98, A-52:¶¶128-29, A-84-85:¶¶222-24, A-89-90:¶¶249-50. These fairness statements were based on JA Solar's supposed past financial performance and projections that Defendants gave to Houlihan and investors, that were themselves deeply misleading. This was of particular importance because Houlihan relied solely on its discounted cash flow analysis, which used JA Solar's projections and past performance to estimate future growth rates, and ignored other traditional valuation metrics.

The Proxies grossly understated the Company's revenue and income projections for the fourth quarter of 2017. Those projections understated the actual revenues for the fourth quarter by approximately 76% and understated the net income for that quarter by approximately 58%. A-50:¶¶124-27, A-82:¶¶216-17, A-90:¶¶252-53. Defendants repeated Houlihan's assessment that the Merger was fair based on these figures, even after the fourth quarter was complete. A-19:¶15. The Proxies also misstated JA Solar's historical financial performance. The reported financial performance for 2015-2017 diverged substantially—for example,

understating operating income for 2016 by approximately $200 million—from the results that JA Solar reported to regulators in China in connection with its relisting. A-60-62:¶¶151-54.

Second, Defendants misrepresented Jin's plans for JA Solar following the Merger. They insisted that "there are ***no present plans or proposals*** that relate to or would result in an extraordinary corporate transaction involving [JA Solar's] corporate structure, business, or management, such as a Merger, reorganization . . . or sale or transfer of a material amount of assets." A-42:¶¶100(d), A-45:¶¶105-06, A-75:¶186 (emphasis added). These reassurances were repeated and emphasized on the Company's official website. A-42-44:¶¶100(a)-(c), (e-f), 102-04, A-76-77:¶¶190, 192, 195-97, A-85-86:¶¶227-28. These statements were false and misleading when made because, as discussed below, Jin already had a plan to relist JA Solar at multiple times the Merger price. A-70:¶173(a).

3. The Shareholder Vote and Close of the Merger

In order to close the Merger, at least two-thirds of votes cast needed to approve the deal, which meant that public investors could have voted down the deal had they not been defrauded. A-36:¶¶82-83. On March 12, 2018, JA Solar announced that the Company's shareholders voted in favor of the Merger. A-46:¶107.

The Merger was completed on July 16, 2018. A-48:¶117. Defendant Jin reaped tremendous gains from the Merger, raising his stake in the surviving

Company to 79.8%. A-47-48¶¶113-15.

4. JA Solar Agrees to Relist in China Just Three Days After the Merger Closes

On July 19, 2018, ***just three days after the Merger closed***, JA Solar and Tianye Tonglian ("Tianye"), a manufacturer that was already publicly listed in China, executed an agreement for Tianye to acquire 100% of JA Solar, with Jin at the helm (the "Relisting Agreement"). A-57-58:¶¶140, 142. Jin signed this agreement on behalf of JA Solar. A-777-87:Fumerton Decl., Ex. F. This agreement advanced JA Solar's "backdoor listing," permitting JA Solar to relist in China without the hassle of a direct public offering. A-28:¶¶52, A-57-58:¶140, 144.

On November 4, 2018, the Chinese media reported that the relisting plan was well underway and that JA Solar could place an estimated CNY 7 billion ($1 billion) of net assets into Tianye. A-59:¶146. Other sources reported that JA Solar was valued at $1.1 billion—***over three times*** the Merger price. A-59-60:¶¶146-50. That difference was money in Jin's pocket. It was estimated that after the relisting would be completed, JA Solar's market capitalization would reach CNY 20 billion (or $2.883 billion). A-59-60:¶¶146, 149, 150.

This superior valuation, just months after the Merger, was ultimately supported by the disclosure of JA Solar's true financial condition. In the restructuring report that JA Solar filed with China's securities regulator in connection with the relisting, JA Solar reported operating income for 2015 through

2017 that ***far exceeds*** what it reported in the Proxies and in other SEC filings when it was listed on the NASDAQ. In fact, the Company's actual net income in 2017—the year most important to the Merger—was ***more than double*** the amount Defendants reported in the United States. A-61:¶¶152-53:

	Operating Income Reported in U.S.	***Operating Income Reported in Connection With Relisting***	**Net Income Reported in U.S.**	***Net Income Reported in Connection With Relisting***
2015	13.525 billion RMB	*14.019 billion RMB*	624 million RMB	*713 million RMB*
2016	15.737 billion RMB	*16.940 billion RMB*	684 million RMB	*800 million RMB*
2017	19.659 billion RMB	*20.55 billion RMB*	300 million RMB	*721 million RMB*

5. The Relisting Was Jin's Plan All Along

Contrary to Defendants' false assurances, Jin and the rest of the Buyer Group planned all along to conduct the relisting after the Merger. Numerous facts support this conclusion, including that:

First, Jin signed the Relisting Agreement on July 19, 2018, just three days after the Merger closed. A-28:¶52, A-57:¶¶140-44; A-777-87:Fumerton Decl., Ex. F. The timing in and of itself is damning. No such plan could have been hatched in just three days.

Second, an expert in Chinese mergers and capital market transactions has explained that the type of asset restructuring that was committed to in the Relisting

Agreement was necessarily the ***result*** of a lengthy process that took many months, if not over a year. A-63-70:¶¶157-72. This included the hiring of financial and legal advisors A-64-65:¶161; securing an appropriate relisting shell company A-65-66:¶¶162-64; conducting auditing, compliance, due diligence, and regulatory assessments A-66-68:¶¶165-67; negotiating transaction terms A-68:¶168; and arranging each company's restructuring A-68-69:¶¶169-70. It is completely implausible, if not impossible, that JA Solar's backdoor listing was not underway by the time the Merger was announced on November 17, 2017, and all the more so by the time the Proxies were published through February 1, 2018. A-69-70¶172.

Third, a JA Solar sales manager (CW 1) heard about the relisting plan in early 2018 and a JA Solar financial budget analyst (CW 2) heard about the plan in 2017. A-53-54:¶¶133-34. Another former JA Solar Sales manager (CW 4) was told by one of his colleagues on April 20, 2018 that JA Solar had already been planning for some time to relist in China at a dramatically higher valuation. A-55-56:¶138. Most notably, a JA Solar financial analyst (CW 3) reported that in May or June of 2018, an audit team from BDO China visited JA Solar's offices and confirmed CW 3's understanding that JA Solar planned to relist in China. A-54:¶135. The witness account of this audit is confirmed by the resume of a former BDO China employee, indicating that beginning in May 2018, this employee worked on an audit of a JA Solar subsidiary for an "IPO listing." A-55:¶137. Similarly, the resume of a senior

manager from Dragon Securities reports that from June 2015 through May 2016—the time of the Buyer Group's original offer to purchase JA Solar—this employee worked on restructuring JA Solar entities for the Merger and subsequent relisting. A-32:¶67, A-33:¶70, A-56:¶139.

Fourth, Jin *admitted* in a speech on November 19, 2017, just two days after the Merger Agreement and before the Proxies were issued, that he planned to return JA Solar to the Chinese capital markets after the Merger. A-52-53:¶¶130-31, A-101:303-05.

6. Plaintiffs and the Class Were Damaged By Defendants' Misconduct

Class members – both those who sold during the Class Period (the "Seller Shareholders"), and those who tendered into the Merger (the "Tenderer Shareholders") – suffered damages when they sold their shares for far less than their fair value. That fair value was higher than what investors received based on the vast disparity between JA Solar's true financial condition at the time of the Merger and the artificially depressed financial metrics that Defendants reported in the Proxies. The much higher fair value of JA Solar is also strongly alleged based on its substantially higher valuation of $1.1 billion shortly after the Merger. Jin alone profited by more than $440 million, at the expense of ordinary shareholders. SPA-25.

B. Procedural History

This action was filed on December 20, 2018. A-3. On March 8, 2019, Plaintiffs were appointed as Co-Lead Plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995. A-4. Plaintiffs filed an amended complaint on June 14, 2019. A-6. On September 25, 2019, the District Court held a pre-motion hearing regarding Defendants' proposed motion to dismiss. A-6.

Defendants filed their motion to dismiss on February 28, 2020. A-8. Plaintiffs filed their opposition on April 17, 2020 and sought leave to move to strike assertions from the motion to dismiss that were outside the pleadings and were unsupported by any cited facts. A-9. On April 22, 2020, Defendants opposed Plaintiffs' request to strike. A-9. On May 18, 2020 Defendants filed their reply in support of their motion to dismiss. A-9.

On October 9, 2020, Jia, a foreign Defendant who had only been served after the motion to dismiss was filed, joined in the motion to dismiss. A-9.

The District Court dismissed the action on November 30, 2020. SPA-1-31. The Order did not resolve the pending request to move to strike and was issued without oral argument. The Court did not grant leave to amend and the dismissal was entered the same day it was issued, November 30, 2020. SPA-32. Plaintiffs filed this timely appeal on December 29, 2020. A-840.

C. Rulings Below

The District Court agreed with Plaintiffs' core allegations, ruling that the Complaint "plausibly allege[d] that Defendants' statements regarding the fairness of the Merger and JA Solar's financial position were misleading" and that "Defendants could not have possibly believed that the projections JA Solar provided were accurate." SPA-22-23. The Court found that JA Solar and Jin misrepresented the fairness of the Merger, with scienter. SPA-24. The Court also found that the Seller Shareholders, who sold their ADS on the NASDAQ before the Merger closed, relied on Defendants' misstatements. SPA-26.

However, the District Court held that Plaintiffs failed to adequately allege the falsity of Defendants' assurances that the Buyer Group had "no present plans or proposals" to relist the Company after the Merger, and other related statements. The Court did not credit the allegations of Plaintiffs' CWs, rejected Plaintiffs' expert analysis explaining the timing of the relisting plan, and found that "Defendants disclosed the possibility of relisting in the future." SPA-16-20.

The District Court also held that Plaintiffs failed to allege reliance as to the Tenderer Shareholders because the Merger itself "fail[ed] to demonstrate the open and developed market that would support market efficiency under the *Basic* presumption." SPA-27-28. As a result, the Court dismissed the Tenderer Shareholders' claims. SPA-28.

The District Court further held that the Complaint did not adequately allege loss causation. The Court explained that while Plaintiffs had adequately pled the falsity of the fairness statements in the Proxies, they "fail[ed] to establish a causal connection between (1) the misleading statements . . . and (2) the value of the Seller Shareholders' Securities during the class period." SPA-29. The Court focused on the market price of the Sellers' securities, finding that "Plaintiffs' allegations that JA Solar depressed the price of JA Solar Securities during the class period are bellied by the fact that JA Solar's stock price rose or remained roughly the same during" that time. SPA-29.

SUMMARY OF THE ARGUMENT

The Complaint Pleads Falsity As to The Relisting Statements

The District Court erred in holding that Plaintiffs failed to adequately allege that the Buyer Group misrepresented that it had "no present plans or proposals" to relist the Company after the Merger, and other statements disavowing any such plan or agreement. In reaching this conclusion, the District Court (1) improperly discounted evidence of the Buyer Group's relisting plan, and (2) applied an overly demanding standard that required Plaintiffs to plead the existence of a "concrete" plan to relist.

Plaintiffs are not required to plead that these plans were "concrete" because the law is clear — since the Supreme Court held in *Basic Inc. v. Levinson* that

"[w]hether merger discussions in any particular case are material . . . depends on the facts" — that it is false for defendants to deny plans for significant corporate transactions that are actually underway, regardless of their stage of development. 485 U.S. 224, 239 (1988). Moreover, the District Court's stricter requirement that Defendant Jin's relisting plan must have been "concrete" is too vague to warrant dismissal based on the inherently factual determination of whether a defendant's plans meet this nebulous standard.

In any event, the facts here surpass even the District Court's "concrete" standard because they show that Jin planned to relist JA Solar in China based on (1) Jin's admission in November 2017, just before he announced the Merger, that he planned to relist JA Solar in China; (2) an expert analysis of the substantial steps that take over one year to reach the point where parties are able to make the sort of backdoor listing agreement that Jin signed just three days after the Merger; (3) confidential witnesses who observed firsthand an audit of JA Solar taking place in May 2018 to prepare for the relisting and heard from their colleagues about the relisting plan; and (4) the resumes of employees of multiple advisors showing that they assisted with these plans before the Merger.

The Complaint Pleads Reliance as to the Tenderer Shareholders

The Complaint adequately alleges reliance as to the Tenderer Shareholders for three independent reasons, any one of which would suffice at the pleading stage.

First, the Supreme Court held in *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384–85 (1970), that reliance is satisfied where a proxy statement containing material misrepresentations solicits shareholder votes that are needed for a merger to pass - precisely the situation here. ***Second***, the fraud-on-the-market presumption applies to the Tenderer Shareholders because it applies to all investors who trade in the shares of a security, if that security trades on an efficient market, regardless of whether the investors themselves traded on the stock exchange. ***Third***, there can be no doubt that Defendants' announcement of the Merger affected the price of JA Solar's shares by making them move toward the Merger price. Defendants' misstatements therefore had "price impact," which is the basis for the *Basic* presumption because market efficiency is only an "indirect proxy for price impact." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 278, 281 (2014). There is no need for a "proxy" when such overwhelming evidence of price impact is alleged.

The Complaint Pleads Loss Causation

Plaintiffs' easily meet their low burden of alleging "some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Supreme Court has ruled that the proper measure of damages when plaintiffs are induced into selling their shares for less than their fair value is "***the difference between the fair value of all that the . . . seller received and the fair value of what he would have received had there been no***

fraudulent conduct." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972) (emphasis added).

The very same allegations that the District Court held support the falsity of Defendants' fairness statements also support loss causation because these facts relate directly to JA Solar's fair value at the time of the Merger. The Court even agreed, when ruling on scienter, that "Defendant Jin stood to gain in a concrete and personal way by materially misrepresenting the financial position of the Company that resulted in approval of the Merger at a price favorable to Defendant Jin," which allowed him to "receive[] $440 million following the Merger." SPA-25. This amount corresponds to Jin's profit from JA Solar's being valued at $1.1 billion shortly after the Merger. A-98-A-99:¶294. The difference between that price and the price that shareholders received in the Merger shows how investors suffered losses as a result of Defendants' misstatements. This by itself is enough to plead loss causation.

The District Court's alternative loss causation framework, which required Plaintiffs to plead that Defendants' specific misstatements "kept the price" low, is simply not the correct standard. Unlike in defrauded ***purchaser*** cases, where the plaintiff ordinarily does not suffer any loss until the stock price ***falls*** when the fraud is revealed, in a defrauded seller case (like here), the plaintiff ***immediately*** suffers a loss upon ***selling*** shares for less than their fair value. The well-established law is that

this loss is measured by the difference in value between what the seller received and the fair value of the shares.

The only allegations to the contrary that the District Court cited are that JA Solar's ADS price increased on several of the days on which Defendants made the misstatements at issue. But this is not surprising given that the purpose of Defendants' misstatements was to induce shareholders into falsely thinking that the Merger price was fair. Plaintiffs have adequately alleged that they received less than fair value for their shares. There is simply no legal or economic reason to require, as the District Court incorrectly did, that Plaintiffs make the added showing that their loss corresponds to price movements at the time of Defendants' misstatements.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff. *See City of Providence v. BATS Glob. Mkts., Inc.*, 878 F.3d 36, 48 (2d Cir. 2017).

ARGUMENT

I. PLAINTIFFS ADEQUATELY ALLEGE MATERIALLY FALSE AND MISLEADING STATEMENTS

A. Defendants' Relisting Statements Were Materially False and Misleading

While the District Court ruled correctly that the Complaint adequately alleges the falsity of Defendants' fairness statements, it erred in holding that Plaintiffs did not "plausibly allege a material misrepresentation of Defendants' statements regarding JA Solar's plans to relist." SPA-21.

Defendants firmly denied the existence of any plan to relist JA Solar after the Merger by warranting in the Proxies—and assuring even more forcefully on JA Solar's website—that "there are no present plans or proposals" to engage in any deal that would materially change JA Solar's corporate structure. A-42-45:¶¶100(d), 103-06, A-75:¶186, A-85-86:¶¶227-28. Defendants also falsely promised that there were no "undisclosed agreements or arrangements" among the Buyer Group; that JA Solar "will continue its operations as a privately held company"; and that there were "no viable alternative[s]" to the Merger. A-42-43:¶¶100(a)-(c), (e)-(f), 101-02, A-75-77:¶¶186-88, 190, 192, 195-97. All of these statements were materially false and misleading because when Defendants made these statements, Jin already planned to relist JA Solar in China at multiple times the Merger price.

The District Court erred in two ways when it ruled that the Complaint does not adequately allege these statements to be false: it (1) improperly discounted the substantial evidence of the relisting plan; and (2) applied an overly demanding standard requiring Plaintiffs to allege a "concrete plan to relist." SPA-20.

1. The District Court Improperly Discounted Evidence of Jin's Relisting Plan

The Complaint presents multiple independent sources showing that Jin already planned to relist JA Solar in China when Defendants issued the Proxies. These sources include (1) the timing of the relisting in relation to the Merger; (2) Jin's admission in November 2017, just before he announced the Merger, that he planned to relist JA Solar in China[2]; (3) several former JA Solar employees who observed or heard about the relisting plan while the Merger was pending; and (3) the resumes of individuals who worked for companies that assisted JA Solar with the relisting process.

On July 19, 2018, ***just three days after the Merger closed,*** Jin signed an agreement for JA Solar to merge with Tianye. A-28-29:¶52, A-43-44:¶¶140-44; A-777-87:Fumerton Decl., Ex. F. An expert in Chinese M&A and capital market transactions explained that the type of asset restructuring that JA Solar agreed to as a necessary part of the backdoor listing, was a major transaction that required

[2] While Jin's speech did not alert Plaintiffs to the relisting plan at the time A-53:¶131, it is now clear that his comments prove what he was planning at the time.

time-consuming preparation. A-63-70:¶¶157-72. It is therefore completely implausible, if not impossible, that JA Solar's backdoor listing was not underway by the time that Defendants issued the Proxies from December 11, 2017 through February 1, 2018. And even without this expert evidence, the improbably close proximity of Jin signing the Relisting Agreement just three days after the Merger closed, leaves no doubt that he was planning this transaction well before the Merger. *See In re Qudian Inc. Sec. Litig.*, 2019 WL 4735376, at *4, 9 n.6 (S.D.N.Y. Sept. 27, 2019) (holding the launch of a new business over a month *after* an IPO supported falsity, noting that "[s]urely if Qudian had announced the opening of [the business] the day after the IPO, a factfinder could conclude that the company misled investors by not disclosing those plans").

The District Court rejected this evidence, finding that "Plaintiffs' arguments regarding the general time it takes to agree to a backdoor listing requires the Court to make inferential leaps regarding a hypothetical plan to relist that has not been plausibly alleged." SPA-20. This circular reasoning fails to acknowledge that the relisting plan is not merely "hypothetical," because the timing itself is concrete evidence that the plan actually existed. There is no way that Jin could have been in a position to sign the Relisting Agreement three days after the Merger closed if he had not already taken the many substantial steps needed to advance the plan, many months before that point.

In addition, the District Court incorrectly ignored or discounted the Complaint's other evidence of the relisting plan. The Court did not mention at all that the resume of a senior manager from Dragon Securities reports that from June 2015 through May 2016—the time of the Buyer Group's original offer to purchase JA Solar—this employee worked on restructuring JA Solar to prepare for its subsequent relisting. A-32-33:¶¶67, 70, A-56:¶139. Similarly, the resume of a BDO China employee shows that in May 2018, JA Solar was conducting an audit for an "IPO listing." A-55-56:¶¶136-37.

The District Court also improperly discounted the Complaint's evidence from former employees of JA Solar who served as confidential witnesses. One of these witnesses, a JA Solar financial analyst (CW 3), interacted firsthand with the BDO team that visited JA Solar's office in May or June of 2018 to conduct an audit in preparation for the Company's planned relisting. A-54:¶135. Moreover, CW 3 and three other former JA Solar employees, including two sales manager (CWs 1 and 4) and another financial analyst (CW 2), all heard, from 2017 through April 20, 2018, that JA Solar was planning to relist in China after the Merger. A-53-56:¶¶133-38.

The District Court did not credit the Complaint's confidential witnesses because it described their allegations as based "on secondhand accounts" and the court determined that their jobs at the Company "do not suggest that these CWs were

in a position to be relayed plans to relist by corporate management." SPA-18. These assessments mischaracterize the CWs' allegations and the applicable law.

First, the CWs did not base their allegations solely on "secondhand accounts"—although the widespread internal reports that they discuss are also significant—because CW 3 observed and interacted firsthand with the BDO team that conducted an audit late in JA Solar's process of planning for the relisting. A-54-55:¶¶135-36.

Second, the District Court incorrectly assessed the CWs' credibility based on their levels of seniority. SPA-18. But courts determine whether a person in the witness's position would have the knowledge that they describe based on the context of how they learned the information, not their level of seniority or title. *See City of Warren Police & Fire Ret. Sys. v. World Wrestling Ent. Inc.*, 2020 WL 4547217, at *5 (S.D.N.Y. Aug. 6, 2020) (holding testimony "based on hearsay and indirect knowledge" should be credited when it is "probable" the witness "would have had access to" the information based on their description of events); *Wallace v. Intralinks*, 2013 WL 1907685, at *8-9 (S.D.N.Y. May 8, 2013). CW 3 easily meets this standard based on the witness's credible, detailed explanation of how he interacted firsthand with the BDO team through the witness's role as a financial

analyst in JA Solar's Beijing office, where CW 3 reported to a senior member of the Company's financial analysis group.[3]

Third, as the District Court acknowledged, the pleading threshold for CWs is lower "when independent adequately pled factual allegations' corroborate a confidential source's statements." SPA-17 (internal quotation marks and brackets omitted); *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). But the Court mischaracterized the CW testimony as uncorroborated SPA-17, even though these allegations were corroborated by each other and the Complaint's other allegations of Jin's relisting plan described above. (*Supra* at 8-10).

The District Court's contrary conclusion ignores the evidence in the Complaint, misapplies the law concerning confidential witnesses, and improperly credits Defendants' version of events in a way that "conflate[s] pleading and proof." *McIntire v. China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 125 (S.D.N.Y. 2013).

[3] The cases that the District Court cited to challenge the CWs' accounts dealt with far-more attenuated allegations. *See* SPA-18-19 (citing *Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 305 (S.D.N.Y. 2019) (plaintiffs did not allege facts showing the basis for the CW's knowledge); *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 579 (S.D.N.Y. 2014) (CWs did not set forth "any facts that suggest that any of the alleged statements were false *when they were made*"); *In re Lehman Bros. Sec. & Erisa Litig.*, No. 09 MD 2017 LAK, 2013 WL 3989066, at *3–4 (S.D.N.Y. July 31, 2013) (plaintiffs did not allege whether CWs worked for defendant when alleged misconduct took place)).

2. The District Court Applied an Overly Demanding Standard to Defendants' Relisting Statements

In addition to improperly discounting the evidence of Jin's relisting plan, the District Court applied an overly demanding standard to the relisting statements. The Court held that Plaintiffs must plead that Jin had a "concrete" plan at the time he claimed there was no plan in place. While the evidence described above supports the highly plausible inference that Jin in fact had a concrete relisting plan, even preliminary plans would suffice to show the falsity of Defendants' statements.

The law is clear that a defendant's statement that it is not planning a course of action is false when the defendant is already planning to do just that. The Supreme Court in *Basic Inc. v. Levinson* addressed this exact situation, holding that the defendant was not permitted to falsely deny the existence of merger negotiations. 485 U.S. 224, 235-39 (1988). Similarly, in *Buxbaum v. Deutsche Bank, A.G.*, 2000 WL 33912712 (S.D.N.Y. Mar. 6, 2000), the court denied defendants' motion to dismiss because "takeover talks were well under way by October 25, 1998," when Deutsche Bank's CEO "falsely and knowingly denied [their] existence." *Id.* at *19; *see also Martinek v. AmTrust Fin. Servs.*, 2020 WL 4735189, at *12-14 (S.D.N.Y. Aug. 14, 2020) (holding statements that defendants "will maintain" preferred stock's listing, and that they "'expected" the stock "would continue to be listed," were actionable when the company delisted the stock following the merger).

These cases hold that denials of plans for corporate transactions are false *even when the plans are only preliminary*, because any questions concerning the plans' significance or stage of development—including "the probability that the event will occur"—are issues of fact related to materiality that cannot be decided at the motion to dismiss stage. *Basic*, 485 U.S. at 239; *Buxbaum*, 2000 WL 33912712, at *18. This principle applies when defendants deny plans for all types of corporate transactions because "[f]ollowing *Basic*, we have consistently rejected a formulaic approach to assessing the materiality of an alleged misrepresentation." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162-63 (2d Cir. 2000); *see also Joseph v. Mobileye, N.V.*, 225 F. Supp. 3d 210, 214, 219-20 (S.D.N.Y. 2016) (holding whether the complaint adequately alleged that defendants misrepresented "that there was no then-existing plans for an IPO" was an issue of fact, where the company brought in investors to help "move toward an IPO" that was "expected . . . in perhaps a year and a half"); *In re Merrill Lynch Auction Rate Sec. Litig.*, 2011 WL 1330847, at *2, 8 (S.D.N.Y. Mar. 29, 2011) (holding statements touting ARS market were false where defendants "*contemplated* ending their [market] intervention").

Similarly, it is misleading for defendants to omit plans that were under "active and serious consideration" when doing so renders other statements misleading. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993); *see also Harley-Davidson Motor Co., Inc., v. PowerSports, Inc.*, 319 F.3d 973, 976, 992 (7th Cir.

2003) (holding that "draft slides to use for an upcoming investor roadshow" created "at least a material question of fact as to whether PowerSports had a present intent of not going public"); *State of N.J. & its Div. of Inv. v. Sprint Corp.*, 2004 WL 1960130, at *7 (D. Kan. Sept. 3, 2004) (holding "question of what defendants were considering" concerning executives' employment, "and to what extent," cannot be resolved on a motion to dismiss).

In addition to contradicting this long line of authority holding that even preliminary plans suffice, the District Court's requirement that the relisting plan be "concrete" is a vague and amorphous standard that does not provide any guidance as to what is required or at what stage of the planning process it is met. It is not clear whether common planning activities such as a memo, an outline, or Board discussions qualify, or why the steps that the Buyer Group took here are any less concrete.

The District Court based its stricter standard, requiring Plaintiffs to plead that Jin had a "concrete" relisting plan, on Defendants' disclaimer in the Proxy that "after the Merger," the Buyer Group "may propose or develop plans and proposals . . . including the possibility of relisting the Company or a substantial part of its business on another internationally recognized stock exchange." SPA-19-20; A-191. The District Court's reasoning is wrong for at least four independent reasons.

First, the plain meaning of Defendants' statements—both their affirmative disavowals of any relisting plans and their halfhearted disclaimer—do not lend themselves to the District Court's interpretation. The Proxy stated firmly and unequivocally that "there are no present plans or proposals" to relist JA Solar following the Merger. Defendants did not disavow just "concrete" plans but all "present plans or proposals." Warning of the possibility that later – "***after*** the Merger" – the Buyer Group might first then "propose or develop plans and proposals" for a potential relisting, cannot change the meaning of Defendants' disavowal of any "present plans or proposals."[4] Investors would not understand from Defendants' warning that Jin already had a ***present*** plan to relist. *See Haw. Structural Ironworkers Pension Tr. Fund v. AMC Ent. Holdings, Inc.*, 422 F. Supp. 3d 821, 837 (S.D.N.Y. 2019) (rejecting argument that allegedly omitted information was disclosed, because "a plan to renovate some Carmike theaters in the future is not the same thing as Carmike's significant underinvestment in improvements").

Second, while the ordinary meaning of Defendants' statements are clear on their face, even if Defendants' words were up for interpretation (which they are not),

[4] The District Court misread Defendants' disclaimer to mean that they "disclosed that they may potentially relist" in the future SPA-20. Defendants, however, warned only that the Buyer Group might first "propose or develop" relisting plans only after the Merger was completed. But even if the District Court was correct that Defendants warned more generally of the possibility of a future relisting, that still would not inform investors that Jin was *already* planning to relist—despite his express denial of any such plan.

that itself would raise a factual issue that the court cannot resolve in Defendants' favor at the motion-to-dismiss stage. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 178 (2d Cir. 2001) (holding there was "a jury question as to" the interpretation of defendant's statement concerning potential IPO); *World Wrestling Ent.*, 477 F. Supp. 3d at 129-30 (holding definition of the term "renewal" is a factual issue); *DoubleLine Cap. LP v. Construtora Norberto Odebrecht, S.A.*, 413 F. Supp. 3d 187, 210 (S.D.N.Y. 2019) (same as to the term "political risk"). "[W]hether a reasonable investor . . . would have received a false impression from" Defendants' statements "presents a factual dispute, not a legal one." *Id.* This rule applies to Defendants' risk disclosure as well as to their statements about present plans. *See In re Mylan N.V. Sec. Litig.*, 2018 WL 1595985, at *9 (S.D.N.Y. Mar. 28, 2018) (holding "the test is whether a reasonable investor could have been misled about the nature of the risk"); *Credit Suisse First Boston Corp. v. ARM Fin. Grp., Inc.*, 2001 WL 300733, at *9 (S.D.N.Y. Mar. 28, 2001) (whether risk disclosures "were substantial enough" are for "discovery [to] reveal").

Third, Defendants' disclaimer about future events cannot—as a matter of well-established law—protect their statements about *present* plans from liability because the "safe-harbor provision does not protect . . . present representations." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 246 (2d Cir. 2016); *Iowa Pub. Emps.' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 142 (2d Cir. 2010) (same as to

bespeaks-caution doctrine). This clear-cut rule plainly forecloses the District Court's holding that Defendants' disclaimer protected (or altered the ordinary meaning of) their statements about present plans. *See P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 97-98 (2d Cir. 2004) (holding that a statement about "the existence of an agreement to try to plan an IPO" was a statement about current plans that was not protected from liability by the warning (among others) that "*it is unlikely that a public market for the Units will develop in the future*").[5]

Fourth, Defendants' disclaimer is itself an additional false statement that misrepresented Jin's relisting plan that already existed at the time of the disclaimer. Defendants did not warn that there was the possibility of a future relisting—as the District Court incorrectly interpreted—but only that after the Merger, the Buyer Group ***might*** first develop plans or proposals for a potential relisting. This was misleading because Jin had ***already*** developed such plans. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 516 (S.D.N.Y. 2013) (warnings are misleading if the "risk has already materialized"); *Plumbers & Pipefitters Nat'l*

[5] Moreover, even assuming *arguendo* that a risk disclosure could protect statements about present plans—which it cannot as a matter of law—Defendants' particular risk language here would not suffice for the reasons explained in the following paragraph showing why Defendants' warning is an additional misstatement that misrepresented Jin's relisting plan.

Pension Fund v. Davis, 2020 WL 1877821, at *12 (S.D.N.Y. Apr. 14, 2020) (statements about *potential* future problems were misleading).

For all of these reasons, the District Court erred in requiring Plaintiffs to plead that Jin had a "concrete" relisting plan at the time of the Merger. The District Court based its erroneous standard on the recent decision in *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 2020 WL 4734989, at *14 (S.D.N.Y. Aug. 14, 2020), where the court required plaintiffs to plead a "concrete and definite" plan. But the *Qihoo* decision created this "concrete" plan requirement out of whole cloth, and is also currently on appeal. Case No. 20-3074.[6]

The District Court framed its use of that overly demanding standard as beside the point because the court first discredited Plaintiffs' factual allegations. SPA-18-19. But this standard was actually essential to the District Court's factual analysis. The Court held that the confidential witnesses discussed in the Complaint "fail to identify any **concrete** plan to relist," that they were not in a position to "have access to **concrete** plans to relist," and "the CWs described no **concrete** plans to relist." SPA-18. The evidence alleged in the Complaint does in fact plausibly allege a concrete relisting plan for the reasons explained above. (*See supra* at 8-10, 19-23).

[6] The District Court also relied on *Altimeo Asset Management v. WuXi PharmaTech (Cayman) Inc.*, 2020 WL 6063539, at *5 (S.D.N.Y. Oct. 14, 2020). But the court in *WuXi* merely adopted the *Qihoo* standard. *WuXi* also dealt with very different factual allegations, where the allegations did "not mention relisting" at all. *Id.*, at *6.

But Defendants' misrepresentation that Jin did not have any plans to relist JA Solar after the Merger are even more clear-cut once the correct standard is applied to Plaintiffs' allegations.

II. PLAINTIFFS ADEQUATELY ALLEGE TRANSACTION CAUSATION

The terms "transaction causation" and "reliance" are used interchangeably. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011). The District Court held that reliance was adequately pled as to the Selling Shareholders, but erred in finding that the Tenderer Shareholders did not adequately plead reliance. SPA-26-28. As the Supreme Court has held, this element "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury," though there is "more than one way to demonstrate the causal connection." *Basic*, 485 U.S. at 243. The Complaint alleges three independent theories of transaction causation.

A. Transaction Causation Under *Mills v. Elec. Auto-Lite Co.*

The Supreme Court has held that there is a unique method available to establishing transaction causation in the merger context:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if . . . he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and,

> by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice.

Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 384–85 (1970). The Supreme Court further clarified that "petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation." *Id.*, at 386. *Mills* addressed claims under § 14(a) of the Exchange Act, but it has been held applicable to § 10(b) claims. *See Grace v. Rosenstock*, 228 F.3d 40, 47-48 (2d Cir. 2000) (holding *Mills* applies in § 10(b) cases); *Basic*, 485 U.S. at 243 (recognizing that *Mills* provides one means by which plaintiffs can show the "requisite causal connection").

In summary, where a merger required minority votes, and where investors were solicited with a proxy containing material misstatements, the transaction causation element is satisfied.

The District Court did not mention *Mills* or its progeny. Instead, the Court addressed reliance entirely through a fraud-on-the-market lens. SPA-26-28. The Tenderer Shareholders' claims are perfectly suited to proceed under the rule stated in *Mills*, which *Basic* makes clear is a separate basis for reliance, independent of the fraud-on-the-market presumption.

B. Fraud-on-the-Market Reliance

Defendants did not challenge the well-pled allegations that JA Solar's ADS traded in an efficient market during the Class Period or that the Seller Shareholders could satisfy the reliance element through the fraud-on-the-market presumption. *See* A-114-115:¶344-48; SPA-26-28 (holding Defendants did not challenge reliance for the Seller Shareholders and "the Court agrees with Plaintiffs that they have adequately pleaded reliance for the Seller Shareholders."). However, the Court erred in finding that the Tenderer Shareholders could not rely on that same presumption.

The *Basic* presumption derives from the "fraud-on-the-market" theory, which holds that "the market price of shares traded on [a] well-developed market[ ] reflects all publicly available information, and, hence, any material misrepresentations." *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 483 (2d Cir. 2018) (citing *Basic*, 485 U.S. at 246). Under *Basic* there is a presumption that both "[1] the price of stock traded in an efficient market reflects all public, material information—including misrepresentations—***and*** [2] that investors rely on the integrity of the market price when they choose to buy or sell stock." *Id.* at 478.

However, the Order found that just the Tenderer Shareholders "fail to demonstrate the open and developed market that would support market efficiency under the *Basic* presumption." SPA-28. The District Court appears to be assessing whether the Merger transaction itself constitutes an efficient market. But this is the

wrong question. Market efficiency is never based on a single transaction, but is an attribute of the market generally.

The efficient market that both the Sellers and Tenderers relied upon is the general public market for the ADS, which traded over the NASDAQ. *See* A-114-115:¶¶345-48. Therefore, packed within the Order, appears to be an implicit finding that the Tenderers are not entitled to a presumption that they relied on the NASDAQ price when they decided to tender into the Merger, rather than seeking appraisal or taking some other action. This implicit finding contravenes the second constituent presumption of *Basic*, "that investors rely on the integrity of the market price when they choose to buy or sell stock." *Goldman,* 879 F.3d at 478. That rule is not limited to investors trading on the stock exchange, but applies to all investors who trade in the shares of a stock, if that stock trades on an efficient market, regardless of whether the investors themselves traded on the stock exchange.

The logic of this second presumption is simple. Imagine an acquaintance offers to sell you Starbucks stock for $50 per share. There are many questions you might ask before deciding to commit to that transaction—and one especially likely question is "what is the market price for Starbucks stock on the NASDAQ?" If that price is $75 a share, you may choose to buy the stock at $50 per share, as it would seem you are getting a good deal (a $25 premium per share). However, if the market price is $25, you would likely reject the offer, as it would seem to be a bad deal.

In the example, even though the transaction is private, you would be relying on the market price in making your investment decision. Here too, those deciding to tender their shares are ***presumed*** to have relied on the NASDAQ price when choosing to tender. A legion of cases establish that it is perfectly ordinary to invoke *Basic* even when not trading on the exchange where the efficiently traded security is listed.

In *Black v. Finantra Capital, Inc.*, the Second Circuit held that the fraud-on-the-market presumption applies to negotiated off-exchange transactions. 418 F.3d 203 (2d Cir. 2005). A friend solicited Black to "make a direct private purchase of restricted shares" of a publicly traded company. *Id.* at 205–06. Both the district court and the Second Circuit found that the *Basic* presumption applied because Black relied on the market price of the stock when deciding to buy at the negotiated price. *Id.* at 210.

Similarly, in *In re Forcefield Energy Inc. Sec. Litig.*, 2015 WL 4476345, at *2 (S.D.N.Y. July 22, 2015), the court held:

> [T]he fact that [plaintiff] bought . . . through off-market transactions is irrelevant . . . The fraud-on-the-market theory depends on the existence of an efficient market whose price signals may be relied upon to inform an investor's choices. Even though [plaintiff] bought equity shares **outside the open market** through a note exchange program, she plausibly relied on the market's efficient valuation of ForceField equity to determine whether to participate in the note exchange.

Id. at *4. And many cases hold that options traders may rely on the fraud-on-the-market presumption—not because they trade "***in***" the efficient market—but because they rely on the efficient market in the stock ***underlying*** the options. *See, e.g.*, *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014). Options traders look to the price of the underlying stock when deciding to trade, just like Plaintiffs looked to the price of the ADS when deciding to sell in the Merger.[7]

In contrast, the Order cites cases addressing whether ***any*** efficient market existed, but those cases are of no moment since (a) there is no challenge to the existence of NASDAQ being *an* efficient market here and (b) they have no bearing on whether a plaintiff who traded off-exchange can invoke *Basic* where such a market exists. For example, *In re Initial Pub. Offering Sec. Litig.* is quoted for recognizing that "the market for IPO shares is not efficient," but this reflects only that at the time of the IPO there is ***not yet*** an efficient market, and it says nothing about off-exchange traders relying on an efficient market that ***does*** exist. *See* SPA-28; *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

[7] *See also, e.g.*, *In re Priceline.com Inc.*, 236 F.R.D. 89, 99 (D. Conn. 2006) ("Option traders . . . may use the fraud-on-the-market presumption"); *In re Oxford Health Plans, Inc. Sec. Lit.*, 199 F.R.D. 119, 123–24 (S.D.N.Y. 2001) (quoting *Basic* and holding options traders were adequate class representatives); *In re Sci.-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1330 (N.D. Ga. 2007) (stating that option sellers rely "on the integrity of the price ***of the underlying stock***") (emphasis added).

The Tenderer Shareholders' reliance on the market price is particularly compelling because as the Merger approached, JA Solar's ADS moved closer to the Merger price. A-804. By July 16, 2018, the last day that the ADS traded before the Merger, the price was just six cents – or 0.8% – less than the Merger price of $7.55 per ADS (pricing in some minor risk that the Merger might not close). *Id.* This makes clear that the Merger price was impacting the price in the efficient market. It makes no sense for there to be a distinction between these two scenarios for pleading reliance under *Basic* when the Tender price was set by the same fraudulent statements that resulted in virtually the same price just the day before in what was undisputedly an efficient market.

The Tenderer Shareholders are also entitled to the *Basic* presumption for the independent reason that market efficiency is only an "indirect proxy for price impact." *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258, 278, 281 (2014). *Basic* applies because Plaintiffs can show directly that Defendants' misrepresentations were reflected in the Merger price at which Plaintiffs sold their securities, removing any need to use market efficiency as an "indirect proxy." Defendants touted the Merger by promoting its price as a premium to JA Solar's trading price. A-35:¶79(h), A-73:¶176. The District Court acknowledged that the market price of JA Solar's ADS reacted to this news. SPA-29-30. Defendants then supported that price through many misrepresentations in the Proxy Materials. *Id.* If

Defendants had disclosed JA Solar's true financial condition or the relisting plan, they would have been forced to ***raise*** the Merger price to deter shareholders dissenting from the transaction. Plaintiffs also relied on the integrity of JA's ADS price, as it was impacted by the Merger price, when they chose how to act in connection with the Merger. A-22:¶27, A-36:¶83, A-38:¶89, A-46:¶108, A-91-93:¶¶319, 322-23. Defendants' misstatements thus directly set and supported the Merger price, firmly establishing price impact here.

Moreover, at most, whether Defendants' misrepresentations had a price impact raises factual issues that require expert evidence and a hearing. *See Halliburton II*, 573 U.S. at 272 ("market efficiency is a matter of degree," and thus "a matter of proof" of the extent of price impact); *Villella v. Chem. & Mining Co. of Chile*, 333 F.R.D. 39, 54 (S.D.N.Y. 2019) (price impact evidence is "most necessary" when "indirect factors indicat[e] that the market . . . is inefficient"); *Lewis*, 445 F. Supp. 2d at 373 n.10 (holding this issue "can be dealt with [at] class certification").

III. PLAINTIFFS ADEQUATELY ALLEGE LOSS CAUSATION

As the Complaint alleges, Plaintiffs suffered economic loss when they sold their ADS for less than fair value. A-105-107:¶319-24. It is well accepted that this allegation states a cogent theory of loss causation, and the facts of this case strongly support this allegation. The District Court erred in finding otherwise.

A. An Investor Defrauded into Selling Securities for Less Than Fair Value Suffers Economic Loss

It is hornbook law that a plaintiff defrauded into selling is entitled to "out of pocket" loss equal to "***the fair value of the security he sold minus the fair value of the consideration he received.***" Jacobs, Disclosure and Remedies Under the Securities Laws, § 20:53 (Mar. 2020) (citations omitted). We refer to this method as the "Fair Value Measure" of out-of-pocket loss and utilize this loss causation measure for both Tenderer and Seller claims. A-106:¶320; A-87:¶¶232-23. A chorus of authority affirms that the Fair Value Measure is a correct theory of loss.

First, Plaintiffs' loss causation theory was expressly endorsed by the Supreme Court in the seminal *Mills* case. There, a merger proxy statement omitted to disclose that members of the issuer's board of directors, were affiliates of the would-be acquirer. 396 U.S. at 378. *Mills* stated that monetary relief would be appropriate "if the merger resulted in a reduction of the earnings or earnings potential of their holding." *Id.* Notably, the most prominent method used to assess fair value — the Discounted Cash Flow method[8] — seeks to find the present fair value of a security

[8] Samuel C. Thompson, Jr., A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions, 21 J. Corp. L. 457, 460 (1996) ("The [Discounted Cash Flow] model provides the mechanism for discounting to present value the target's expected future cash flows. . . . Modern finance theory teaches that the value of an investment . . . equals the present value of the cash flows expected to be produced by the investment, discounted at a rate that properly reflects the risk associated with the investment[.]").

by estimating its future "earning potential," and thus the Court seems to be describing ordinary valuation principles.

This point is further emphasized by the *Mills* Court's statement that "if commingling of the . . . merged companies makes it impossible to establish direct injury from the merger, ***relief might be predicated on a determination of the fairness of the terms of the merger at the time it was approved.***" *Mills*, at 389 (emphasis added). This point clearly endorses the Fair Value Measure of damages.

Second, whereas *Mills* endorsed the Fair Value Measure in the context of a merger, the Supreme Court endorsed the same method in the context of ordinary sales in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). That case dealt with allegations that defendants had induced plaintiffs "to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell." *Id.* at 153. The *Affiliated Ute* Court held that "***the correct measure of damages . . . is the difference between the fair value of all that the . . . seller received and the fair value of what he would have received had there been no fraudulent conduct.***" *Id.* at 155 (emphasis added).

Third, the Second Circuit has repeatedly endorsed the Fair Value Measure. In an early § 10(b) case, *Pierre J. LeLandais & Co., Inc. v. MDS-Atron, Inc.*, the Second Circuit rejected a novel equitable estoppel damages theory and provided guidance on the correct measure of damages. It held that plaintiff had failed to prove

the "'fair cash value,' *i.e.*, the appraisal value, of their holdings" as of the sale. 543 F.2d 421, 424-26 (2d Cir. 1976). The *Pierre* court explained that there is "no dearth of corporate valuation experts" that could be relied upon to make such a showing. *Id.* This clearly endorsed the Fair Value Measure, informed by appraisal experts and discovery, as the correct measure of loss.

Then, in *Schlick v. Penn-Dixie Cement Corp.*, the Second Circuit held that loss causation for §10(b) claims in the context of a merger can be shown "rather easily" where the complaint alleges that "as a result of the merger, [plaintiff] was forced to sell his . . . shares to [defendant] on the basis of an exchange ratio that reflected adversely the manipulated market value." 507 F.2d 374 (2d Cir. 1974). Similarly, the Second Circuit held in *Mendell v. Greenberg*, that § 14(a) claims[9] could proceed to trial to determine "the issue of fair value," where plaintiff argued that the "value of the company's stock[,] when assessed in accordance with recognized methods of valuation, was higher than the 'fair' price stated by the directors." 938 F.2d 1528, 1529 (2d Cir. 1991).

The Second Circuit also endorsed the Fair Value Measure in two separate appeals in *Wilson v. Great American Industries, Inc.* First, it held that "determination of damages should include a valuation of [the issuer's] future earning

[9] There is no basis to distinguish between the method of loss causation appropriate in §14(a) and §10(b) case, and we are unaware of any case in this Circuit making any such distinction.

power, viewed prospectively from the date of the merger." 855 F.2d 987, 996 (2d Cir. 1988). Then, on a later appeal it was reiterated that plaintiff's "loss causation or economic harm . . . may be established when a proxy statement prompts a shareholder to accept an unfair exchange ratio for his shares." 979 F.2d 924, 931-33 (2d Cir. 1992) (noting that determination of fair value depends on "valuation methods" and recognizing that the relevant economic concepts "often fall outside the realm of judicial expertise and require reliance on expert testimony").

Most recently, the Second Circuit addressed allegations of loss causation in *Gray v. Wesco Aircraft Holdings, Inc.*, which alleged that a proxy that had published two sets of projection was misleading, because the updated projections were "illegitimate." *Gray v. Wesco Aircraft Holdings, Inc.*, 454 F. Supp. 3d 366, 376 (S.D.N.Y. 2020) ("*Gray*"), *aff'd*, 2021 WL 745310 (2d Cir. Feb. 26, 2021) ("*Gray Appeal*") (summary order).

The District Court in *Gray* rejected the allegation in full – finding that "the most cogent and compelling inference" is that the second set of publicly-known projections were legitimate updates and reflected the most accurate projections. *Gray*, at 400-01. Unsurprisingly, *Gray* rejected the plaintiff's loss causation theory that was premised on the earlier set of projections, because the plaintiff provided no plausible basis to conclude that the earlier projections were more reliable. *Id.* at 403-07. The District Court clearly recognized that this holding was fact-dependent, and

that "***the decision to be acquired could [in another circumstance] cause a loss compared to the decision to remain independent***." *Id.* (emphasis added). In other words, the holding endorsed the view that ***if*** the deal undervalued the shares compared to fair value, that would cause losses.

In the *Gray Appeal*, the Second Circuit briefly noted that plaintiff's "theory of economic loss is based on the difference between the . . . merger share price and what the complaint describes as 'the true value of [the] shares prior to the Merger.'" *Gray Appeal*, at *1. At no point did the Second Circuit disparage this *theory*, and instead evaluated whether there were any allegations to support that theory, before ultimately agreeing with the District Court that there were not. *Id.* Thus, the Second Circuit recently tacitly approved of loss causation based on the Fair Value Measure, even if it ultimately found the specific allegation, which are highly inapposite from the allegations in this case, to be lacking.

Fourth, District Court opinions routinely credit allegations of loss causation based on the Fair Value Measure. *E.g., Baum v. Harman Int'l Indus., Inc.*, 408 F. Supp. 3d 70, 92 (D. Conn. 2019) (recognizing that when "plaintiff asserts that shareholders were misled into approving an acquisition that undervalued the company, loss causation is adequately alleged," and crediting allegations based on that theory); *Lewis v. Termeer*, 445 F. Supp. 2d 366 (S.D.N.Y. 2006) (finding loss causation based on allegation that transaction consideration "did not reflect the true

value"); *Lichtenberg v. Besicorp Grp. Inc.*, 43 F. Supp. 2d 376, 389-90 (S.D.N.Y. 1999) ("[L]oss causation is established when a proxy solicitation would result or has resulted in merger on terms that are unfair to the shareholders.").

Out-of-circuit cases endorsing this measure of loss causation are voluminous. *E.g., In re Hot Topic, Inc. Sec. Litig.*, 2014 WL 7499375, at *10 (C.D. Cal. May 2, 2014) (loss causation well pled upon allegation that higher projections showed "intrinsic value" was greater than merger consideration); *Azar v. Blount Int'l, Inc.*, 2017 WL 1055966, at *10 (D. Or. Mar. 20, 2017) (approving of allegation that "Company's intrinsic value exceeded the" merger price); *In re Envision Healthcare Corp.*, 2019 WL 3494407, at *8 (D. Del. Aug. 1, 2019) (same); *Brown v. Brewer*, 2010 WL 2472182, at *25 (D. Del 2010) (endorsing damages based on fair value measure and permitting appraisal expert report).

B. Plaintiffs' Allegations of Receiving Less Than Fair Value are Plausible and Strong

The Fair Value Measure of loss causation applies with equal force to ADS sold on the stock exchange during the Class Period and to those tendered into the Merger. Plaintiffs will be able to ***precisely*** demonstrate the fair value of their ADS only after discovery and with the assistance of a valuation expert. However, plaintiffs easily meet their pleading burden at this stage by strongly — and certainly plausibly — alleging that fair value exceeded the prices received.

As a threshold matter, the burden of pleading loss causation "is not a heavy one." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 187 (2d Cir. 2015) (citation omitted). Because "pleading rules are not meant to impose a great burden upon a plaintiff," all that is required at this stage is for plaintiff to "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The pleading stage is not the time to test the strength of the allegations of loss causation. *See Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 404 (2d Cir. 2015) (plaintiff "need only allege sufficient facts to raise a reasonable inference" in support of its loss causation theory).[10]

Regardless of the applicable burden, Plaintiffs' allegations of loss causation survive a motion to dismiss because they show the Merger was unfair.

First, the District Court correctly held that "Defendants' statements regarding the fairness of the Merger" were actionable, which necessarily means that Plaintiffs have adequately alleged that the Merger price was less than fair value. SPA-22. JA

[10] The Second Circuit has noted that it has not formally recognized whether loss causation must meet a Rule 8 or Rule 9 pleading standard. *Gray Appeal*, at *1 n.3. Notably, however, "the vast majority of courts in this [Circuit] have required that [pleading] loss causation only meet the notice requirements of Rule 8." *Loreley*, 797 F.3d at 183 (internal quotation marks omitted)). The cases cited above also firmly establish the substance of the applicable standard.

Solar's true financial results and projections that Defendants misrepresented would, by their nature, support a higher price.

Second, within 3-days of closing the Merger the relisting process was publicly announced, and less than 4 months later it was reported that the relisting would be at a valuation of ***approximately three times*** the valuation offered by the Merger. A-57:¶140; A-59-60:¶¶146-50. This much higher valuation, just a short time after the merger, strongly supports the conclusion that the Merger price was less than fair value.

These facts strongly show that the fair value of the ADS substantially exceeded the merger price of $7.55, meaning that under the Fair Value Measure, each Tenderer Shareholder suffered economic loss. A-107:¶ 323. Similarly, the ADS traded at prices ranging from $6.26 to $8.04 during the Class Period. *Id.* A-106:¶ 320. Each shareholder selling below the $7.55 price can show loss causation to the same extent as any Tenderer Shareholder. Finally, the same facts strongly support the conclusion that the fair value of the ADS also exceeded even the high end of the Class Period range – which came nowhere close to JA Solar's relisting value – meaning loss causation is adequately alleged as to sales at the top of that range.

C. The District Court's Loss Causation Analysis Was Erroneous

The District Court did not address whether Plaintiffs had adequately alleged that the fair value of their shares was higher than the price they received upon selling. The District Court also did not explain any reason that Plaintiffs' alleged theory of loss causation — the Fair Value Measure — is not a proper approach.

Instead, the District Court held that "Plaintiffs have failed to adequately plead that the misleading statements regarding JA Solar's financial position kept the price of the Seller Shareholders' Securities artificially low at the time they sold their shares." SPA-29. This analysis is erroneous because (a) it misstates the applicable loss causation standard for seller claims and (b) Plaintiffs did establish that the fraud kept the price of the ADS low at the time of sale.

1. The District Court's Analysis Does Not Comport With Well-Established Loss Causation Principles for Sellers Claims

As explained above, and recognized by courts far and wide, the appropriate method of assessing loss causation for seller claims is the Fair Value Measure. In requiring that Plaintiffs allege that the fraud "kept the price low," the court below erroneously applied principles of loss causation that look at price movements on particular days as they relate to ***purchaser*** claims – not seller claims. Indeed, none of the many cases cited in Section III.A-B, which establish that the Fair Value Measure is an appropriate theory of loss causation in sellers' cases, included such a

requirement – all that is required is that a plaintiff show they sold at a price lower than the fair value. Furthermore, the District Court cited no case that supports such a requirement. Instead, the cases that the District Court cited observe generally that loss causation is the "causal connection between the material misrepresentation and the loss." SPA-28 (quoting *Dura,* 544 U.S. at 342).

Loss causation for purchaser claims and seller claims are necessarily different. A plaintiff in a purchaser case must allege that the misstatement or omission "kept the price high" or artificially maintained because a party who was defrauded into ***purchasing*** stock at an ***inflated*** price does not immediately suffer loss until the stock price ***falls*** in reaction to a corrective disclosure or materialization of undisclosed risk that relates to the fraud. *Dura*, 544 U.S. at 342.

In a defrauded seller case (like this one), there is simply no requirement of a corrective disclosure. Upon selling a share for less than fair value, the plaintiff immediately suffers a loss. In other words, the "causal connection" between the fraud and the injury is the ***sale*** at an unfairly low price. No further events — beyond the sale at an unfairly low price — are required for plaintiff to suffer loss. Unlike in the defrauded purchaser scenario, where plaintiffs show loss by pointing to the amount that the stock dropped on a particular day, the overwhelming authority discussed above establishes that the way for a defrauded seller to show harm is to offer sufficient allegations that the fair value of their shares exceeded the sale price

— as Plaintiffs have done here (*see* Section III.B.). And, the plaintiffs must adequately allege that the sale was connected to, or caused by, the defendants' fraud, but ***that requirement is established by meeting the "transaction causation" requirement*** (*see* Section II).

Plaintiffs have also tied their loss even more closely to the fraud because Defendants' misstatements of JA Solar's fair value and financial performance, as well as of Jin's relisting plan, misrepresented the Company's value in the Merger. This direct connection between Defendants' misstatements and JA Solar's value surpasses what Plaintiffs are required to plead in support of the Fair Value Measure of loss causation. But there is no support whatsoever for the District Court's *additional requirement* that Plaintiffs plead how Defendants' specific misstatements "kept the price low" in terms of how the price reacted to those statements over the course of the Class Period.

The one seller case cited in the Order's analysis of loss causation is not to the contrary. *See* SPA-29-30 (citing *Collier v. Aksys Ltd.*, WL 1949868 (D. Conn. Aug. 15, 2005), *aff'd* 179 F. App'x 770 (2d Cir. 2006)). That opinion did not deal with ordinary stock sales — it dealt with short selling, meaning that plaintiff had ***opened*** a position (a short contract), wherein the plaintiff would profit if the price of the

stock fell.[11] The *Collier* court held that a short seller actually experiences losses only if the price in fact rises. In the inverted world of a short sale, the defrauded seller opens a position with a sale, and then has economic exposure to the company thereafter, whereas the ordinary defrauded seller realizes economic injury when he or she sells shares for less than fair value, which injury is not contingent on any future events. Short seller cases therefore are inapposite.

This exact same point was made in *Levie v. Sears, Roebuck & Co.*, which credited allegations that ordinary defrauded sellers could pursue claims based on the Fair Value Measure, but rejected similar claims on behalf of anyone who sold short "and then covered that sale by purchasing at a lower price before the fraud was revealed." 496 F. Supp. 2d 944, 949 (N.D. Ill. 2007).

In conclusion, the District Court incorrectly required proof, in the form of price movements in response to the Defendants' misstatements, that the fraud "kept the price" low, as part of its loss causation analysis. There is no legal support for such a requirement. Instead, once Plaintiffs (both the Selling and Tenderer Shareholders) adequately allege materially false statements, and transaction causation (*i.e.*, the causal connection between the fraud and the ***sales***), their burden under loss causation is only to allege that their sales were at an unfairly low price.

[11] Through a short sale, the short seller contracts to borrow a share, sells that share, and then hopes to profit by repurchasing the share at a lower price in the future.

2. Even Under the District Court's Standard, Plaintiffs Allege the Stock Price Was "Kept…Low" – As Defendants' Misstatements Kept it Lower Than the Fair Value

Even if it were required, the Complaint would easily satisfy the requirement of establishing that Defendants' misstatements "kept the price" of JA Solar's ADS low, as the Complaint alleges that Defendants' misstatements caused the price to be deflated – below the fair value – because they misrepresented the Company's fair value. *See* A-105-107:¶¶319-24.

Additionally, as explained in Section II, Plaintiffs have pled that the ADS traded in an efficient market, as part of Plaintiffs' invocation of the *Basic* presumption of reliance, and the law clearly supports the conclusion that Defendants' fraud was incorporated into the market price and thus kept the price artificially low.

The District Court seemed to doubt this conclusion solely because the market price for JA Solar's ADS increased on several of the days in which the misstatements were made. SPA-29-30. But of course, this price movement says nothing about what the fair value of the shares ***should be***; and indeed the allegations support that the stock price should have been much higher than what was paid to investors. In other words, the price may have gone up when the merger was announced, but, even having risen slightly, ***the price was still lower than it should have been***. This price reaction is also utterly unsurprising, given that the market was defrauded into

thinking the Merger was fair, and each subsequent disclosure brought investors one step closer to what they falsely believed was a good deal. Under the District Court's reasoning, it would be virtually impossible to allege loss causation in the merger context, because buyers typically offer a premium to the company's prior price and the market price moves toward that transaction price when the company's shareholders are unwittingly tricked into selling their shares for less than their fair value.

In any case, these price increases do not defeat loss causation at the pleading stage. ***At most,*** they could be seen as relevant to an attempt to rebut the *Basic* presumption at class certification (***not*** rebutting loss causation), but the evidentiary issue of rebutting the presumption is not ripe on this record. *See Halliburton*, 573 U.S. at 272 ("market efficiency is a matter of degree," and thus "a matter of proof" of the extent of price impact); *Lewis*, 445 F. Supp. 2d at 373 n.10 (holding this issue "can be dealt with [at] class certification"). Here, those price increases have not been put in any factual context, no expert reports have analyzed their significance, and there is not even evidence that they were statistically significant or firm specific. However, submission of such evidence, and certainly drawing the related factual conclusions, would be premature at this stage. *Id.*

The District Court cited *Collier* for the proposition that loss causation is disproven by price increases on the day of the misstatements. SPA-29-30 (citing

2005 WL 1949868). But *Collier* (which addressed a short seller (*supra* at 49-50)) did not address the price movement on the day of the misstatements; it addressed price increases on the day of the supposed *corrective disclosure*. 2005 WL 1949868, at *12. *Collier* thus stands for the ordinary rule that a damages theory based on a ***corrective disclosure*** must plead that the stock price declined on the correction, and does not support any rule about how the price moves on the day of the misstatements. It also does not support any rule where, as here, losses are not measured by a corrective disclosure.

IV. PLAINTIFFS' CONTROL PERSON CLAIMS SHOULD BE SUSTAINED

Control person claims must show a primary violation, control, and culpable participation. *Sjunde AP-Fonden v. Gen. Elec. Co.*, 417 F. Supp. 3d 379, 415 (S.D.N.Y. 2019); 15 U.S.C. § 78t(a). The District Court dismissed the control person claims entirely for failure to plead a primary violation and therefore those claims should be revived. SPA-18.

V. THIS COURT SHOULD AFFIRM THE LOWER COURT'S HOLDINGS ON FALSITY AND SCIENTER

The District Court has already found liability as to Defendants Jin and JA Solar, holding that they made false and misleading statements with scienter – defrauding shareholders of hundreds of millions of dollars. SPA-23-26. These rulings should be affirmed.

A. The District Court Held Correctly That Defendants' Fairness Statements Are Actionable

The Order held correctly that Plaintiffs "plausibly allege that Defendants' statements regarding the fairness of the Merger and JA Solar's financial position were misleading." SPA-23.

In particular, the Order held that the Complaint adequately alleges "that the projections for the fourth quarter were vastly different than what was provided," "that the actual results for the first three quarters of 2017 far exceeded even what was reported in the Proxies," and "that the restructuring report JA Solar and Tianye issued in connection with its relisting provided operating income for 2015 through 2017 that far exceeded what was reported in [JA Solar's Proxies] and SEC filings." SPA-22-23. The District Court concluded that "Defendants could not have possibly believed that the projections JA Solar provided were accurate" and that their fairness assertions were misleading. SPA-22.

The projections in the Proxies were facially implausible based on JA Solar's actual performance because they (1) understated the Company's revenue and income for the fourth quarter of 2017 by between 58% and 76% even though the projections were for only half of that quarter and (2) misrepresented the Company's historical performance for 2015 through the first three quarters of 2017. A-50-52:¶¶124-27, A-60-62:151-54, A-82:¶¶216-17, A-90-91:¶¶252-53, SPA-22.

The District Court's ruling that the fairness statements were misleading applies to three related categories of misstatements in the Proxies: (1) Defendants' descriptions of the Merger price as fair to JA Solar's shareholders A-38-39:¶91, A-78-80:¶¶199-211, A-88:¶¶243-44, A-91:¶254; (2) the projections that formed the basis for those fairness opinions A-50-52:¶¶124-27, A-82:¶¶216-17, A-90-91:¶¶252-53; and (3) statements describing JA Solar's financial performance from 2015 through the first three quarters of 2017. A-60-62:¶¶151-55. *See also* ¶ A-70-71:¶173(b)-(c).[12]

1. Defendants' Misleading Assertions That the Merger was Fair

The District Court's decision is well-supported by the long line of cases holding that securities fraud claims arise when proxies misrepresent the basis for a transaction's fairness. *See, e.g.*, *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999) (holding proxy was actionable if the report that it was based on used the false assumption that lessee was in compliance with lease obligations); *Bricklayers & Masons Loc. Union No. 5 v. Transocean Ltd.*, 866 F. Supp. 2d 223, 244 (S.D.N.Y. 2012); *In re Livent, Inc. Sec. Litig.*, 148 F. Supp. 2d 331, 346, 366 (S.D.N.Y. 2001); *In re Trump Hotels S'holder Derivative Litig.*, 2000 WL 1371317, at *14-16 (S.D.N.Y. Sept. 21, 2000); *Capital Real Estate Inv'rs Tax Exempt Fund Ltd. P'ship*

[12] Defendants made the same misrepresentations in all versions of the Proxies. A-86-91:¶¶ 231, 237, 243-44, 249-55, 258, A-95:¶283.

v. Schwartzberg, 929 F. Supp. 105, 115 (S.D.N.Y. 1996) ("[w]here an issuer recommends a course of action for a stated reason and the evidence then establishes that it did not act for that reason, it may be held liable").

This remains the law even where fairness statements or projections are analyzed as statements of opinion under *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 176-77 (2015), when defendants do not have a basis for making those statements. SPA-21-22. *See In re Avon Sec. Litig.*, 2019 WL 6115349, at *17 (S.D.N.Y. Nov. 18, 2019) (holding beliefs are irrelevant when statements conflict with omitted information); *In re Lehman Bros. Sec. & ERISA Litig.*, 131 F. Supp. 3d 241, 253-54, 258-59 (S.D.N.Y. 2015) (holding a valuation is misleading if it is not supported by "accepted principles and relevant data").

Similarly, *In re Mindbody, Inc. Securities Litigation*, 2020 WL 5751173 (S.D.N.Y. Sept. 25, 2020), where the defendant company substantially outperformed what it had previously projected for its most recent quarter, Judge Caproni held that it was misleading for the company to promote the merger price and supposed premium as beneficial to shareholders based on outdated projections while omitting updated "earnings [that] were known to have beaten projections." *Id.* at *20 n.19.

2. The Projections and Historical Financial Results in the Proxies Are Independently Actionable

In addition to misrepresenting the fairness of the Merger, the projections that Defendants included in the Proxies are independently actionable false and misleading statements. Many decisions hold that defendants may not use unfounded projections to support a merger. *See Mindbody*, 2020 WL 5751173, at *12 n.11 (disclaimers cannot insulate disproven projections.); *Lickteig v. Cerberus Cap. Mgmt., L.P.*, 2020 WL 1989424, at *3, 10-11 (S.D.N.Y. Apr. 26, 2020) (holding valuation multiple was actionable where figure was "grossly understated"); *Baum*, 408 F. Supp. 3d at 88 (holding "a projection that is seriously undermined by undisclosed facts or unreasonable assumptions . . . is likely to be false" (quoting *Hot Topic*, 2014 WL 7499375, at *6)); *Azar*, 2017 WL 1055966, at *8 (sustaining claim that "pessimistic financial projections [were presented] to shareholders to justify a merger").

The District Court also explained that the facts here are stronger than in another recent decision it issued in a case involving a management buyout of a Chinese company, *In re Shanda Limited Securities Litigation*, 2020 WL 5813769 (S.D.N.Y. Sept. 30, 2020), because of the extent to which the basis for the projections here were contradicted by the Company's past performance. SPA-22-23. The projections that formed the basis for JA Solar's valuation were misleading because they were based on the Company's misstated historical performance from

2015 through the first three quarters of 2017, and were completely unrealistic for the fourth quarter of 2017. This misstated historical performance contradicted the Company's internal data that it later revealed when Defendants no longer had an incentive to artificially deflate the Company's value in the Merger. A-50-52:¶¶124-27, A-82:¶¶216-17, A-90-91:¶¶252-53; A-60-61:¶¶151-54.

The false historical financial results that Defendants used to support the projections and, in turn, fairness assessments, are therefore independently actionable misstatements. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 246 (2d Cir. 2016) (holding forecast's forward-looking and present elements are severable); *Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd.*, 620 F.3d 137, 142 (2d Cir. 2010) (distinguishing between statements concerning "future performance of newly acquired businesses" and "omissions of information concerning existing financial and operational difficulties").

B. The District Court Held Correctly That Defendants' Jin and JA Solar Acted with Scienter

The Order also held correctly that Plaintiffs "have adequately pleaded that JA Solar and Defendant Jin had a motive and opportunity to commit fraud." SPA-26. The Court credited the fact that Jin was JA Solar's CEO, largest shareholder before and after the Merger (increasing his ownership stake to 79.8%), and Executive Chairman of its Board of Directors, and received ***$440 million following the Merger***. *Id.*; *see Buxbaum*, 2000 WL 33912712, at *14, 19 (holding a buyer who

"thinks he can save money by lying[,] has all the motive and the opportunity"); *Buxbaum*, 196 F. Supp. 2d 367, 376 (S.D.N.Y. 2002); *Shanda*, 2019 U.S. Dist. LEXIS 171592, at *22 (holding scienter adequately pled based on motive alone).

The Court recognized that Jin "stood to gain in a concrete and personal way by materially misrepresenting the financial position of the Company that resulted in approval of the Merger at a price favorable to Defendant Jin." SPA-25. The Court also correctly imputed Jin's scienter to JA Solar based on Jin's seniority within JA Solar and his pivotal role within the Buyer Group. *Id.* (citing to *Thomas v. Shiloh Indus., Inc.*, 2017 WL 2937620, at *3 (S.D.N.Y. July 7, 2017)).[13]

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court reverse the Judgment of the District Court and remand for further proceedings. To the extent that this Court finds the claims defective in a manner that could be cured by amendment, Plaintiffs respectfully request the action be remanded with leave to amend. *See Loreley*, 797 F.3d at 190.

[13] While the Plaintiffs adequately alleged scienter under the conscious misbehavior and recklessness prong, the District Court did not address these allegations, finding motive and opportunity sufficient. In the unlikely even the Court reverses on the motive issue, Plaintiffs request that the Court remand for the District Court to consider recklessness in the first instance. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012) (remanding arguments that "the district court did not consider . . . in the first instance").

Dated: March 19, 2021

Respectfully submitted

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Dated: March 19, 2021

/s/ Jeremy A. Lieberman
Jeremy A. Lieberman

SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ODS CAPITAL LLC ET AL,

Plaintiffs,

-against-

JA SOLAR HOLDINGS CO. LTD ET AL,

Defendants.

18-CV-12083 (ALC)

MEMORANDUM AND ORDER

ANDREW L. CARTER, JR., District Judge:

ODS Capital LLC and Altimeo Asset Management commenced this securities action on December 20, 2018 against JA Solar Holdings Co. Ltd, Boafang Jin, and Shaohua Jia ("Defendants") alleging that Defendants participated in a scheme to defraud JA Solar's ADS holders into selling their securities at a price artificially depressed below its fair value. (ECF No. 1). Defendants now move to dismiss the amended complaint. (ECF No. 54.) For the reasons that follow, the Court grants Defendants' motion to dismiss.

FACTUAL BACKGROUND

Plaintiffs purport to bring claims on behalf of two distinct classes of Plaintiffs. The first class of Plaintiffs covers Shareholders who sold their JA Solar Securities during the Class Period and prior to the completion of the Merger ("Seller Shareholders"), and the second class of Plaintiffs concerns Shareholders who held their JA Solar Securities through the close of the class period and ultimately sold/tendered their securities in the Merger for either $7.55 per American Depositary Share ("ADS") or $1.51 per common share ("Tenderer Shareholders"). Am. Compl. at ¶¶ 320, 323.

Defendant JA Solar

JA Solar is a Chinese solar power company founded by Boafang Jin ("Jin") in 2005. Am. Compl. ¶ 53, 55. JA Solar's ADS were listed on the NASDAQ, which would remain JA Solar's only publicly traded securities from the time of its IPO through the completion of the Merger. *Id.* Initially, JA Solar's primary business had been the manufacturing and sale of solar cells. *Id.* at ¶ 56. However, in 2009, 2013, and 2015, JA Solar expanded its business, manufacturing silicon wafers and solar modules and engaging in project development and the sale of electricity. *Id.* at ¶¶ 56–67. JA Solar sells its products in over 90 countries, and for the years ending on December 31, 2015, 2016, and 2017, JA Solar generated approximately $2 billion, $2.3 billion, and $2.9 billion in total revenue respectively. *Id.* at ¶ 58.

Defendant Jin

Plaintiffs allege Defendant Jin had multiple ties to JA Solar, including controlling the Jinglong group of entities, which owned the largest stake in JA Solar prior to the Merger and were part of the Buyer Group that continued to own a substantial stake in the Company after the Merger; did substantial business with JA Solar in related transactions; and facilitated the relisting transaction following the Merger. *Id.* at ¶ 59. Specifically, Jinlong BVI, part of the Jinlong group of entities, was JA Solar's largest shareholder prior to the Merger, owning approximately 16.3% of the Company before and after the Merger. *Id.* at ¶ 60. Defendant Jin owned approximately 32.96% of Jinlong BVI and served as its sold director. *Id.* Additionally, Jin controlled Hebei Jinlong as the largest shareholder, owning 74.85% of the Company. *Id.* at ¶ 62.

Defendant Jia

Defendant Jia was a member of JA Solar's Board of Directors and Chairman of the two-person Special Committee, who ultimately recommended that the Board approve the Merger.

The Instant Merger

On June 5, 2014, the Buyer Group initially submitted a preliminary proposal letter to JA Solar's Board of Directors, indicating an intention to acquire all of the outstanding shares of the Company that was not presently owned by the Buyer Group in a go private transaction for $9.69 per ADS in cash. *Id.* at ¶ 67. The Board of Directors then established a Special Committee to consider the proposal, including "the power and authority to . . . (i) investigate, evaluate, discuss, and negotiate the Proposed Transaction, (ii) make reports and recommendations to the Board as the Special Committee considers appropriate with respect to the Proposed Transaction, (iii) retain any advisors . . . and outside counsel, as the Special Committee deems appropriate . . . and (iv) exercise any other power that may be otherwise exercised by the Board and that the Special Committee may determine is necessary or advisable to carry out and fulfill its duties and responsibilities through the abandonment or completion of the Proposed Transaction." *Id.* at ¶ 68.

The Special Committee obtained Houlihan Lokey ("Houlihan") as its independent financial advisor and Gibson, Dunn & Crutcher LLP as its independent U.S. Legal advisor. *Id.* at ¶ 69. The go private transaction was then put on hold from October 27, 2015 to May 3, 2017 because the Buyer Group failed to secure adequate financing for the transaction. *Id.* at ¶ 70.

On June 6, 2017, the Buyer Group submitted a new proposal for the go private transaction and offered $6.80 per ADS in cash. *Id.* As justification for the lowered offer, the Buyer Group cited "(i) significant volatility in global financial markets hindering the Buyer Group's ability to secure financing, (ii) poor short term outlook for the solar industry, (iii) increased uncertainty in trade policy and government subsidies affecting the Company's growth prospects, and (iv) economic slowdown and challenges in China." *Id.* at ¶ 71. Negotiations ensued with the Special

Committee, and on October 27, 2017, the Buyer Group offered $7.55 per ADS and $1.51 per share as its best and final offer. *Id.* at ¶ 72.

Thereafter, Houlihan determined that the consideration of $7.55 per ADS was fair. *Id.* at ¶ 73. The Special Committee relied on Houlihan's analysis in reaching their conclusion that the Merger was fair and their recommendation to the Board that they should authorize and approve the Merger. *Id.* at ¶ 90. JA Solar provided information to Houlihan for his analysis, and Houlihan "relied upon and assumed, without independent verification, the accuracy and completeness of all data . . . made available" to him. *Id.* at ¶ 91. Specifically, Houlihan accepted the financial, economic, market conditions provided and assumed that they were prepared in good faith, expressing no opinion with respect to such projections or the assumptions on which they are based. *Id.*

On October 27, 2017, the Special Committee approved the proposed Merger and recommended that the Company's Board of Directors approve the transaction. *Id.* at ¶ 75. Shareholders that exercised their right to dissent from the Merger under Cayman Islands Law, and the shares of the Rollover Shareholders that were a part of the Buyer Group were excluded from receiving the Merger consideration. *Id.* at ¶ 76. The Board, excluding Defendant Jin, unanimously approved the proposed Merger, concluding that it was "fair and in the best interests of the Company and Unaffiliated Security Holders. *Id.* at ¶ 77. On November 17, 2017, the Company and Buyer Group executed the Merger agreement for the proposed transaction. *Id.* at ¶ 78.

Plaintiffs allege that the Special Committee and the Board promoted the Merger as advisable based on alleged poor economic conditions of JA Solar and the market. *Id.* at ¶ 79.

Proxy Materials

Plaintiffs allege that the Proxy Materials were misleading. *Id.* at ¶ 84. As the Merger approval would require at least two-thirds of the Company's shares that were present and voting, between November 17, 2017 and February 1, 2018, plaintiffs allege that "Defendants authorized the filing of materially false and misleading Proxy Materials with the SEC." *Id.* For instance, Shareholders had the right to dissent from the proposed Merger and exercise their appraisal rights to receive payment of the fair value of their shares. *Id.* at ¶ 85. According to Plaintiffs, exercising the right to dissent was discouraged. *Id.* The Proxy Materials warned that dissenting was risky as the fair value of the shares determined by Cayman Islands Companies Law was uncertain and could be less than the Shareholder would receive pursuant to the Merger Agreement. *Id.* Consequently, the Proxy Materials instructed that Cayman Islands Companies Law was technical and complex and advised Shareholders to consult Cayman Islands legal counsel if they wished to exercise dissenters' rights. *Id.* Plaintiffs further allege that dissenting was more difficult for ADS holders because the Proxy Materials advised ADS holders would have to go through "extra complicated procedural steps and bear the extra costs of doing so." *Id.* at ¶¶ 86–87. Due to the misleading Proxy Materials, Plaintiffs state that most JA Solar Securityholders were convinced not to take the risk of dissenting from the Merger. *Id.* at ¶ 89.

Additionally, Plaintiffs allege that the Proxy Materials made assurances that no transaction to relist in China was under consideration; expressly disclaimed that any such transaction was in the works; and affirmed that there was no viable alternative to the proposed sale of the Company to the Buyer Group *Id.* at ¶¶ 99–102. JA Solar made further assurances in December 2017 through their website, posting a notice that again assured investors that there were no plans to relist its shares in China. *Id.* at ¶ 103. On January 11, 2018 and February 1, 2018, JA Solar published the

Amended Proxy Materials and the Second Amended Proxy Materials, reproducing statements concerning the Buyer Group's intention not to relist its shares in China. *Id.* at ¶¶ 105–106. A final amendment would be issued on July 16, 2018, following the completion of the Merger. *Id.* at ¶ 118.

Shareholder Vote

Approval of the Merger required an affirmative vote of Securityholders representing at least two-thirds of JA Solar's shares that were present and voting. *Id.* at ¶ 82. On March 12, 2018, 90% of the Company's total outstanding ordinary shares presenting in person or by proxy voted in favor of the Merger. *Id.* at ¶¶ 107–108. Approximately 56.5% of the Company's total outstanding ordinary shares presented in person or by proxy at the meeting. *Id.* Additionally, 10% of the Company's ordinary shares exercised their dissenting rights and objected to the Merger. *Id.* at ¶ 109. Since 10% of the Company's ordinary shares objected to the Merger, the Company and the Parent Parties had the right to terminate the transaction unless the Parent Parties irrevocably waived that condition within 10 business days. *Id.* at ¶ 110. The Company stated that it would "update its shareholders if and when it receives from the Parent Parties their decision with respect to their granting of the waiver in due course." *Id.* at ¶ 111. The Company never updated the Shareholders, and the Merger closed with neither the Company nor the Buyers terminating the transaction. *Id.*

Following the Merger, Defendant Jin's stake in the Company increased from 5.4% to 79.8%, Defendant Jin would continue to serve as the Chairman of the Board and CEO of the surviving Company, and Jinglong BVI, which Defendant Jin owned a 32.96% stake in, had an ownership interest of 16.3%. *Id.* at ¶¶ 13, 116. According to Plaintiffs, the plan for the Merger was to allow JA Solar insiders to take over 100% of JA Solar for far below the Company's actual value.

Id. at ¶ 114. Notwithstanding Defendant Jin, other members of Buyer Group kept their same standing in the Company. *Id.* at ¶ 115. Plaintiffs, however, allege that those members would benefit from the plan to relist the Company in China at a higher valuation.

On July 16, 2018, the Merger was completed, and JA Solar no longer existed as publicly traded and became a subsidiary of an entity owned by the Buyer Group. *Id.* at ¶ 117. The previous Company's ordinary shares were canceled in exchange for the right to receive $1.51 in cash per share and the Company's ADS was cancelled in exchange for the right to receive $7.55 in cash per ADS. *Id.*

Post Shareholder Vote and Merger

On April 30, 2018, after the shareholder vote, JA Solar released its Annual Report for 2017. *Id.* at ¶ 120. Despite the projections in the Proxy Materials, JA Solar reported the revival of industry demand, as well as expected growth in 2017 and 2018 due to developing and emerging markets such as India and China. *Id.* at ¶ 121. Additionally, regarding JA Solar's finances, the Company reported a total revenue of $3.022 billion and a net income of $46 million. *Id.* at ¶ 125.

In the Proxy Materials released on January 11, 2018 and February 1, 2018, the Company projected a total revenue for 2017 of $2.596 billion and an estimated net income of $39 million. Plaintiffs allege that JA Solar's financial projections were 16% and 18% lower than their total revenue and net income estimates for 2017, and that the projections were crucial in JA Solar Securityholders' decision to vote in favor of the Merger. *Id* .at ¶ 125. Additionally, Houlihan relied exclusively on his financial analysis in determining the Merger's fairness, which was based on underestimated projections provided by the Company. *Id.* at ¶ 128.

Plaintiffs allege the Securityholders approved the Merger based on the recommendation and/or fairness determinations provided by the Proxy Materials, the Board, Houlihan, and the

Buyer Group, which relied upon projections and misleading characterizations of the Company's business conditions.

Relisting Rumors and Confidential Witnesses

Despite assuring investors that there were no plans to relist, Plaintiffs allege that there was actually a present plan in place for JA Solar to relist its shares. Plaintiffs identify a statement from Jin on November 19, 2017 and four confidential witnesses ("CWs") that they allege are indicative the Company's plan to relist its shares following the Merger. *Id.* at ¶ 131. First, Plaintiffs allege that Jin stated at the "2017 Entrepreneur 'To conscience' (Beijing) Forum" that JA Solar had plans to return to the Chinese capital Markets in a publicly traded forum within the following two or three years. *Id.* Plaintiffs further state that the informal marks were by no means a definitive statement of the Company's plans. *Id.*

Plaintiffs' first CW was a sales manager in JA Solar's Shanghai office from before the start of the Class Period in 2018; reported to a senior member of the Sales group for Mainland China; and recalled hearing about the relisting plan at the beginning of 2018. *Id.* at ¶ 133.

CW 2 was a financial analyst with the Beijing office from 2015 until after the Merger closed in July 2018; reported to a senior member of the financial analysis team; and stated that he first heard about the delisting plan sometime in 2017 and heard that the Company probably would be relisted on the A-shares Market after hearing about the delisting plan. *Id.* at ¶ 135.

CW 3 worked on financial analysis in the Beijing Office from before the start of the class period to 2018; reported to a senior member of JA Solar's financial analysis group; and recalled seeing a message on JA Solar's website telling people not to believe the rumors regarding the relisting and that even after this message, the rumors regarding the relisting persisted. *Id.* CW 3 further explained that in May or June of 2018 an audit team from BDO China came to the Beijing

office, and CW 3 inquired about which capital market the Company was going to be relisted in, and one of the auditors replied that it was not decided. *Id.* Plaintiffs allege that this shows that by May or June of 2018, JA Solar was far enough in its relisting plans to have its Chinese auditor begin its audit that would be necessary for the transaction to take place, which would normally not occur until the final stages of the process. *Id.* at ¶ 136.

CW 4 worked on JA Solar's sales staff from 2016 to 2018. CW 4 heard about the delisting plan in Spring of 2018 and heard from a colleague that JA Solar wanted to go back to Mainland China. *Id.* at ¶ 138.

JA Solar Announces the Relisting

On July 19, 2018, three days after the Merger closed, JA Solar and Tianye Tonglian ("Tonglian") signed their agreement for Tonglian to acquire JA Solar by issuing 100% of JA Solar's equity. *Id.* at ¶ 140. This deal operated as a backdoor listing, which is "a way for a company to go public without the hassle and costs of a traditional initial public offering" and allowed JA Solar to return to the stock market at "multiple of the value of which it was taken private" by relisting on the Shenzhen Stock Exchange. *Id.* at ¶¶ 140, 144.

Thereafter on July 23, 2018, Tonglian published a "Public Notice on Material Asset Restructurings Agreement," announcing the intent to conduct the backdoor listing of JA Solar through Tonglian purchasing a 100% stake in JA Solar. *Id.* at ¶ 142. After the transaction, the letter of intent stated that Defendant Jin would become the controller of the listed Company. *Id.* On November 4, 2018, January 21, 2019, and January 22, 2019, the national financial media in China, Bloomberg, and China Business News reported the deal, estimating that JA Solar could place an estimated $1 billion worth of net assets into Tonglian, which was multiple times the value at which JA Solar went private. *Id.* at ¶ 146, 147, 149. Bloomberg further reported that purchase of JA

Solar's equity for 1.1 billion is around 11 times JA Solar's net profit in 2017 and it is also more than three times JA Solar's earlier valuation. *Id.* at ¶ 150.

Plaintiffs allege that this higher valuation in China was Defendant Jin's and the Buyer Group's primary motivation for completing the Merger. *Id.* at ¶ 148. Plaintiffs further allege that in the restructuring report that JA Solar and Tonglian issued regarding the relisting, JA Solar reported operating income for 2015 through 2017 that exceeds what was reported in the Proxy Materials and other SEC filings when it was listed on the NASDAQ. *Id.* at ¶ 152. Plaintiffs allege that these projections in the Proxy Materials were deflated in comparison to the figures that JA Solar reported in China in connection with the relisting. *Id.* at ¶ 153. Presently, the relisting continues to progress through the Chinese regulatory approval process. *Id.* at ¶ 156.

Timing of the Relisting

Plaintiffs allege that the relisting could only have been announced after a lengthy period of deal making, but state that the exact details of JA Solar's deal making is largely unknown. *Id.* at ¶¶ 157, 160. Plaintiffs rely on an expert in Chinese M&A and capitals market transactions in explaining the steps it would take to reach the stage of announcing the relisting to the public. *Id.* at ¶¶ 157–160. Plaintiffs allege that hiring a financial advisor or investment Bank and a Legal advisor; identifying a potential transaction counterparty; finding the appropriate relisting shell; auditing and accounting compliance; performing diligence on potential transaction counterparty; conducting regulatory assessments; negotiating preliminary transaction terms; removal of variable interest entity structure; and divesting the shell Company of its assets would normally take more than 12 months for a Company to agree to announce an asset restructuring deal. *Id.* at ¶¶ 161–171. Therefore, plaintiffs allege that the relisting must have been underway by July 2017, before the

announcement of the Merger in November 2017 and the publication of the preliminary Proxy Materials on December 11, 2017. *Id.* at ¶ 172.

False and Misleading Statements and/or Omissions

Plaintiffs allege that Defendants made several materially false and misleading statements and omissions during the class periods, including statements in the Preliminary, Amended, and Second Amended Proxy Materials, and JA Solar's website concerning an intention not to relist; statements in the Preliminary, Amended, and Second Amended Proxy Materials that presented the transaction as fair; statements in the Preliminary, Amended, and Second Amended Proxy materials regarding the Special Committee's, the Board's, and the Buyer Group's determination that the transaction was fair; statements regarding the triggering of the dissenting shareholder condition where JA Solar stated it intended to update Shareholders regarding the Parent Parties decision whether to terminate the Merger Agreement.

Scienter

Plaintiffs allege that Jin and Jia acted with scienter in making the materially false and misleading statements and omissions as they had actual knowledge that the statements and omissions were false and misleading, or acted with reckless disregard for the truth or falsity of those statements and omissions. *Id.* at ¶ 292.

Plaintiffs further allege Defendant Jin had the motive and opportunity to commit the fraud as he had the ability to influence information contained in the Proxy Materials; had the opportunity to vote his substantial amount of shares as he saw fit to further cement the Merger; and stood to own 79.8% of the Company following the Merger. *Id.* at ¶ 293. Due to the aforementioned, Plaintiffs allege Defendant Jin had the motivation to complete the transaction at the lowest price possible, and thus by deflating the value of the JA Solar Securities through the fraudulent scheme,

Defendant Jin subsequently reduced the money he needed to spend to acquire JA Solar. *Id.* at ¶ 294. Through the defrauding of JA Solar Securities, Plaintiffs allege Defendant Jin received a windfall of at least $440 million. *Id.*

According to Plaintiffs, Defendant Jin and Defendant Jia, by virtue of their position and control of the company, would have been involved and apprised of the backdoor listing negotiations that predated and coincided with the Merger process. *Id.* at ¶¶ 301–302.

Loss Causation

Plaintiffs allege that through Defendants' scheme to deceive the market by misrepresenting the facts and making certain omissions, Class members relied on the misrepresentations and on the market price of JA Solar Securities during the Class Period and sold their shares at a depressed price. *Id.* at ¶ 319. Plaintiffs allege that the Class members did not receive fair value for their shares in the Merger, and the that the true value of the ADS far exceeded the Merger consideration. *Id.* Plaintiffs state that this is supported by the value of the company during the relisting, the eventual disclosure of financial results that were significantly higher than the projections used to evaluate the transaction. *Id.*

Plaintiffs additionally state that Class members who sold their shares during the Class period suffered economic loss as their shares were sold at a depressed value and were deprived of fair value of their shares through the false and misleading statements. *Id.* at ¶ 320. The false and misleading statements deterred Shareholders from making an informed decision in exercising their right to dissent and seek appraisal. *Id.* at ¶ 322. As to the Plaintiffs who held their JA Solar Securities through the close of the Class Period sold their JA Solar Securities for either $7.55 per ADS or $1.51 per common share; however, Plaintiffs allege these shares were worth far more than

the transaction price as evidenced by the relisting in China which valued JA Solar at multiple times the Merger price. *Id.* at ¶ 323.

PROCEDURAL HISTORY

Plaintiffs commenced this action on December 20, 2018. (ECF No. 1.) On March 8, 2019, the Court appointed Altimeo Asset Management and ODS Capital LLC as Co-lead Plaintiffs. (ECF No. 15.) On June 14, 2019, Plaintiffs filed an amended complaint, (ECF No. 32), and on February 28, 2020, Defendant moved to dismiss the amended complaint. (ECF No. 54.)

LEGAL STANDARD

I. Motion to Dismiss

When deciding a motion to dismiss, the Court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp*., 482 F.3d 184, 191 (2d Cir. 2007). However, the Court need not credit "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Claims should be dismissed when a plaintiff has not pleaded enough facts that "plausibly give rise to an entitlement for relief." *Id.* at 679. A claim is plausible "when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678 (citing *Twombly*, 550 U.S. at 556). While not akin to a "probability requirement," the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). Accordingly, where a plaintiff alleges facts that are "'merely consistent with' a defendant's

liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

II. Federal Rules of Civil Procedure 9(b)

Under Rule 8(a) of the Federal Rules of Civil Procedure, pleadings must contain only "a short and plain statement" of the basis for the court's jurisdiction and of the claim showing that the pleader is entitled to relief, and a demand for the relief sought. Fed. R. Civ P. 8(a). However, where, as here, Plaintiffs allege fraud claims under § 10(b) of the Exchange Act, the complaint is subject to the heightened pleading requirements of Federal Rules of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Rule 9(b) requires that the complaint "state with particularity the circumstances constituting fraud or mistake." To satisfy the particularity requirement, a complaint must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 403 (2d Cir. 2015).

The PSLRA holds private securities Plaintiffs to an even more stringent pleading standard. Under the PSLRA, Plaintiffs must "(1) specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading; and (2) state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (internal citation and quotation marks omitted) (quoting 15 U.S.C. § 78u-4(b)). To determine that an inference of scienter is strong, the court must decide whether "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324.

DISCUSSION

III. Section 10(b) of the Securities Exchange Act and Rule 10b-5

To state a claim under both Section 10(b) of the Exchange Act and Rule 10b-5, Plaintiffs must show: "(i) a material misrepresentation or omission; (ii) scienter; (iii) a connection with the purchase or sale of security; (iv) reliance by the plaintiff(s); (v) economic loss; and (vi) loss causation." *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010). *See also* 15 U.S.C. § 78u–4(b). Plaintiffs, here, allege a scheme to depress the market by misrepresenting JA Solar's financial position and withholding a plan to relist JA Solar after the Merger, thereby allowing Defendants to purchase JA Solar at the depressed price at the expense of Plaintiffs. Defendants argue that Plaintiffs' Amended complaint should be dismissed as Plaintiffs fail to state claim under Section 10(b) of the Exchange Act and Rule 10b-5.

Since there is no dispute that Plaintiffs allege a connection with the purchase or sale of a security and economic loss, the Court does not address those elements.

A. Material Misrepresentations or Omissions

Here, Plaintiffs allege that Defendants made materially false and misleading statements and omissions in the Preliminary, Amended, and Second Amended Proxy Materials and JA Solar's website regarding JA Solar's intention not to relist; the Special Committee's, the Board's, and the Buyer Group's determination that the transaction was fair; and the intent to update Shareholders regarding the Parent Parties decision whether to terminate the Merger Agreement. Plaintiffs have adequately pleaded material misrepresentations or omissions.

Rule 10b-5 "renders it unlawful 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 the light of the circumstances under which they were made, not misleading." *Levy v. Maggiore*, 48 F. Supp. 3d

428, 444 (E.D.N.Y. 2014) (citation and internal quotation marks omitted). "A statement is considered materially misleading under § 10(b) when its representations, viewed as a whole, would have misled a reasonable investor." *Id.* (citations and internal quotation marks omitted). It is not sufficient to allege that the investor might have considered the misrepresentation or omission important, nor is it necessary to assert that the investor would have acted differently if an accurate disclosure was made. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000).

Materiality is a mixed question of law and fact, and accordingly at the motion to dismiss stage "a complaint may not properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Id.* (citation and internal quotation marks omitted); *see also In re CannaVest Corp. Secs. Litig.*, 307 F. Supp. 3d 222, 237 (S.D.N.Y. 2018) (quoting *Ganino*, 228 F.3d at 161) ("At the pleading stage, a plaintiff satisfies the material requirement of Rule 10b-5 by alleging a statement or omission that a reasonable investor would have considered significant in making investment decisions.").

i. Statements Regarding JA Solar's Intention not to Relist

Plaintiffs allege that JA Solar made materially false and misleading statements regarding their intention not to relist JA Solar after the Merger as discussions with Tonglian were well underway prior to the announcement of the Merger and the publishing of the Preliminary Proxy Materials. Specifically, Plaintiffs allege that the Preliminary, Amended, and Second Amended Proxy Materials stated that there were no "present plans or proposals" of an "extraordinary corporate transaction involving the Company's corporate structure . . . such as a Merger[.] See Am. Compl at ¶¶ 100, 186, 23, 258. Additionally, Plaintiffs allege as materially false or misleading a December 2017 statement on JA Solar's website that read "JA Solar Co. Ltd. Currently does not

have plans to list domestically . . . much less will it take any public placement actions in relation to relisting." *Id.* at ¶ 227. To support these allegations, Plaintiffs rely on four CWs with purported knowledge of the plans to relist.

"The case law examining facts attributed to unidentified witnesses reflects the need to view such attributions with caution and care." *Long Miao v. Fanhua, Inc.*, 42 F. Supp. 3d 774, 797 (S.D.N.Y. 2020). The Second Circuit addressed confidential sources in a securities fraud action in *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000). There, the Court stated:

> [W]here plaintiffs rely on confidential personal sources but also on other facts, they need not name their sources as long as the latter facts provide an adequate basis for believing that the defendants' statements were false. Moreover, even if personal sources must be identified, there is no requirement that they be named, provided they are 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. In both of these situations, the plaintiffs will have pleaded enough facts to support their belief, even though some arguably relevant facts have been left out.

Novak, 216 F.3d at 314.

Where a securities fraud complaint relies on uncorroborated CWs, Courts in this District resolve the adequacy of such complaints as facially pled, and "will credit confidential source allegations, generally, in two situations." *Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 590 (S.D.N.Y. 2011). First, "when 'independent [adequately pled] factual allegations' corroborate a confidential source's statements, the requirement of a description of the source's job is loosened." *Id.* (quoting *In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F. Supp. 2d 474, 493 n.10 (S.D.N.Y. 2004)). Second, in the absence of such well-pled corroborative facts, the Court will credit confidential sources when "those sources' positions and/or job responsibilities are described sufficiently to indicate a high likelihood that they actually knew facts underlying their allegations." *Id.* (citation omitted).

As a threshold matter, the Court does not credit Plaintiffs' CWs. The CWs that Plaintiffs identify base their allegations on secondhand accounts in which they heard about relisting plans from a colleague; recalled hearing employees discuss rumors regarding relisting; or heard about internal rumors. *See* Am. Compl. 131–138. Notably, the confidential witnesses fail to identify any concrete plan to relist. Rather, the confidential witnesses merely reiterate the allegations in the amended complaint regarding the relisting. *Id.* Courts have generally been hostile to non-particular allegations from CWs. *See, e.g.*, *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, No. 19 Civ. 10067, 2020 WL 4734989 (S.D.N.Y. Aug. 14, 2020) (disregarding the allegations of CWs that were insufficiently particularized and failed to substantiate the allegations in the complaint); *Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 305–06 (S.D.N.Y. 2019) (rejecting "[g]eneric and conclusory allegations" from Plaintiffs' CWs as "so vague as to be meaningless"); *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 580 (S.D.N.Y. 2014), *aff'd*, 604 F. App'x 62 (2d Cir. 2015) ("general allegations" regarding quality control issues "do not render the [defendants'] statements described herein, considered in context, false or misleading," where the complaint does not also "contain the . . . required specific factual allegations (by CWs or otherwise)"); *In re Sierra Wireless, Inc. Sec. Litig.*, 482 F. Supp. 2d 365, 376 (S.D.N.Y. 2007) ("[P]laintiffs have not satisfied the heightened pleading requirements for their channel-stuffing claim . . . [because the CW on whom they rely] merely parrots the conclusory allegations contained in the complaint.").

Moreover, the CWs' employment descriptions in the amended complaint–financial analysts, sales manager, and sales staff–do not suggest that these CWs were in a position to be relayed plans to relist by corporate management or have access to concrete plans to relist JA Solar, and in fact, as discussed *supra*, the CWs described no concrete plans to relist. *See, e.g.*, *Qihoo*, 2020 WL 4734989, at *14; *Frankfurt-Tr. Inv. Luxemburg AG v. United Techs. Corp.*, 336 F. Supp.

3d 196, 223 (S.D.N.Y. 2018); *In re Lehman Bros. Sec. & Erisa Litig.*, No. 10 Civ. 6637, 2013 WL 3989066, at *4 (S.D.N.Y. July 31, 2013) (disregarding CWs who "were loan level underwriters, not managers or corporate officers who could have spoken to the company's practices broadly"); *Local No. 38 Int'l Bhd. of Elec. Workers Pension Fund v. Am. Express Co.*, 724 F. Supp. 2d 447, 460 (S.D.N.Y. 2010) (discounting allegations of "low-level, rank-and-file employees or outside contractors" who the complaint did not indicate had any "access to aggregated data regarding [the company's] credit risk" or contact with the individual defendants*), aff'd*, 430 F. App'x 63 (2d Cir. 2011). Accordingly, the Court finds that the CWs fail to put forth particularized allegations to satisfy the PSLRA.

Even assuming *arguendo* that the Court credited Plaintiffs' CWs, Plaintiffs' assertion that JA Solar's statements not to relist the Company represent material misrepresentations or omissions is unavailing. Two recent cases in this Court have addressed similar claims regarding a company concealing plans to relist following a private transaction and instruct the Court's analysis here. *See Altimeo Asset Mgmt. v. WuXi PharmaTech (Cayman) Inc.*, No. 19 Civ. 1654, 2020 WL 6063539, at *5 (S.D.N.Y. Oct. 14, 2020); *Qihoo*, 2020 WL 4734989, at *1. In both cases, the Court held that because Defendants disclosed the possibility of relisting after the go private transaction, Plaintiffs could not survive a motion to dismiss absent some plausibly alleged facts that Defendants failed to disclose an actual, concrete plan to relist. *WuXi*, 2020 WL 6063539, at *5; *Qihoo*, 2020 WL 4734989, at *16.

Similarly, in the present case, Defendants disclosed the possibility of relisting in the future. Specifically, the Final Proxy Materials provided:

> "The Buyer Group will continue to evaluate the Company's entire business and operations from time to time, and may propose or develop plans and proposals which they consider to be in the best interests of the Company and its equity holders, including the disposition or acquisition of material assets, alliances, joint

> ventures, and other forms of cooperation with third parties or other extraordinary transactions, including the possibility of relisting the Company or a substantial part of its business on another internationally recognized stock exchange[.]"

Defs.' Ex. A at 53.

As Defendants disclosed that they may potentially relist on "another internationally recognized stock exchange," Plaintiffs must plausibly allege that there was an actual, concrete plan to relist that Plaintiffs failed to disclose. In order to support their claim that there was a relisting plan that Defendants failed to disclose, Plaintiffs cite the allegations from CWs; an analysis from their expert in Chinese M&A transactions who explains the timeline for backdoor listings; and a speech Defendant Jin made on November 19, 2017 where he stated that he had plans to return to the Chinese capital markets in a publicly traded form within the following two or three years. Pls.' Mem. of Law at 9–12.

As discussed *supra*, Plaintiffs' CWs fail to put forth particularized allegations to satisfy the PSLRA. Moreover, Defendant Jin's November 19, 2017 statement revealed a hope to relist in the future; however, that statement is not indicative of a present plan to list, and in fact, Plaintiffs concede in the amended complaint that the statement was by no means a definitive statement of the Company's plans. Am. Compl. at ¶ 131.

Regarding the agreement to relist JA Solar three days after the Merger was officially completed, Plaintiffs' expert witness on Chinese M&A transactions explained that it takes at least one year before the parties are able to agree on the type of backdoor listing that JA Solar and Tonglian entered into. Therefore, Plaintiffs allege that there must have been a present plan to relist JA Solar. Plaintiffs' expert is unavailing. Plaintiffs' arguments regarding the general time it takes to agree to a backdoor listing requires the Court to make inferential leaps regarding a hypothetical plan to relist that has not been plausibly alleged. Similar to the allegations in *Qihoo* and *WuXi*,

"the allegations . . . are far too conclusory, insufficiently particular, and devoid of details confirming their reliability" to support a plausible inference that JA Solar had a concrete plan to relist before the before the Merger. *Qihoo*, 2020 WL 4734989, at *16; *WuXi*, 2020 WL 6063539, at *6. Accordingly, Plaintiffs have failed to plausibly allege a material misrepresentation of Defendants' statements regarding JA Solar's plans to relist.

ii. Fairness Statements

Plaintiffs argue that Defendants falsely misrepresented the Merger as fair by expressly adopting Houlihan's fairness evaluation that was based on distorted financial information provided by JA Solar that presented poor business conditions for JA Solar. Am. Compl. at ¶¶ 308–317. Specifically, Plaintiffs allege that the 2017 annual report and financial results that were released on April 30, 2018 significantly deviated from the projections Defendants provided to Houlihan, and despite having actual data that contradicted the projections, they were published in the Proxy Materials released on December 11, 2017, January 11, 2018, February 1, 2018, and July 16, 2018. Defendants' projections for total revenue and net income for 2017 were 16% and 18% lower than their actual total revenue and net income for 2017. *Id.* at ¶ 125. Plaintiffs state that it's significant that when the projections were given to Houlihan, the first three quarters of the 2017 year were already complete. *Id.* at ¶ 126.

In the Second Circuit, "statements about a 'company's projections [are treated as] opinions rather than guarantees.'" *In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 480 (S.D.N.Y. 2018) (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 112 (2d Cir. 2011)). Accordingly, the Court must consider the framework set forth in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, to determine whether Plaintiff has sufficiently pleaded actionable misstatements and omissions concerning the projections. 135 S. Ct. 1318. "Pursuant to the safe

harbor, 'a defendant is not liable [for a forward-looking statement] if the forward-looking statement is identified and accompanied by meaningful cautionary language or is immaterial or the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading.'" *Fresno Cty. Employees' Ret. Ass'n v. comScore, Inc.*, 268 F. Supp. 3d 526, 548 (S.D.N.Y. 2017) (quoting *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 766 (2d Cir. 2010)). In *Omnicare*, the Supreme Court established that opinions can be misleading if "(1) 'the speaker d[oes] not hold the belief . . . professed'; (2) the 'fact[s] [ ] supplied' in support of the belief professed are 'untrue'; or (3) the speaker 'omits information' that 'makes the statement misleading to a reasonable investor.'" *Martin v. Quartermain*, 732 F. App'x 37, 40 (2d Cir. 2018) (quoting *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016); *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092–1096 (1991).

Plaintiffs have adequately pleaded that Defendants' statements regarding the fairness of the Merger were misleading. Plaintiffs distinguish the present case from the Court's decision in *In re Shanda Ltd. Sec. Litig.*, No. 18 Civ. 2463 (ALC), 2020 WL 5813769, at *1 (S.D.N.Y. Sept. 30, 2020), by alleging that unlike in *Shanda*, Plaintiffs here have plausibly alleged that Defendants could not have possibly believed that the projections JA Solar provided were accurate. Pls.' Mem. of Law at 13–14. Defendants allege that the claims here are similar to *Shanda* as Plaintiffs have failed to plausibly allege that Defendants knew the projections were false. The Court disagrees.

In *Shanda*, only the first quarter of 2015 was complete when the financial projections were provided, and the Court relied on this fact when determining that Defendant's fairness statements constituted "inactionable opinion statements." *Id.* at 6–7. Here, the first three quarters of 2017 were complete when the projections were provided to Houlihan, and Plaintiffs have alleged that the projections for the fourth quarter were vastly different than what was provided. Notably,

Plaintiffs also allege that the actual results for the first three quarters of 2017 far exceeded even what was reported in the Proxy Materials, and Plaintiffs have additionally alleged that the restructuring report JA Solar and Tonglian issued in connection with its relisting provided operating income for 2015 through 2017 that far exceeded what was reported in the Proxy Materials and SEC filings when JA Solar was publicly traded on the NASDAQ. Am. Compl. at ¶ 152. Taking the allegations as true, at the very least the 2015 and 2016 operating income was understated and misrepresented in the Proxy Materials and information furnished to Houlihan, who used the information to form his opinion that the Merger was fair.

Thus, construing the allegations in the amended complaint in the light most favorable to Plaintiffs–as the Court must on a motion to dismiss–Plaintiffs' allegations plausibly allege that Defendants' statements regarding the fairness of the Merger and JA Solar's financial position were misleading. *See Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002) ("The touchstone of the inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered."); *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985) ("[A] complaint may not properly be dismissed pursuant to Rule 12(b)(6) . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.")

iii. The Intent to Update the Shareholders

Plaintiffs claim that Defendants misrepresented the dissenting shareholder condition when they failed to update the Shareholders regarding the intent of the Parent Parties decision whether to terminate the Merger Agreement. This claim is insufficient. This alleged misstatement is "so

obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of [its] importance." *Goldman*, 754 F.2d at 1067. Thus, Plaintiffs' claim regarding the intent to update the Shareholders fails to meet the standard for materiality. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

B. Scienter

Under the PSLRA, a plaintiff must "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)(A). "The requisite state of mind in a Rule 10b-5 action is 'an intent to deceive, manipulate or defraud.'" *Ganino*, 228 F.3d at 168 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)). To satisfy the PSLRA's pleading requirements for scienter, Plaintiffs must allege facts "(1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). In evaluating whether either of these showings has been made, the court may consider, among other things, whether the plaintiff has alleged that the defendant "(1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." *Novak*, 216 F.3d at 311 (internal cross references omitted). When examining these factors, a court must be mindful that the inquiry is "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs*, 551 U.S. at 322-23.

Plaintiffs have adequately pleaded that JA Solar and Defendant Jin had a motive an opportunity to commit fraud. Regarding Defendant Jin, Plaintiffs have demonstrated that Jin had

a significant stake in JA Solar, was a member of the Board of Directors, increased his ownership stake in the Company to 79.8%, and received $440 million following the Merger. Additionally, Defendant Jin owned 32.96% of Jinlong BVI, which was JA Solar's largest shareholder prior to the Merger, owning approximately 16.3% of the Company before and after the Merger. Am. Compl. at ¶ 60. Plaintiffs have demonstrated that Defendant Jin stood to gain in a concrete and personal way by materially misrepresenting the financial position of the Company that resulted in approval of the Merger at a price favorable to Defendant Jin.

Conversely, Plaintiffs fail to plead a strong inference of scienter as to Defendant Jia. Defendant Jia was the Chairman and Director of the two-person special committee that approved the proposed Merger and recommended that the Board approve the Merger as well. Plaintiffs allege that Defendant Jia, due to his position, would have known that the statements were materially false and misleading statements. This is insufficient. Plaintiffs have offered nothing more than general allegations regarding Defendant Jia and ask the Court to presume, primarily because his position, that he must have known the statements were materially false or misleading. The Court considers such broad allegations insufficient to support an inference of Scienter. *See Bay Harbour Mgmt. LLC v. Carothers*, 282 F. App'x 71, 76 (2d Cir. 2008); *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001).

As Plaintiffs fail to plead a strong inference of scienter as to Defendant Jia, the Court grants Defendants' motion to dismiss the amended complaint's claims against Defendant Jia.

Regarding JA Solar, generally, courts in this District have held that "'management level' employees can serve as proxies for the corporation in suits filed under them Exchange Act." *Thomas v. Shiloh Indus., Inc.*, No. 15 CV 7449, 2017 WL 2937620, at *3 (S.D.N.Y. July 7, 2017). Although courts have "not developed a bright-line rule to determine when an executive is

sufficiently senior such that his or her scienter can be attributed to the entity[,] . . . courts typically consider the individual's relative seniority at the issuing entity and the connection between the executive's role and the fraudulent statements." *Barrett v. PJT Partners Inc.*, No. 16 Civ. 2841, 2017 WL 3995606, at *7 (S.D.N.Y. Sept. 8, 2017). In the present case, defendant Jin was the single largest shareholder of JA Solar, a member of the Board of Directors, and was a part of the Buyer Group. Based on Defendant Jin's seniority position within JA Solar and his pivotal role within the Buyer Group, the Court concludes that Defendant Jin's scienter may be imputed to Defendant JA Solar. *See Stream SICAV v. Wang*, 989 F. Supp. 2d 264, 276 (S.D.N.Y. 2013).

C. Reliance

Plaintiffs allege reliance for two separate classes of Plaintiffs, the Seller Shareholders and the Tenderer Shareholders. Am. Compl. at ¶¶ 320, 323. Defendants fail to challenge Plaintiffs' assertion of reliance for the Seller Shareholders who sold their ADS during the Class Period and focus entirely on the Tenderer Shareholders who held their Securities through the close of the class period. As the Court agrees with Plaintiffs that they have adequately pleaded reliance for the Seller Shareholders, The Court's analysis shall focus on the Plaintiffs who held their Securities through the close of the class period.

The traditional way a Plaintiff demonstrates reliance is "by showing that he was aware of a company's statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (quoting *Amgen*, 133 S.Ct. at 1192). However, in some circumstances, Plaintiffs may invoke a "rebuttable presumption of reliance." *Id.* at 268. This presumption rests on the "fraud-on-the-market' theory" which states "that 'the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.'" *Id.*

(quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)). Because "the typical 'investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price'—the belief that it reflects all public, material information— . . . his 'reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b–5 action.' " Id. (quoting *Basic*, 485 U.S. at 247, 108 S.Ct. 978). But the presumption, as its name suggests, is rebuttable. "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption ...." *Id.* (quoting *Basic*, 485 U.S. at 248) (alteration omitted).

Both Plaintiffs and Defendants make much of the Court's decision in *Shanda*, 2019 WL 11027710, at *1. Defendants allege that the Court in *Shanda* held that the *Basic* presumption does not apply to go private transactions. Defs.' Mem. of Law at 30. As an initial matter, *Shanda* does not stand for the proposition that the *Basic* presumption could never apply to a go private transaction. Rather, the Court opined that generally go private transactions are treated as inefficient. Additionally, in the motion for reconsideration, the Court held that the unique facts presented in *Shanda* failed to support an efficient market. *In re Shanda Ltd. Sec. Litig.*, No. 18 Civ. 2463 (ALC), 2020 WL 5813769, at *1 (S.D.N.Y. Sept. 30, 2020).

Turning to the present case, the Court finds that Plaintiffs' allegations for the Tenderer Shareholders also fail to support an efficient market. "[T]he federal courts are unanimous in their agreement that a listing on the NASDAQ or a similar national market is a good indicator of efficiency." *In re Initial Pub. Offering Sec. Litig.*, 544 F. Supp. 2d 277, 296 n.133 (S.D.N.Y. 2008)*; see also Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 650–51 (S.D.N.Y.2012) (holding that an efficient market is one that is open, developed, and large number of persons can buy or sell); *In re Livent, Inc. Noteholders Sec. Litig.*, 211 F.R.D. 219, 221

(S.D.N.Y. 2002); *Reingold v. Deloitte Haskins & Sells, Yarwood Vane*, 599 F. Supp. 1241, 1264 (S.D.N.Y.1984) (declining to apply the fraud on the market theory to inefficient markets). By contrast, generally, IPOs and private transactions are treated as inefficient. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), decision clarified on denial of reh'g sub nom. *In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir. 2007) ("the market for IPO shares is not efficient"); *Sable v. Southmark/Envi Capital* Corp., 819 F. Supp. 324, 339 (S.D.N.Y. 1993) ("there is no such justification for a presumption of reliance here, because the partnerships were offered privately and were not traded actively in a large public market."). While the Court does not hold that a go private transaction could never be treated as efficient, Plaintiffs allegations here regarding the Tenderer Shareholders fail to demonstrate the open and developed market that would support market efficiency under the *Basic* presumption.

As Plaintiffs fail to adequately plead reliance on behalf of the Tenderer Shareholders, the Court grants Defendants' motion to dismiss Plaintiffs' amended complaint for failure to state a § 10(b) and rule 10b-5 claim on behalf of the Tenderer Shareholders.

D. Loss Causation

The Court finds that Plaintiffs fail to adequately plead loss causation on behalf of the Seller Shareholders. Loss causation is the "causal connection between the material misrepresentation and the loss." *Dura Pharms. Inc. v. Broudo*, 544 U.S. 336, 342 (2005). To plead loss causation, Plaintiffs must "link the defendant's purported material misstatements or omissions with the harm ultimately suffered." *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 163 (S.D.N.Y. 2008). If the relationship between the loss and the information concealed or misstated by the defendant is "sufficiently direct, loss causation is established, but if the connection is attenuated, or if the plaintiff fails to demonstrate a causal connection between the content of the

alleged misstatements or omissions and the harm actually suffered, a fraud claim will not lie." *In re Bristol Myers*, 586 F. Supp. 2d at 163 (citation omitted). Allegations of loss causation "are not subject to the heightened pleading requirements of Rule 9(b) and the PSLRA. Rather, courts in this District have made it clear that if the complaint connects the Defendants' fraud with Plaintiffs' purported loss within the short and plain statement standard of Rule 8(a)," then nothing further is needed at this stage of the litigation. *Bristol Myers Squibb*, 586 F. Supp. 2d at 163 (alterations, quotation marks, and citations omitted); *In re SLM Corp. Sec. Litig.*, 740 F. Supp. 2d 542, 559 (S.D.N.Y. 2010).

Plaintiffs allege that the Seller Shareholders suffered economic loss as their shares were sold at a depressed value, and they were subsequently deprived of the fair value of their shares through the false and misleading statements. *Id.* at ¶ 320.The Court has found that Plaintiffs have adequately pleaded that Defendants made misleading statements regarding the fairness statements in the Proxy Materials.

However, the Court finds that the amended complaint fails to establish a causal connection between (1) the misleading statements in the Proxy Materials and (2) the value of the Seller Shareholders' Securities during the class period. *See ATSI Commc'ns, Inc.*, 493 F.3d at 106; *Dura*, 544 U.S. at 346. Plaintiffs have failed to adequately plead that the misleading statements regarding JA Solar's financial position kept the price of the Seller Shareholders' Securities artificially low at the time they sold their shares. Plaintiffs' allegations that JA Solar depressed the price of JA Solar Securities during the class period are bellied by the fact that JA Solar's stock price rose or remained roughly the same during the relevant class period.

JA Solar's ADS price rose when the Merger was announced; rose once the Preliminary Proxy Materials were released; remained roughly the same when the Amended Proxy Materials

were released; and rose again when the Final Proxy Materials were released. *See* Defs.' Ex. J*; Collier v. Aksys Ltd.*, No. 04 Civ. 1232, 2005 WL 1949868 (D. Conn. Aug. 15, 2005), *aff'd* 179 Fed. Appx. 770 (2d Cir. 2006) (finding claims that Defendants artificially deflated the stock price defeated by the stock price actually rising). The Court notes that Plaintiffs allege that the stock was rising less than it should have due to the misleading statements in the Proxy Materials; however, "[s]entiment simply is not enough to sufficiently plead loss causation" and "speculation and conjecture, even a well-educated guess, in the context of market prognostication does not suffice to establish a fact." *See Janbay v. Canadian Solar, Inc.*, No. 10 Civ. 4430, 2012 WL 1080306, at *16 (S.D.N.Y. Mar. 30, 2012) (quoting *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 477 (4th Cir. 2011)).

As Plaintiffs fail to adequately plead loss causation on behalf of the Seller Shareholders, the Court grants Defendants' motion to dismiss Plaintiffs' amended complaint for failure to state a § 10(b) and rule 10b-5 claim on behalf of the Seller Shareholders.

IV. Section 20(a) and Section 20A Claims

As Plaintiffs have failed to adequately allege their § 10(b) claim, their claims under §§ 20(a) and 20A fail as a matter of law. Both require a predicate violation of the Exchange Act, which the amended complaint does not adequately plead. *See Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014); *Qihoo*, 2020 WL 4734989.

Conclusion

Plaintiffs fail to adequately plead violations of the Exchange Act on behalf of the Seller Shareholders and Tenderer Shareholders. Therefore, the Court grants Defendants' motion to dismiss the amended complaint for failure to state a claim under both § 10(b) of the Exchange Act and Rule 10b-5. Plaintiffs' claims under §§ 20(a) and 20A are dismissed as well.

SPA-31

SO ORDERED.

Dated: November 30, 2020
New York, New York

ANDREW L. CARTER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ODS CAPITAL LLC, ET AL.,

Plaintiff,

-against-

18 **CIVIL** 12083 (ALC)

JUDGMENT

JA SOLAR HOLDINGS CO. LTD. ET AL.,

Defendants.

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It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Memorandum and Order dated November 30, 2020, Plaintiffs fail to adequately plead violations of the Exchange Act on behalf of the Seller Shareholders and Tenderer Shareholders. Therefore, Defendants' motion to dismiss the amended complaint for failure to state a claim under both § 10(b) of the Exchange Act and Rule 10b-5 is granted. Plaintiffs' claims under §§ 20(a) and 20A are dismissed as well.

Dated: New York, New York

November 30, 2020

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk