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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEITH THOMAS, et al.,
Plaintiffs,
v.
MAGNACHIP SEMICONDUCTOR
CORP., et al.,
Defendants.

Case No. 14-cv-01160-JST

**ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS TO
DISMISS**

Re: ECF Nos. 121, 123, 126, 130, 155

Before the Court are five motions to dismiss filed by Nader Tavakoli, ECF No. 121; by Avenue Capital Management II, L.P., Michael Elkins, and Randal Klein, ECF No. 123; by Ilbok Lee, Magnachip Semiconductor Corp., and R. Douglas Norby, ECF No. 126; by Barclays Capital Inc., Citigroup Global Markets Inc., Deutsche Bank Securities Inc., Needham & Company, LLC, and UBS Securities LLC, ECF No. 130; and by Margaret Sakai, ECF No. 155. On December 11, 2015, the parties informed the Court that a settlement had been reached in regards to all claims asserted against all defendants except for Avenue Capital Management II, L.P. ECF No. 174. Accordingly, the motions to dismiss in regards to all other defendants are denied as moot.

For the reasons stated below, the motions to dismiss in regards to Avenue Capital Management II, L.P. are granted in part and denied in part. The parties have also filed five requests for judicial notice, ECF Nos. 125, 128, 132, 140, 157, which the Court will grant.

I. BACKGROUND

Plaintiffs in this case bring claims under both the Securities Exchange Act of 1934 (the “Exchange Act”) and the Securities Act of 1933 (“the Securities Act”), related to allegations that Magnachip made materially false and misleading statements in its financial statements and other information related to securities offerings. Magnachip announced in 2013 that it needed to restate many of its financial reports for the prior few years due to accounting errors, and later restated its

1 financial results for the reporting periods during those years, in some instances reporting a loss
2 rather than a profit. The claims were first brought in two separate cases that were later
3 consolidated by this Court. See ECF No. 112.

4 **A. Factual Background**

5 For the purpose of this order, the following allegations in the Third Amended Complaint
6 (“TAC”), ECF No. 114, are taken to be true.

7 Magnachip, a Delaware corporation with its principle place of business in Seoul, Korea,
8 designs and manufactures “analog and mixed-signal semiconductor products” for a number of
9 high volume consumer applications including smartphones, tablets, and PCs. TAC, ECF No. 114,
10 at ¶¶ 23, 38. Magnachip began operations in 2004, but struggled and filed for Chapter 11
11 bankruptcy protection in 2009. Id. at ¶¶ 39-40. Following Magnachip’s reorganization, Avenue
12 Capital, a “global investment marketing firm” that “specializes in investing in high yield debt,
13 debt of insolvent or financially distressed companies, and equity of companies undergoing
14 financial or operational turnarounds or reorganizations,” was the majority owner of Magnachip by
15 virtue of owning 70.3% of Magnachip’s shares. Id. at ¶¶ 33, 40. Avenue Capital was entitled to
16 have three designees serving as members of the seven-member board of directors, and, in
17 exercising its power, appointed four out of the seven, three of which were Avenue employees and
18 two of which served on the “Audit Committee” for the company. Id. at ¶ 41.

19 Magnachip eventually executed an IPO on March 10, 2011, at \$14 per share. Id. at ¶ 41.
20 Despite the “highly cyclical” nature of the semiconductor industry, Plaintiffs allege that
21 Magnachip’s reported results “curiously ‘managed’ to consistently beat analysts’ consensus
22 estimates,” which caused its stock price to “skyrocket” to \$23.57 per share and “enabled Avenue
23 Capital to sell over \$310 million of its Magnachip shares.” Id. at ¶ 42.

24 MagnaChip also conducted a follow-on public stock offering on February 6, 2013 (the
25 “2/13 Offering”). Id. at ¶ 1. On or about April 13, 2012, Magnachip filed Form S-3 Registration
26 forms with the SEC using a “shelf” registration that would allow it to sell securities in continuing
27 offerings. Id. at ¶ 112. For the February 6, 2013 offering, Magnachip’s stock was priced at
28 \$14.50 per share, and Avenue Capital sold 5.75 million shares of common stock to the public. Id.

1 at ¶113. Plaintiffs’ Securities Act claims arise from stock purchases they made pursuant to this
2 2/13 Offering. Id. at ¶¶ 244, 254, 260.

3 Magnachip consistently reported positive results for each quarter from the beginning of
4 2011 through the third quarter of 2013. Id. at ¶¶ 44-90. On January 27, 2014, however, it
5 “abruptly postponed its year-end and fourth quarter 2013 earnings release.” Id. at ¶ 92.

6 On March 11, 2014, Magnachip announced that its Audit Committee had determined that
7 “Magnachip needed to restate its financial results for 2011 through 2013 due to improper revenue
8 recognition for products sold through its distributors.” Id. at ¶ 94. It stated that this decision was
9 “based on an ongoing review by ‘outside professional advisors,’” which had “identified ‘material
10 weaknesses’ in Magnachip’s accounting procedures such that ‘internal controls over financial
11 reporting and disclosure controls and procedures were not effective.’” Id. It also announced that
12 Defendant Margaret Sakai had been “relieved” of her position as “principal accounting officer.”
13 Id. Finally, “[w]hile stating that prior financial statements ‘should not be relied upon’,
14 MagnaChip otherwise reassured investors that the accounting problem was one of simply timing
15 of revenue recognition, rather than the absence of legitimate sales; and would be limited to
16 distributor related transactions.” Id. Defendant Sang Park resigned in May 20, 2014 from his
17 position as CEO of the company. Id. at ¶ 97.

18 On August 12, 2014, Magnachip announced that its financial statements would be “further
19 delayed due to expansion of the investigation beyond ‘sales’ to distributors to include issues of
20 revenue recognition involving all customers; cost of goods sold; and inventory reserves.” Id. at
21 ¶ 98. On November 12, 2014, Magnachip issued “preliminary findings” regarding the restatement
22 identifying several “specific illegal accounting practices in violation of Generally Accepted
23 Accounting Principles (‘GAAP’).” Id. at ¶ 99.

24 Magnachip issued its restatement of its financial results on February 12, 2015. Id. at ¶ 102.
25 The restatement showed that Magnachip had overstated its earnings throughout 2011 to 2013 — in
26 the fiscal year 2011, for example, a reported net income of \$21.8 million was restated to a loss of
27 \$11.3. Id. The following day, Magnachip’s stock price was cut in half, from its previous price of
28 \$15.02 per share to \$7.52 per share. Id. at ¶ 105. Over the next few days, Magnachip’s share

1 price continued to decline. Id. at ¶ 106.

2 **B. Procedural Background**

3 On March 12, 2014, the day after Magnachip first announced it would be issuing
4 restatements of its financial reports, plaintiff Richard Hayes filed a class action complaint against
5 Magnachip and multiple Magnachip officers. See Complaint, ECF No. 1. The complaint alleged
6 claims under the Exchange Act. Id. On July 3, 2014, the Court appointed Keith Thomas
7 (hereinafter, “Lead Plaintiff”) as Lead Plaintiff of the case. ECF No. 32.

8 On April 21, 2015, in a separate case, the Oklahoma Police Pension & Retirement System
9 (“OPPRS”) filed a class action complaint against Magnachip, Avenue Capital, various officers at
10 both companies, and several institutions serving as underwriters for Magnachip’s transactions.
11 See ECF No. 1, Case No. 3:15-cv-01797-JST. In addition to asserting the same claims as Lead
12 Plaintiff, OPPRS also asserted claims for Securities Act violations. Id. On April 27, 2015,
13 Magnachip moved to relate the two cases. ECF No. 74. Lead Plaintiff then filed a motion to
14 consolidate the cases, though initially suggested cabining off OPPRS’s Securities Act claims.
15 ECF No. 78. OPPRS opposed the motion, ECF No. 86, while the Defendants argued for
16 consolidating the cases in full, ECF No. 89, 91. On June 15, 2015, the Court consolidated the two
17 cases in full. ECF No. 112.

18 The Plaintiffs filed their most recent complaint, the Third Amended Complaint, on June
19 26, 2015. ECF No. 114. The complaint brings claims under both the Exchange Act and the
20 Securities Act. The defendants named in the complaint are Magnachip; three of Magnachip’s
21 current and former officers (Sang Park, Margaret Sakai, and Tae Young Hwang); two members of
22 the Board of Directors and the Audit Committee who were also Avenue Capital employees
23 (Randall Klein and Michael Elkins); three additional members of the Board of Directors and the
24 Audit Committee (R. Douglass Norby, Ilbok Lee, and Nader Tavakoli); Avenue Capital; and the
25 Underwriters to Magnachip’s offerings (Barclays Capital Inc., Deutsche Bank Securities Inc.,
26 Citigroup Global Markets Inc., UBS Securities LLC, and Needham & Company, LLC). Id.

27 Four sets of defendants filed motions to dismiss on July 27, 2015: Mr. Tavakoli
28 (“Tavakoli”), ECF No. 121; Avenue Capital and Mr. Klein and Mr. Elkins, (“Avenue

1 Defendants”), ECF No. 123, Magnachip and Mr. Norby and Mr. Lee (“Magnachip Defendants”),
2 ECF No. 126; and by Barclays Capital Inc., Citigroup Global Markets Inc., Deutsche Bank
3 Securities Inc., Needham & Company, LLC, and UBS Securities LLC (“Underwriter
4 Defendants”), ECF No. 130. A fifth motion to dismiss was filed on November 9, 2015¹ by
5 Margaret Sakai (“Sakai”), ECF No. 155.²

6 The five motions to dismiss were heard together and submitted on December 1, 2015.
7 ECF No. 169. On December 11, 2015, the Plaintiffs filed a Notice of Settlement, informing the
8 Court that a settlement had been reached that will result in the release of all claims asserted against
9 Magnachip, Mr. Park, Mr. Hwang, Ms. Sakai, Mr. Norby, Mr. Lee, Mr. Tavakoli, Mr. Klein, Mr.
10 Elkins, and the Underwriter Defendants. ECF No. 174. The settlement did not release any claims
11 against Avenue Capital. Id. At a telephonic case management conference held on January 22,
12 2016, the parties informed the Court that they will file a motion for preliminary settlement by
13 February 5, 2016 but that no agreement with Avenue Capital had at that time been reached. ECF
14 No. 182. Plaintiffs subsequently filed a motion for preliminary approval of the settlement. ECF
15 No. 185. Accordingly, the motions to dismiss in regards to all Defendants other than Avenue
16 Capital are denied as moot without prejudice to their re-filing if the settlement agreement is not
17 approved. In the remainder of this order, the Court will consider and resolve the motions to
18 dismiss in regards to Avenue Capital. Because all Defendants extensively incorporate the
19 arguments from their co-defendants briefs, the Court considers these briefs in full as well as the
20 Plaintiffs’ responses.

21 _____
22 ¹ Ms. Sakai’s brief was filed at a later date because, as the parties informed the Court, she
23 was not served until September 8, 2015. See ECF Nos. 159, 161. The parties also informed the
24 Court that two remaining defendants, Mr. Park and Mr. Hwang, had still not been served.
25 Pursuant to the Court’s order, Plaintiffs filed a motion for alternative service or for discovery to
26 obtain Mr. Park’s and Mr. Hwang’s addresses. ECF No. 176. In light of the settlement
27 agreement, that motion was vacated as moot. ECF No. 183.

28 ² The Court will refer to the briefs in regards to each of these motions by the stage of
briefing (the Motion, Opposition, or Reply) and the party that filed it (for example, the
Underwriter Defendants or the Magnachip Defendants), along with the ECF docket number. By
stipulation, the plaintiffs jointly filed two briefs in response to the first four motions to dismiss.
See ECF No. 136. The first brief was filed by the counsel for plaintiffs in the Hayes/Thomas case,
ECF No. 137, while the second brief was filed by the counsel for plaintiffs in the OPPRS case,
ECF No. 138. For the sake of clarity, the Court will refer to these as the “Lead Plaintiff
Opposition” and the “OPPRS Opposition,” respectively.

1 **II. LEGAL STANDARD**

2 The Court has federal question jurisdiction over the claims in this case pursuant to 28
3 U.S.C. § 1331.

4 On a motion to dismiss, courts accept the material facts alleged in the complaint, together
5 with reasonable inferences to be drawn from those facts, as true. Navarro v. Block, 250 F.3d 729,
6 732 (9th Cir. 2001). However, “the tenet that a court must accept a complaint’s allegations as true
7 is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory
8 statements.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). To be entitled to the presumption of
9 truth, a complaint’s claims “must contain sufficient allegations of underlying facts to give fair
10 notice and to enable the opposing party to defend itself effectively.” Starr v. Baca, 652 F.3d 1202,
11 1216 (9th Cir. 2011).

12 While a plaintiff generally need only plead “enough facts to state a claim to relief that is
13 plausible on its face” to survive a motion to dismiss, Bell Atlantic Corp. v. Twombly, 550 U.S.
14 544, 570 (2007), “[s]ecurities fraud class actions must meet the higher, exacting pleading
15 standards of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act
16 (‘PSLRA’).” Oregon Pub. Employees Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 604 (9th Cir.
17 2014). Under the PSLRA, a complaint must “state with particularity facts giving rise to a strong
18 inference that the defendant acted with the required state of mind” with respect to each alleged
19 false statement or omission. 15 U.S.C. § 78u–4(b)(2)(A). The PSLRA also provides that “the
20 complaint shall specify each statement alleged to have been misleading, the reason or reasons why
21 the statement is misleading, and, if an allegation regarding the statement or omission is made on
22 information and belief, the complaint shall state with particularity all facts on which that belief is
23 formed.” 15 U.S.C. § 78u–4(b)(1)(B).

24 The Ninth Circuit has held that under the PSLRA, securities fraud plaintiffs must plead all
25 the elements of a securities fraud action with particularity. Oregon Pub. Employees Ret. Fund,
26 774 F.3d at 605. “These requirements present no small hurdle for the securities fraud plaintiff.”
27 In re VeriFone Holdings, Inc. Sec. Litig., 704 F.3d 694, 701 (9th Cir. 2012).

28 **III. DISCUSSION**

1 Plaintiffs assert seven causes of action against the various Defendants under the Exchange
2 Act and the Securities Act.

3 The claims brought are as follows: (I) violation of section 10(b) of the Exchange Act, 15
4 U.S.C. § 78j(b) against defendants Magnachip, Park, Sakai, Hwang, Klein, Elkins, Norby, Lee,
5 and Tavakoli; (II) violation of section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), against
6 defendants Park, Sakai, Hwang, Klein, Elkins, Norby, Lee, and Tavakoli; (III) violation of section
7 20(a) against Avenue Capital; (IV) violation of section 20A of the Exchange Act, 15 U.S.C. § 78t-
8 1, against Avenue Capital; (V) violation of section 11 of the Securities Act, 15 U.S.C. § 77k,
9 against defendants Magnachip, Park, Sakai, Elkins, Klein, Lee, Norby, Tavakoli, and the
10 Underwriter Defendants; (VI) violation of section 12(a)(2), 15 U.S.C. § 771(a)(2), against
11 defendants Magnachip, Park, Sakai, Elkins, Klein, Lee, Norby, Tavakoli, the Underwriter
12 Defendants, and Avenue Capital; and (VII) violation of section 15 of the Securities Act, 15 U.S.C.
13 § 77o, against Magnachip, Avenue Capital, Park, Sakai, and Hwang. See TAC, ECF No. 114, ¶¶
14 23-37, 190-263.

15 The only counts brought against Avenue Capital, and which therefore must be resolved
16 following the Notice of Settlement, are counts III, IV, VI, and VII: violation of sections 20(a) and
17 20A of the Exchange Act, and violations of sections 12(a)(2) and section 15 of the Securities Act.

18 **A. Judicial Notice**

19 Before addressing Plaintiffs' claims, the Court considers the four requests for judicial
20 notice filed by Defendants, ECF Nos. 125, 128, 132, 157 and a fourth request filed by Plaintiffs,
21 ECF No. 140. While the scope of review on a motion to dismiss is generally limited to the
22 contents of the complaint, under Federal Rule of Evidence 201(b), courts may take judicial notice
23 of facts that are "not subject to reasonable dispute." Courts have previously taken judicial notice
24 of documents on which complaints necessarily rely, Lee v. City of Los Angeles, 250 F.3d 668,
25 688 (9th Cir. 2001), publicly available financial documents such as SEC filings, Metzler Inv.
26 GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1064 n.7 (9th Cir. 2008), and publicly
27 available articles or other news releases of which the market was aware, Heliotrope Gen., Inc. v.
28 Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999).

1 Defendants request judicial notice of numerous reports, press releases, and other filings
2 with the SEC, many of which were referenced by Plaintiffs in their complaint. See ECF Nos. 125,
3 128, 132, 157. Plaintiffs do not object to the Court taking judicial notice of these documents
4 generally, but they request judicial notice is taken only of the facts of their existence, not of any
5 allegations made within. Lead Plaintiffs’ Opposition, ECF No. 137 at 23. Defendants’ requests
6 are accordingly granted.

7 Plaintiffs request judicial notice of three documents, two of which are public reports by
8 financial analysts and one of which was filed by Magnachip with the SEC. ECF No. 140 at 3.
9 Defendants do not object to this request. The request is granted.

10 **B. Exchange Act Claims**

11 Though Plaintiffs do not bring section 10(b) claims against Avenue Capital, the viability of
12 their section 20(a) claims against Avenue Capital depends on the existence of a primary violation
13 of securities law, which in this case is alleged in connection with Plaintiffs’ 10(b) claims against
14 the other defendants. Avenue Capital asserts that Plaintiffs’ 20(a) claims fail in part because they
15 have not plausibly plead a primary violation. Avenue Defendants’ Motion, ECF No. 123 at 21.
16 Therefore, the Court begins by examining the 10(b) claims before turning to the 20(a) claims and
17 lastly to the 20A claims.

18 **1. 10(b) Claims**

19 Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it unlawful “for any
20 person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any
21 manipulative or deceptive device or contrivance in contravention of such rules and regulations as
22 the Commission may prescribe[.]” Rule 10b–5, which is promulgated by the SEC under the
23 authority of section 10(b), in turn makes it unlawful for any person “(a) To employ any device,
24 scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to
25 state a material fact necessary in order to make the statements made, in light of the circumstances
26 under which they were made, not misleading, or (c) To engage in any act, practice, or course of
27 business which operates or would operate as a fraud or deceit upon any person, in connection with
28 the purchase or sale of any security.” 17 C.F.R. § 240.10b–5. “The basic elements of a Rule 10b-5

1 claim, therefore, are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) a
 2 connection with the purchase or sale of a security, (4) transaction and loss causation, and
 3 (5) economic loss.” In re Daou Sys., Inc., 411 F.3d 1006, 1014 (9th Cir. 2005) (citing Dura
 4 Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S.Ct. 1627, 1631, 161 L.Ed.2d 577 (2005)).

5 Defendants assert that Plaintiffs have not viably alleged a Rule 10b-5 violation based on
 6 three issues: (1) scienter, (2) loss causation, and (3) whether defendants “made” the material
 7 misrepresentations. For the reasons detailed below, the Court concludes that Plaintiffs have
 8 successfully pleaded a primary violation under Rule 10b-5.

9 **a. Scienter**

10 The Avenue Defendants, Magnachip Defendants, Tavakoli, and Sakai all argue that
 11 Plaintiffs have failed to allege they acted with the requisite scienter. The scienter required for a
 12 PSLRA claim is “a mental state embracing intent to deceive, manipulate, or defraud.” Tellabs,
 13 Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007). “[T]he complaint must allege that
 14 the defendants made false or misleading statements either intentionally or with deliberate
 15 recklessness.” In re Daou Sys., Inc., 411 F.3d 1006, 1015 (9th Cir. 2005). Recklessness, in this
 16 context, “may be defined as a highly unreasonable omission, involving not merely simple, or even
 17 inexcusable negligence, but an extreme departure from the standards of ordinary care, and which
 18 presents a danger of misleading buyers or sellers that is either known to the defendant or is so
 19 obvious that the actor must have been aware of it.” Hollinger v. Titan Capital Corp., 914 F.2d
 20 1564, 1569 (9th Cir. 1990) (internal quotation marks omitted). Because scienter is a subjective
 21 inquiry, “the ultimate question is whether the defendant knew his or her statements were false, or
 22 was consciously reckless as to their truth or falsity.” Gebhart v. SEC, 595 F.3d 1034, 1042 (9th
 23 Cir. 2010).

24 The “strong inference” of scienter required by the PSLRA “need not be irrefutable, i.e., of
 25 the ‘smoking-gun’ genre, or even the most plausible of competing inferences.” Tellabs, Inc., 551
 26 U.S. at 324 (internal quotation marks omitted). It must, however, “be more than merely
 27 ‘reasonable’ or ‘permissible’—it must be cogent and compelling, thus strong in light of other
 28 explanations.” Id. “A court must compare the malicious and innocent inferences cognizable from

1 the facts pled in the complaint, and only allow the complaint to survive a motion to dismiss if the
 2 malicious inference is at least as compelling as any opposing innocent inference.” Zucco Partners,
 3 LLC v. Digimarc Corp., 552 F.3d 981, 991 (9th Cir. 2009). Courts cannot conduct this analysis
 4 “in a vacuum.” Tellabs, Inc., 551 U.S. at 323. To evaluate whether a complaint satisfies the
 5 “strong inference” requirement, courts must consider “all of the facts alleged, taken collectively,”
 6 not “scrutinized in isolation.” In re VeriFone Holdings, Inc. Sec. Litig., 704 F.3d 694, 701 (9th
 7 Cir. 2012) (emphasis in original).

8 The Magnachip Defendants, Sakai, and Tavakoli all argue that Plaintiffs have failed to
 9 allege any specific facts that they knew, or were reckless in failing to know material information
 10 regarding the alleged false statements. See Magnachip Defendants’ Motion, ECF No. 126 at 14;
 11 Sakai’s Motion, ECF No. 155 at 15; Tavakoli’s Motion, ECF No. 121 at 11.

12 **i. Magnitude and Nature of Violation**

13 Plaintiffs offer several arguments in response. First, Plaintiffs assert that scienter can be
 14 inferred from the “magnitude, obviousness, and reasonableness” of the violation. Lead Plaintiffs’
 15 Opposition, ECF No. 137 at 26 (quoting In re Medicis Pharm. Corp. Sec. Litig., No. CV-08-1821-
 16 PHX-GMS, 2010 WL 3154863, at *4 (D. Ariz. Aug. 9, 2010)). Thus, violations that have a
 17 “significant impact on core business operations” can lead to a stronger inference. Id. at 27.
 18 (quoting In re Medicis, 2010 WL 3154863 at *5) Similarly, a “very obvious” violation of an
 19 accounting rule that is “extremely clear” will lead to a stronger inference than a violation where
 20 the accounting rule is “subject to competing interpretations that are reasonable.” Id. (quoting In re
 21 Medicis, 2010 WL 3154863 at *5) Here, they argue that Magnachip violated “arguably the most
 22 fundamental and straightforward corporate accounting principle” — namely, when to recognize
 23 revenue — through devices such as “sham ‘round-trip transactions,’” TAC, ECF No. 114 at ¶ 159,
 24 “recognizing revenue on unfinished and semi-finished products,” Id. at ¶ 160, and neglecting to
 25 include “concessions” to buyers that lowered the price, including “future discounts, price
 26 adjustments, and free products,” Id. at ¶ 167. See Lead Plaintiffs’ Opposition, ECF No. 137 at 28-
 27 29. They also point to the magnitude of the effect that the violations had on Magnachip’s reported
 28 profits, stating that Magnachip’s total revenue was inflated by \$121.7 million and total net income

1 by almost 500%, and that without the violations, Magnachip would have missed analyst estimates
2 every single quarter. Id. at 29-30.

3 These were not minor accounting errors. To the contrary, they dramatically affected
4 Magnachip's financial results, and in ways that strongly suggest a typical corporate executive
5 should have noticed them. "Accounting errors that prove to have a significant impact on core
6 business operations-i.e. cash, revenue, profits, liquidity, or viability of a product, sometimes give
7 rise to a compelling inference of scienter." In re Medicis, 2010 WL 3154863, at *5. This is
8 particularly so where the magnitude of the accounting error is great, the GAAP provisions that
9 were violated "are relatively straightforward or basic," or "the mistake is pervasive over a long
10 period of time." Id.

11 As Defendants point out, Plaintiffs' own case law suggests that allegations regarding the
12 nature and magnitude of the alleged accounting violations will rarely be enough by themselves to
13 show scienter. See, e.g., In re Diamond Foods, Inc. Sec. Litig., No. C 11-05386, 2012 WL 600923
14 at *8-9 (N.D. Cal. Nov. 30, 2012); In re Medicis, 2010 WL 3154863 at *5-7. Nevertheless, within
15 the "holistic" approach that the Court takes for its scienter inquiry, it is appropriate to draw at least
16 some inference of scienter from the significance of Magnachip's accounting errors.

17 **ii. Magnachip Management Allegations**

18 Second, Plaintiffs argue that Magnachip admitted its own management was responsible for
19 the errors that led to the allegedly false statements. Lead Plaintiffs' Opposition, ECF No. 137 at
20 25. They point to Magnachip's statement on March 11, 2014 that the decision to issue
21 restatements was prompted by ongoing review into "practices and procedures by management,"
22 and conclusions by outside auditors that management was "not maintaining an effective control
23 environment" and there was "circumvention of numerous internal controls under the management
24 team then in place." TAC, ECF No. 114 at ¶¶ 94, 103. They argue that "[a]dmissions of
25 management's actual participation in the improper practices are powerful evidence of scienter."
26 Lead Plaintiffs' Opposition, ECF No. 137 at 26.

27 Defendants argue that these admissions are not helpful unless they establish that
28 defendants "knew specific facts at the time that rendered their accounting determinations

1 fraudulent.” See Magnachip Defendants’ Reply, ECF No. 148 at 14 (quoting Rudolph v.
2 UTStarcom, 50 F. Supp. 2d 880, 889 (N.D. Cal. 2008). It is true, of course, that admissions that
3 particular individuals knew particular facts would be far more significant than a general admission
4 of fault. But generalized statements pointing to management remain relevant because they
5 discourage the otherwise equally compelling inference that Magnachip’s accounting violations
6 were caused through “innocent bookkeeping error.” Rudolph v. UTStarcom, 50 F. Supp. 2d at
7 890. Moreover, if there are enough other suggestions of knowledge or recklessness on the part of
8 defendants, an admission of fault by “management” as a whole may be enough for a court to infer
9 scienter even if the company was unwilling — or unable at the time — to disclose specifically who
10 was responsible.

11 **iii. Further Inferences**

12 Third, Plaintiffs argue that several other facts provide additional inferences of scienter.
13 Lead Plaintiffs’ Opposition, ECF No. 137 at 30-33. They note that Magnachip’s dismissal of
14 defendants Sakai and Park (though both of them resigned) contributes to an inference of scienter.
15 Lead Plaintiff’s Opposition, ECF NO. 137 at 30. Courts have held that such resignations may be
16 relevant; however, “[w]here a resignation occurs slightly before or after a defendant corporation
17 issues a restatement, a plaintiff must plead facts refuting the reasonable assumption that the
18 resignation occurred as a result of restatement’s issuance itself in order for a resignation to be
19 strongly indicative of scienter.” Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1002 (9th
20 Cir. 2009).

21 Plaintiffs also point to the SEC’s ongoing investigation of Magnachip, which some courts
22 have acknowledged as “one more piece of the scienter puzzle,” In re UTstarcom, Inc. Sec. Litig.,
23 517 F. Supp. 2d 964, 976 (N.D. Cal. 2009). They further point to Sakai’s and Park’s signing of
24 Sarbanes-Oxley (SOX) certifications stating that Magnachip’s financial quarterly statements were
25 accurate, and Defendants’ potential motives for committing the violations, including securing a
26 favorable corporate debt rating, inflating Magnachip’s stock price, and securing personal bonuses
27 tied to more favorable results.

28 These allegations by themselves are not sufficient to plead scienter. See Zucco Partners,

1 552 F.3d at 1004 (signatures of SOX certifications are not “substantial” in the scienter calculus);
2 Seaman v. Cal. Bus. Bank, No. 13-cv-02031, 2013 WL 5890726, at *6 (N.D. Cal. Oct. 30, 2013)
3 (same for motives of defendants). Plaintiffs, however, are not relying on these allegations alone.
4 They are arguing instead that the allegations are part of a broader picture from which a court may,
5 at the initial pleading stage, infer a compelling claim of scienter. This is squarely in line with
6 applicable case law. See No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W.
7 Holding Corp., 320 F.3d 920, 944-45 (9th Cir. 2003).

8 Plaintiffs also allege, in relation to individual defendants Lee, Norby, Elkins, Klein, and
9 Tavakoli, that their membership in Magnachip’s Audit Committee leads to a further inference of
10 scienter. Lead Plaintiff’s Opposition, ECF No. 137 at 35. They assert that the audit committee’s
11 obligation — indeed, its reason for existence — is to review the company’s financial statements
12 and its accounting procedures, and therefore the Defendants acted recklessly by disregarding those
13 responsibilities despite attesting that they had met them. Id. at 37.

14 Defendants argue that mere membership in an audit committee is insufficient to meet the
15 heightened pleading standard of Rule 9(b) and the PSLRA, and contrasts this case with others
16 involving more specific allegations. Avenue Defendants’ Motion, ECF No. 123 at 18; see also,
17 e.g., Novak v. Kasaks, 216 F.3d 300, 311-312 (2d Cir. 2000) (complaint alleged that committee
18 member defendants knew about fraudulent inventory mark-ups but refused to fix them to avoid
19 damaging company’s financial prospects). But combined with other allegations, it may be “at
20 least as compelling as any opposing innocent inference,” Zucco Partners, 552 F.3d at 991, to
21 conclude that responsible members of an Audit Committee should have noticed significant errors
22 in revenue recognition, and that at the very least, a failure to do so was reckless on their part.

23 **iv. Core Operations Inference**

24 Lastly, Plaintiffs argue that, given these other inferences, scienter can be assumed based on
25 the inference that executive officers have knowledge of the “core operations” of their company.
26 Lead Plaintiffs’ Opposition, ECF No. 137 at 34. Generally, a plaintiff cannot “rely[] exclusively
27 on the core operations inference to plead scienter under the PSLRA.” S. Ferry LP, No. 2 v.
28 Killinger, 542 F.3d 776, 784 (9th Cir. 2008). However, allegations regarding management’s role

1 in a company may be relevant when “used in any form along with other allegations that, when
2 read together, raise an inference of scienter that is ‘cogent and compelling, thus strong in light of
3 other explanations’” or in “rare circumstances where the nature of the relevant fact is of such
4 prominence that it would be “absurd” to suggest that management was without knowledge of the
5 matter.” Id. at 785-86.

6 **v. Stock Sales**

7 Defendants argue that because many of the individual defendants did not sell any stock
8 while the alleged fraud was ongoing, the Court should draw the inference that they therefore
9 lacked scienter of that fraud. See Sakai Motion, ECF No. 155 at 25; Tavakoli Reply, ECF No. 145
10 at 15. They argue that if the individual defendants in fact knew about the overstatements of
11 revenue, they would not have kept their stock and incurred the same losses as all investors when
12 the price declined after Magnachip’s restatements. See In re Hansen Natural Corp. Sec. Litig., 527
13 F. Supp. 2d 1142.

14 The Court does not agree. “Scienter can be established even if the officers who made the
15 misleading statements did not sell stock during the class period.” No. 84 Employer-Teamster
16 Joint Council Pension Trust Fund v. Am. W. Holding Corp., 320 F.3d 920, 944 (9th Cir. 2003)
17 (citing to Hanon v. Dataprods. Corp., 976 F.2d 497, 507 (9th Cir. 1992)). Indeed, there are several
18 explanations for why an individual defendant would not sell stock even if she knew about false
19 financial statements, such as a desire to avoid drawing the market’s attention to the problem.
20 Further, even if an individual who knows of company misstatements may on the whole be less
21 likely to keep her stock, the same cannot be said of an individual who is merely deliberately
22 reckless in failing to be aware of such misstatements. Given that many of Plaintiffs’ allegations
23 lend themselves more to recklessness than knowledge (for example, their argument that the
24 individual Defendants recklessly neglected their duties as Audit Committee members),
25 Defendants’ argument is unpersuasive.

26 **vi. Plaintiffs’ Allegations as a Whole**

27 In sum, Plaintiffs have alleged that the violations committed by Magnachip had such a
28 significant effect on its revenue and was of such a fundamental nature that it can be inferred that

1 most reasonable, non-reckless executives would have become aware of them. They alleged that
2 Magnachip admitted, albeit somewhat vaguely, that management may be at fault for these
3 violations. They alleged that two high-level officers were dismissed at the same time the
4 violations were announced, that other officers signed documents attesting to the accuracy of the
5 false statements, and that defendants had strong motives to commit them. Finally, they alleged
6 that many of the individual defendants served on a committee whose responsibility was to police
7 for such violations. While each of these allegations alone might be insufficient to plead a “cogent
8 and compelling” claim of scienter, taken as a whole the Court concludes they meet the standard
9 under the PSLRA.

10 **b. Loss Causation**

11 The Magnachip Defendants argue that Plaintiffs have also failed to prove loss causation.
12 Magnachip Defendants’ Motion, ECF No. 126 at 24. Loss causation, “i.e. a causal connection
13 between the material misrepresentation and the loss” experienced by the plaintiff, is a necessary
14 element of pleading a securities fraud claim under section 10(b) of the Exchange Act. Dura
15 Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005). “A complaint fails to allege loss causation if it
16 does not ‘provide[] [a defendant] with notice of what the relevant economic loss might be or of
17 what the causal connection might be between that loss and the misrepresentation[.]’ Stated in the
18 affirmative, the complaint must allege that the defendant's share price fell significantly after the
19 truth became known.” Meltzer Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1062
20 (9th Cir. 2008) (quoting Dura Pharm., 544 U.S. at 347). “The burden of pleading loss causation is
21 typically satisfied by allegations that the defendant revealed the truth through ‘corrective
22 disclosures’ which ‘caused the company's stock price to drop and investors to lose money.’”
23 Lloyd v. CVB Fin. Corp., No. 13-56838, 2016 WL 384773, at *8 (9th Cir. Feb. 1, 2016) (citing
24 Halliburton Co. v. Erica P. John Fund, Inc., ___ U.S. ___, 134 S.Ct. 2398, 2406 (2014)).

25 “Typically, ‘to satisfy the loss causation requirement, the plaintiff must show that the
26 revelation of that misrepresentation or omission was a substantial factor in causing a decline in the
27 security's price, thus creating an actual economic loss for the plaintiff.’” Nuveen Mun. High
28 Income Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1119 (9th Cir. 2013) (quoting

1 McCage v. Ernst & Young, LLP, 494 F.3d 418, 425-26 (3d. Cir. 2007)). For example, loss
2 causation is adequately alleged where plaintiffs stated that a company had engaged in improper
3 accounting practices and that the “stock fell precipitously after [the company] began to reveal
4 figures showing the company's true financial condition.” Id. at 1119-1120 (quoting In re Daou
5 Sys., Inc., 411 F.3d 1006, 1026 (9th Cir. 2005)).

6 In asserting that loss causation is not shown here, the Magnachip Defendants argue that
7 Plaintiffs “cite seven purported corrective disclosures that they allege cause Magnachip’s stock
8 price to drop,” but that “five of these purported disclosures” did not “reveal[] to the market the
9 pertinent truth that was previously concealed or obscured by the Company’s alleged fraud.”
10 Magnachip Defendants’ Motion, ECF No. 126 at 24. For example, they assert that Magnachip’s
11 announcements of Sakai’s resignation and Park’s retirement did not, “in and of themselves” reveal
12 any false or fraudulent conduct by Magnachip. Id. at 25. Plaintiffs respond that these disclosures
13 sufficiently plead loss causation under the “materialization of the risk” theory, in which “the stock
14 price declines in response to an event that is the materialization of a risk that was created and/or
15 concealed by defendants’ fraud.” Lead Plaintiffs’ Opposition, ECF No. 137 at 40 (citing to
16 Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005)).

17 As the Magnachip Defendants correctly note, Magnachip Defendants’ Reply, ECF No. 148
18 at 18, the Ninth Circuit has not adopted the materialization of the risk theory. Nuveen, 730 F.3d at
19 1122 n.5. Regardless, the Court concludes that the TAC adequately pleads loss causation. As
20 Nuveen also makes clear, “Disclosure of the fraud is not a sine qua non of loss causation, which
21 may be shown even where the alleged fraud is not necessarily revealed prior to the economic
22 loss.” Id. at 1120. This means that any particular corrective disclosure is relevant only insofar as
23 it may provide a data point regarding the market’s reaction to information about a defendant’s
24 alleged misconduct. The fundamental inquiry before the Court remains whether there is “a causal
25 connection between the material misrepresentation and the loss.” Dura Pharm., 544 U.S. at 342.

26 Here, Plaintiffs allege that beginning with Magnachip’s January 27, 2013 postponement of
27 its financial report and through its February 12, 2015 release of its restatement of its financial
28 results, Magnachip’s stock steadily declined, from over \$17 a share to less than \$6 a share. TAC,

1 ECF No. 114 at ¶¶ 92-106. Plaintiffs further allege that over this period of time, Magnachip
2 received a “credit negative” report, Id. at ¶ 93, outside auditors suggested that Magnachip was
3 “not maintaining an effective control environment,” Id. at ¶ 103, and market analysis downgraded
4 their ratings of the company, Id. at ¶ 104. Perhaps most significantly, Plaintiffs allege that
5 Magnachip’s stock price was cut in half, from \$15.02 per share to \$7.52 per share, the day after it
6 revealed the effects of its accounting errors on its financial results. Id. at ¶ 105. These allegations
7 are sufficient to plead a claim that Plaintiffs’ economic loss was caused by Magnachip’s
8 misrepresentations. See In re Daou, 411 F.3d at 1026 (finding loss causation sufficiently pleaded
9 by allegations that “Daou’s stock fell precipitously after defendants began to reveal figures
10 showing the company’s true financial condition” and an analyst was anonymously quoted as
11 saying “You have got to question whether they are manufactured earnings.”).

12 **c. “Making” the Alleged Misrepresentations**

13 The final argument raised against Plaintiffs’ 10(b) claims is that they fail to show that any
14 Defendants made the alleged misrepresentations. The Supreme Court has held that only a
15 “maker” of an allegedly false statement can be held liable for that statement under Section 10(b)
16 and Rule 10b–5. Janus Capital Grp. v. First Deriv. Traders, 131 S. Ct. 2296, 2302 (2011). “For
17 purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority
18 over the statement, including its content and whether and how to communicate it.” Id. The
19 Supreme Court analogized the concept of a “maker” of a statement with that of a speaker as
20 opposed to his or her speechwriter: “Even when a speechwriter drafts a speech, the content is
21 entirely within the control of the person who delivers it. And it is the speaker who takes credit—or
22 blame—for what is ultimately said.” Id.

23 Plaintiffs argue that they sufficiently alleged that Defendants made the false statements by
24 stating that all of the individual Defendants signed the 2011 and 2012 Form-10Ks filed with the
25 SEC, which included the allegedly false financial statements that ground Plaintiffs’ claims. Lead
26 Plaintiffs’ Opposition, ECF No. 137 at 45-46; see also TAC, ECF No. 114, ¶¶ 48, 72. Plaintiffs’
27 argument is supported by Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 (9th Cir. 2000), in
28 which the Ninth Circuit held that a corporate official who “signs a SEC filing containing

1 misrepresentations” is, in doing so, “mak[ing] a statement so as to be liable as a primary violator
2 under § 10(b).” As the Ninth Circuit noted, “when a corporate officer signs a document on behalf
3 of the corporation, that signature will be rendered meaningless unless the officer believes that the
4 statements in the document are true.” Id. Moreover, “by placing responsibility in corporate
5 officers to ensure the validity of corporate filings, investors are further protected from misleading
6 information.” Id.

7 Defendants argue that Howard should only apply to inside directors, who presumably have
8 a greater knowledge of the day-to-day operations of the company, and not to outside directors,
9 who presumably do not. They contend that “outside directors are differently situated than officers,
10 and signing an SEC filing, in and of itself, is not sufficient to plead a securities fraud claim against
11 an outside director.” Magnachip Defendants’ Motion, ECF No. 126 at 17 (citing to Wojtunik v.
12 Kealy, 394 F. Supp. 2d 1149, 1165 (D. Ariz. 2005) and other cases). The majority of the
13 individual Defendants — with the exception of Sakai, Park, and Hwang — were merely members
14 of the Board of Directors and Audit Committee rather than executive officers in Magnachip, and
15 therefore, according to Defendants, should not be held liable.

16 Neither authority nor public policy support the establishment of the distinction for which
17 Defendants argue. For one thing, Howard itself addresses the issue. Citing many of the same
18 cases as Defendant, Howard explains that these cases are better classified as cases in which the
19 defendants arguably lacked scienter rather than in which they did not “make” the relevant
20 statements. 228 F.3d at 1062. In other words, Defendants’ true objection here is not that outside
21 directors do not have “ultimate authority” over their statements —after all, they had just as much
22 control over their decisions to sign the SEC forms as inside directors — but rather that they lacked
23 the knowledge and awareness of the company’s inner workings possessed by inside directors. Yet
24 as explained above, the Court has separately found that scienter is adequately pleaded.

25 For another, Defendants ignore the fact that most of their cases are concerned with the
26 “group pleading doctrine,” by which “plaintiffs are allowed to plead claims for fraud against
27 officers of the corporation using group pleading presumptions that the fraud was the collective
28 action of the officers.” In re Ross Sys. Sec Litig., No. C-94-0017 DLJ, 1994 WL 583114 at *5-6

1 (N.D. Cal. July 21, 1994); see also Wojtunik v. Kealy, 394 F. Supp. 2d 1149, 1164 (D. Ariz.
2 2005); In re Gupta Corp. Sec. Litig., 900 F. Supp. 1217, 1241 (N.D. Cal. 1994); Stack v. Lobo,
3 903 F. Supp. 1361, 1376 (N.D. Cal. 1995). These cases indeed hold that outside directors should
4 not be held liable for signing allegedly false statements — but within the context of plaintiffs’
5 attempts to make use of the group pleading doctrine. This is because the doctrine is based on the
6 assumption that all of a company’s officers are “directly involved in the day-to-day affairs,
7 management, or control of the company,” which is not always the case for outside directors.
8 Stack, 903 F. Supp. at 1376.

9 Accordingly, the Court concludes that Plaintiffs have sufficiently pleaded that the
10 Defendants “made” allegedly false statements. In light of this and the preceding discussion, the
11 Court concludes Plaintiffs’ have sufficiently asserted a 10(b) violation.

12 2. 20(a) Claims

13 Section 20(a) of the Exchange Act extends liability for 10(b) violations to those who are
14 “controlling persons” of the alleged violations. See Hollinger v. Titan Capital Corp., 914 F.2d
15 1564, 1572 (9th Cir. 1990). In order to prove a prima facie case under section 20(a), a plaintiff
16 must prove: (1) a primary violation of federal securities laws, and (2) that the defendant exercised
17 “actual power or control” over the primary violator. Howard v. Everex Sys., Inc., 228 F.3d 1057,
18 1065 (9th Cir. 2000). “Whether [the defendant] is a controlling person is an intensely factual
19 question, involving scrutiny of the defendant’s participation in the day-to-day affairs of the
20 corporation and the defendant’s power to control corporate actions.” Id. at 1065 (quoting Kaplan
21 v. Rose, 49 F.3d 1363, 1382 (9th Cir. 1994)).³

22 The Court has already addressed Defendants’ arguments that Plaintiffs have failed to plead
23 a primary violation. It now turns to Defendants’ arguments that Plaintiffs have also failed to plead
24 that Avenue Capital is a “controlling person.”⁴

25 _____
26 ³ Plaintiffs argue that the heightened fraud pleading standard should not apply to 20(a)
27 claims because unlike section 10(b), fraud is not a necessary element of pleading a claim under
28 section 20(a). Lead Plaintiffs’ Opposition, ECF No. 137 at 49. The Court does not address this
argument, as it concludes that Plaintiffs sufficiently allege control even under the higher pleading
standard.

⁴ In light of the Notice of Settlement, the Court does not address Defendants’ arguments

1 Plaintiffs assert that Avenue Capital’s control over Magnachip’s statements is established
2 through its role as majority shareholder, and its corresponding power to appoint the majority of
3 Magnachip’s Board of Directors. Lead Plaintiffs’ Opposition, ECF No. 137 at 52. Though
4 Avenue sold enough of its stock to lose its status as majority shareholder shortly after the
5 beginning of the class period, Plaintiffs argue that Avenue nevertheless retained its control since
6 its appointees continued to serve on the Board of Directors and the Audit Committee. Id. They
7 argue that Avenue’s control can be established through the following facts: (a) that it has
8 substantial holdings of the controlled entity; (b) it places its designees on the board, and (c) these
9 designees signed the document(s) containing false statements. Id. at 53. They rely on In re Am.
10 Apparel, 2013 WL 10914316 at *36-37 and In re UTStarcom, Inc. Sec. Litig., 517 F. Supp. 2d
11 964, 979-80 (N.D. Cal. 2009) as support. Id.

12 Defendants offer two responses to Plaintiffs’ argument. First, they assert that applicable
13 case law establishes that minority shareholders — which Avenue became after selling much of its
14 stock — cannot be considered to have “control” over companies in which they own their minority
15 share. Avenue Defendants’ Reply, ECF No. 146 at 14. Second, they argue that In re Am. Apparel
16 and In re UTStarcom are distinguishable because the complaints in both of those cases involved
17 specific allegations that the minority shareholder had a significant role in company decisions,
18 while the TAC in this case does not. Id. at 15.

19 Regarding the latter argument, Plaintiffs plead in the TAC that Magnachip stated in its
20 public filings that “Avenue will continue to have significant influence over [the Company’s]
21 affairs for the foreseeable future” and “will be able to control most matters requiring stockholder
22 approval, including the election of directors and approval of significant corporate transactions.”
23 TAC, ECF No. 114 at ¶ 213. They also allege that Avenue “used its control of Magnachip to cash
24 out its investments in the Company at enormous profits.” Id. at ¶ 214. These allegations are
25 comparable to the ones made in In re Am. Apparel, 2013 WL 10914316 at *37 (plaintiffs alleged
26 acknowledgments by executive officers that defendant was “going to be involved in ‘management
27

28 regarding whether the other Defendants are “controlling persons.” See Avenue Defendants’
Motion, ECF 123 at 21; Magnachip Defendants’ Motion, ECF No. 126 at 26.

1 decisions as far as strategic issues”) and in In re UTStarcom, 617 F. Supp. 2d at 979 (plaintiffs
2 alleged that defendant, through their officers serving as directors, “had the power to cause [the
3 Company] to engage in the unlawful conduct complained of” and “were able to, and did, directly
4 and indirectly, control the conduct of [the Company’s] business”).

5 As for Defendants’ argument that minority status precludes possession of “control,” the
6 Court concludes that Defendants’ cited case law is distinguishable because none of it involves a
7 party who began the class period as a majority shareholder only to lose that status shortly
8 thereafter. Rather, Defendants’ cases stand merely for the proposition, which no one here
9 disputes, that a party that has always held only a minority share of the company does not, by virtue
10 of that fact alone, possess “control” over that company. See Avenue Defendants’ Reply, ECF No.
11 146 at 14 (citing to Silsby v. Icahn, 17 F. Supp. 3d 348, 371 (S.D.N.Y. 2014); In re Kosmos
12 Energy Ltd. Sec. Litig., 955 F. Supp. 2d 658 (N.D. Tex. 2013); In re Flag Telecom Holdings, Ltd.
13 Sec. Litig., 308 F. Supp. 2d 249, 273-74 (S.D.N.Y. 2004); In re Splash Tech. Holdings, Inc. Sec.
14 Litig., No. 99 Civ. 109, 2000 WL 1727405, at *16 (N.D. Cal. Sept. 29, 2000); Sloane Overseas
15 Fund, Ltd. v. Sapiens Int’l Corp., N.V., 941 F. Supp. 1369, 1379 (S.D.N.Y. 1996); In re Gupta
16 Corp. Sec. Litig., 900 F. Supp. 1217, 1243 (N.D. Cal. 1994); O’Sullivan v. Trident Microsys.,
17 Inc., No. 93 Civ. 20621, 1994 WL 124453, at *19 (N.D. Cal. Jan. 31, 1994)).

18 Defendants’ motions to dismiss Plaintiffs’ 20(a) claims are denied.

19 3. 20A Claims

20 Section 20A(a) of the Exchange Act imposes liability on parties who engage in insider
21 trading, for “damages suffered by individuals who trade contemporaneously with the insider.”
22 Johnson v. Aljian, 590 F.3d 778, 779 n.8 (9th Cir. 2007). Insider trading is defined as “purchasing
23 or selling a security while in possession of material, nonpublic information.” 15 U.S.C. § 78t-1(a).

24 Here, Plaintiffs have alleged that Lead Plaintiff purchased shares of Magnachip stock on
25 August 2, 2013, the day after Avenue Capital sold a portion of its stock on August 1, 2013. See
26 TAC, ECF No. 114 at ¶ 236. This is sufficient to allege that Lead Plaintiff traded
27 “contemporaneously” with Avenue. See In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d
28 1132, 1205 (C.D. Cal. 2008) (trading on the same day or the day after is “contemporaneous”).

1 A more difficult question is whether Avenue engaged in insider trading. An initial matter,
2 though not discussed by the parties, is whether section 20(A) requires the defendant to “actually
3 use” the inside information as part of their investment decision, or merely requires the defendant
4 to possess such information at the same time it conducts its transactions. Two district courts in
5 this circuit have considered the issue and reached different results. In In re Countrywide Financial
6 Corp. Sec. Litig., 588 F. Supp. 2d 1132, 1203 (C.D. Cal. 2008), the court held that “scienter and
7 loss causation for insider trading requires that the insider actually use (scienter) the inside
8 information in deciding to make the trade (loss causation).” The court cited to U.S. v. Smith, 155
9 F.3d 1051, 1067-69 (9th Cir. 1998), which reached the same conclusion, albeit in a criminal case.
10 The In re Countrywide court acknowledged that Smith was a criminal case and that the Ninth
11 Circuit explicitly left open whether the same standard applied to civil cases, but it concluded that
12 only the “actual use” standard “satisfies the PSLRA and the Ninth Circuit’s demanding deliberate
13 recklessness or actual knowledge or intent standards.” 588 F. Supp. 2d at 1203 n.82.

14 The court in Johnson v. Aljian, 394 F. Supp. 2d 1184, 1198-99 (C.D. Cal. 2004), on the
15 other hand, considered the same issue and reached a different result. It also acknowledged the
16 Smith holding, but declined to import Smith’s holding in a criminal context to civil cases. Instead,
17 it relied on the Second Circuit’s scienter standard, described in U.S. v. Teicher, 987 F.2d 112, 120
18 (2d Cir. 1993). In Teicher, the Second Circuit concluded that “a requirement of casual connection
19 between the [inside] information and the trade could frustrate attempts to distinguish between
20 legitimate trades and those conducted in connection with inside information.” 987 F.2d at 121.
21 The less strict “knowing possession” standard, by contrast, “recognizes that one who trades while
22 knowingly possessing material inside information has an informational advantage over other
23 traders.” Id. “Unlike a loaded weapon which may stand ready but unused, material information
24 can not lay idle in the human brain.” Id.

25 This Court agrees with the Second Circuit and Johnson v. Aljian that Section 20A requires
26 only that a party know the inside information while making the trade, not that she actually use that
27 information. This conclusion comports with the language of the section, which prohibits
28 “purchasing or selling a security while in possession of material, nonpublic information.” 15

1 U.S.C. § 78t-1(a) (emphasis added).

2 Plaintiffs allege that Avenue Capital “through its Audit Committee appointees had access
3 to MagnaChip’s material, nonpublic and highly confidential information concerning the improper
4 business and accounting practices giving rise to the Restatement and the knowledge that
5 Magnachip’s financial reports were materially misstated during the Class Period.” TAC, ECF No.
6 114 at ¶ 238. The Court has already concluded, in its analysis of Plaintiffs’ 10(b) claims, that the
7 individual Avenue Defendants Elkins and Klein are alleged to have the requisite scienter regarding
8 Magnachip’s misrepresentations. Plaintiffs argue that because Elkins and Klein were also Avenue
9 employees, their knowledge can be imputed to Avenue itself, Lead Plaintiff’s Opposition, ECF
10 No. 137 at 55 n.26, citing to W. R. Grace & Co. v. W. U. S. Indus., Inc., 608 F.2d 1214, 1218 (9th
11 Cir. 1979) and Nordstrom, Inc. v. Chubb & Son, Inc., 54 F.3d 1424, 1435 (9th Cir. 1995).

12 Plaintiffs’ cases are not entirely on point, as Defendants note. Avenue Defendants’ Reply,
13 ECF No. 146 at 21. W.R. Grace was a patent infringement case in which the Ninth Circuit held
14 that an employee’s knowledge of a fraudulent affidavit could be imputed to his employer
15 corporation under established agency-principal doctrines. 608 F.2d at 1218. Nordstrom, Inc. was
16 an insurance coverage case in which the insurer argued that it was responsible only for individual
17 officer defendants, and not Nordstrom itself, in defending a securities fraud case. 54 F.3d at 1427.
18 Plaintiffs cite to a portion of the opinion that acknowledges that corporations are “liable for
19 actions by senior management personnel that are intrinsically corporate and bear the imprimatur of
20 the corporation itself.” Id. at 1435 (internal quotation marks and citation omitted).

21 Here, Plaintiffs have not offered allegations regarding agency-principal relationships or
22 actions that are “intrinsically corporate.” But they have alleged that Elkins and Klein had scienter
23 of Magnachip’s false statements and further that they were employees of Avenue Capital while
24 also serving as officers of Magnachip. These facts do not establish without a doubt that Elkins’s
25 and Klein’s inside information regarding Magnachip’s financial statements was imputed to
26 Avenue, but they are enough to suggest that “the malicious inference is at least as compelling as
27 any opposing innocent inference.” Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 991
28 (9th Cir. 2009).

1 Accordingly, Defendants’ motions to dismiss Plaintiffs’ Section 20A claims are denied.

2 **C. Securities Act Claims**

3 Though Plaintiffs raise claims under sections 11, 12(a)(2), and 15 of the Securities Act in
4 their TAC, only the latter two claims apply to Avenue Capital. However, as explained below,
5 sections 11 and 12(a)(2) often overlap in their analysis. As the parties do in their briefing, the
6 Court therefore discusses the claims related to these two sections together. It concludes that
7 Plaintiffs’ claims under these sections, and accordingly their claims under section 15, must be
8 dismissed.

9 **1. 11 and 12(a)(2) claims**

10 “Section 11 creates a private right of action for any purchaser of a security where ‘any part
11 of the registration statement, when such part became effective, contained an untrue statement of a
12 material fact or omitted to state a material fact required to be stated therein or necessary to make
13 the statements therein not misleading.’” Rieckborn v. Jefferies LLC, 81 F. Supp. 3d 902, 914
14 (N.D. Cal. 2015) (quoting 15 U.S.C. § 77k(a)). “To prevail on a Section 11 claim, a plaintiff must
15 demonstrate (1) that the registration statement contained a misrepresentation or omission; and (2)
16 that the misrepresentation or omission was material.” Id. (citing to In re Daou Sys., Inc., 411 F.3d
17 1006, 1027 (9th Cir.2005)).

18 Section 12(a)(2) functions as the “sibling” to Section 11 of the Securities Act, allowing
19 plaintiffs to bring suit against parties who are statutory sellers of securities pursuant to
20 misrepresentations in registration statements. Id. at 925. “To plead a claim under Section
21 12(a)(2), the plaintiff must allege that (1) the defendant is a statutory seller; (2) the sale was
22 effected by means of a prospectus or oral communication; and (3) the prospectus or oral
23 communication contained a material misstatement or omission.” Maine State Ret. Sys. v.
24 Countrywide Fin. Corp., No. 2:10-CV-0302 MRP, 2011 WL 4389689, at *8 (C.D. Cal. May 5,
25 2011) (citing to 15 § U.S.C. 77l(a)(2)).⁵

26 _____
27 ⁵ Plaintiffs allege that because neither section 11 nor section 12(a) requires a showing of
28 fraud, only the standard pleading requirements of Rule 8(a) are applicable to claims under those
sections. However, such claims for which the alleged violations are “grounded in fraud” must
nevertheless meet the heightened 9(b) standard. In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405

1 Defendants raise two arguments that these claims are not sufficiently pleaded against
2 Avenue Capital: (1) that they are time-barred, and (2) that Plaintiffs lack statutory standing.⁶ As
3 detailed below, the Court will grant Defendants’ motions to dismiss these claims based on both
4 grounds.

5 **a. Whether Plaintiffs’ Claims are Time-Barred**

6 Defendants first argue that Plaintiffs’ Securities Act claims are time-barred. Claims
7 brought under the Securities Act are barred “unless brought within one year after the discovery of
8 the untrue statement or the omission, or after such discovery should have been made by the
9 exercise of reasonable diligence.” 15 U.S.C. § 77m. The one-year period “begins to run once the
10 plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting
11 the violation — whichever comes first.” Merck & Co. v. Reynolds, 559 U.S. 633, 653 (2010).⁷
12 “Plaintiffs are considered to have discovered a fact when a ‘reasonably diligent plaintiff would
13 have sufficient information about that fact to adequately plead it in a complaint . . . with sufficient
14 detail and particularity to survive a 12(b)(6) motion to dismiss.’” F.D.I.C. v. Countrywide
15 Financial Corp., No. 2:12-CV-4353 MRP, 2012 WL 5900973 at *3 (C.D. Cal. Nov. 21, 2012)
16 (quoting City of Pontiac Gen. Employees’ Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 175 (2d Cir.
17 2011)). This is a “fact intensive” inquiry, and some courts have held it is “usually not
18 appropriate” to conduct it at the pleading stage. Rafton v. Rydex Series Funds, No. 10-cv-01171-
19 LHK, 2011 WL 31114 at *9 (N.D. Cal. Jan. 5, 2011) (citation omitted). “At the pleading stage,
20 the question is whether it is plausible that [the] disclosures were insufficient to supply a

21
22 (9th Cir. 1996). Plaintiffs attempt to avoid the heightened pleading standard by “specifically
23 exclude[ing]” all allegations of fraud from their Securities Act claims, TAC, ECF No. 114 at ¶¶
24 245, 255, 261, but this is unavailing. See Reickborn v. Jefferies LLC, 81 F. Supp. 3d 902, 918
25 (N.D. Cal. 2015) (“A plaintiff cannot escape the requirements of Rule 9(b) by virtue of a general
26 disclaimer that a [Section 11] claim is based on negligence rather than fraud.” (internal quotation
27 marks and citation omitted)).

28 ⁶ The other Defendants besides Avenue Capital also argued that they were not statutory
sellers. Because Avenue Capital did not contest that it was a statutory seller, the Court does not
address this issue.

⁷ Though Merck was an Exchange Act case, its reasoning applies equally to the similar
timeliness requirements for Securities Act claims. See, e.g., Booth v. Strategic Realty Trust, Inc.,
No. 13-CV-04921-JST, 2014 WL 3749759, at *5 (N.D. Cal. July 29, 2014); F.D.I.C. v.
Countrywide Financial Corp., No. 2:12-CV-4353 MRP, 2012 WL 5900973 at *2-3 (C.D. Cal.
Nov. 21, 2012).

1 reasonably diligent plaintiff with the information necessary to plead the Section 11 claims with
2 sufficient detail and particularity to survive a 12(b)(6) motion.” Booth v. Strategic Realty Trust,
3 Inc., No. 13-CV-04921-JST, 2014 WL 3749759, at *6 (N.D. Cal. July 29, 2014).

4 The focus of the dispute is whether Magnachip’s announcement in March 11, 2014 that it
5 needed to restate its financial results for 2011 through 2013 gave reasonably diligent plaintiffs
6 enough information to discover Magnachip’s alleged misrepresentations. If so, the Securities Act
7 claims, which were first raised by OPPRS in April of 2014, would be time-barred because they
8 were brought thirteen months after the announcement.

9 Plaintiffs argue that there were not sufficient facts to support their claims until at least
10 August 12, 2014, when Magnachip first announced that the effect of its restatements would be
11 “material.” See OPPRS Opposition, ECF No. 138 at 18.⁸ They contend that the March 11, 2014
12 announcement “revealed only that the Company would restate its financial results for 2011
13 through 2013 to correct timing errors in revenue recognition on some sales made through its
14 distributors.” OPPRS Opposition, ECF No. 138 at 16. They argue that it was not made clear until
15 August 2014 that these errors would have a material effect on the financial information provided
16 to investors. Id. at 17. Thus, for example, Plaintiffs explain that if a “timing error” had caused the
17 revenues to be overstated for the fiscal year for 2011, the same error would be expected to cause
18 revenues to be understated in the fiscal year for 2012, leaving the revenue impact “neutral” for
19 Magnachip. Id. at 17 n.7. They analogize to Reickborn v. Jefferies, 81 F. Supp. 3d 902 (N.D. Cal.
20 2015). In that case, defendants argued that plaintiffs’ Securities Act claims were time-barred due
21 to the company’s disclosure that it was changing its metric for “day sales outstanding,” or DSO, to
22 avoid excluding certain contract receivables. Id. at 909, 915. The court held, however, that the
23 disclosure did not “ma[ke] plain the linkages between Velti’s method of calculating its reported
24 DSO and its alleged understatement of reserves and overstatement of revenues.” Id. at 915.

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26 ⁸ The Underwriter Defendants also contend that Plaintiffs should not be allowed to argue they
27 lacked sufficient information to bring their claims until August 12, 2014 because the Lead
28 Plaintiffs first filed their complaint on March 12, 2014. Underwriter Reply, ECF No. 144, at 9.
The Court will not address this argument except to say it is based on a selective reading of the
prior history of the case and the consolidation of OPPRS’s claims with those of the Lead Plaintiff.

1 Plaintiffs here argue that Magnachip’s March 11, 2014 announcement similarly did not reveal the
2 “timing errors” would ultimately render the financial reports to be materially false.

3 Defendants argue that the March 11 announcement would still have put a “reasonably
4 diligent” investor on notice that the financial reports should not be relied upon as true; indeed,
5 Plaintiffs themselves allege that Magnachip stated that the prior financial reports “should not be
6 relied upon.” TAC, ECF No. 114 ¶ 94. Defendants analogize to In re Magnum Hunter Resources
7 Corp. Sec. Litig., 616 Fed. Appx. 442 (2d Cir. 2015). In that case, the defendant Magnum Hunter
8 “repeatedly disclosed ongoing control weaknesses in late-2012 through mid-2013 while
9 continuing to warn of possible additional problems.” Id. at 446. The Second Circuit rejected
10 plaintiffs’ argument that their claims were not time-barred because the full extent of the “internal
11 control weaknesses” was only revealed in the later 2013 disclosures. Id. at 447. It held that “[w]e
12 have never permitted the statute of limitations to be tolled until a company’s disclosures touch on
13 every specific allegation that a plaintiff chooses to put in his complaint.” Id.

14 This case appears to lie somewhere in between the two cited by Plaintiffs and Defendants.
15 The March 11 and August 12 announcements were not merely a series of “repeated disclosures of
16 ongoing weaknesses” as in Magnum Hunter. At the same time, the March 11 announcement did
17 “make plain” that the accounting errors cited by Magnachip would cause changes to Magnachip’s
18 financial results, unlike in Reickborn. Nevertheless, Plaintiffs may be correct that the March 11
19 announcement, in and of itself, did not sufficiently put them on notice to begin their one-year
20 clock.

21 However, as Defendants point out, there were several other sources of information that a
22 reasonably diligent investor would likely uncover. Most significant is the March 12 complaint
23 filed by the Lead Plaintiffs, in which they allege similar claims to those later brought by OPPRS in
24 April of the following year. Underwriter Defendants’ Opposition, ECF No. 130 at 15. Indeed,
25 Lead Plaintiffs alleged in their initial complaint that “defendants made false and/or misleading
26 statements” in relation to the fact that Magnachip “was improperly recognizing revenues” and “as
27 a result of the above, the Company’s financial statements were materially false and misleading at
28 all relevant times.” Complaint, ECF No. 1 at 3. At base, these allegations are the same as those

1 now alleged in Plaintiffs’ Securities Act claims. Defendants also point to several news stories
2 regarding Magnachip’s announcements, as well as numerous law firms who publicized
3 announcements or calls for suggested class action litigation against Magnachip in early 2014.
4 Underwriter Defendants Opposition, ECF No. 130 at 11.

5 Plaintiffs contend that “Defendants ignore significant differences between OPPRS’s initial
6 complaint and the March 12, 2014 complaint, including the pleading of information about the
7 magnitude and impact of the accounting violations.” OPPRS’s Opposition, ECF No. 138 at 26.
8 However, the one-year time period does not reset simply because additional information is
9 revealed that could make for a stronger claim. See Stitching Pensioenfonds ABP v. Countrywide
10 Fin. Corp. 802 F. Supp. 2d 1125, 1137 (C.D. Cal. 2011) (“A statute which does not begin to run
11 until every possible phrasing or permutation of the defendant’s wrongdoing has been publicly
12 reported would never run. Each new news report or interview with company executives would
13 reset the clock.”).

14 Accordingly, the Court concludes that the combination of the March 11 announcement, the
15 Lead Plaintiffs’ initial complaint filed the next day, and the other coverage surrounding the
16 announcement would have put a reasonably diligent investor on notice of potential Securities Act
17 claims against Defendants.

18 Plaintiffs argue in the alternative that their claims are not time-barred because they relate
19 back to the original complaint filed on March 12. However, the Ninth Circuit has held that an
20 amended complaint that adds new plaintiffs relates back to the original complaint only if “there is
21 an identity of interests between the original and newly proposed plaintiff.” In re. Syntex Corp.
22 Sec. Litig., 95 F.3d 922, 936 (9th Cir. 1996). Here, there is no identity of interests because the
23 later complaint filed by OPPRS was based on a different securities transaction and different
24 disclosures by Magnachip. See id. Plaintiffs’ claims under sections 11 and 12(a)(2) are therefore
25 time-barred.

26 **b. Statutory Standing**

27 In the alternative, the Court concludes Plaintiffs also lack statutory standing for their
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1 section 11 and 12(a)(2) claims.⁹ “To have standing to bring a Section 11 claim, plaintiffs must be
2 able to trace their shares back to an allegedly misleading registration statement.” In re Ubiquiti
3 Networks, Inc. Sec. Litig., 33 F. Supp. 3d 1107, 1117 (N.D. Cal. 2014) (citing In re Century
4 Alum. Co. Sec. Litig., 729 F.3d 1104, 1106 (9th Cir. 2013)). Statutory standing under Section
5 12(a)(2) requires further that plaintiffs show they purchased their shares “in a public offering, as
6 opposed to the secondary market. Id. at 1126 (citing Gustafson v. Alloyd Co., Inc., 513 U.S. 561,
7 577 (1995)).

8 The Ninth Circuit has explained that the “level of factual specificity” needed to trace
9 shares back to a particular offering and registration statement “will vary depending on the
10 context.” In re Century Alum. Co. Sec. Litig., 729 F.3d 1104, 1107 (9th Cir. 2013). For example,
11 “[w]hen all of a company's shares have been issued in a single offering under the same registration
12 statement, this ‘tracing’ requirement generally poses no obstacle.” Id. at 1106 (citation omitted).
13 However, when a company has issued shares under multiple registration statements, as was the
14 case here, the plaintiff “must prove that her shares were issued under the allegedly false or
15 misleading statement, rather than some other registration statement.” Id.

16 This can be done in two ways. First, plaintiff can prove that they purchased the shares
17 directly in the offering itself. Id. Second, plaintiffs can prove “that their shares, although
18 purchased in the aftermarket, can be traced back to the secondary offering.” Id. This second
19 method is “often impossible,” because it requires plaintiffs “to trace the chain of title for their
20 shares back to the [pertinent] offering, starting with their own purchases and ending with someone
21 who bought directly in the [pertinent] offering.” Id. at 1106-07. Most trading, however, “is done
22 through brokers who neither know nor care whether they are getting newly registered or old
23 shares.” Id. (citation omitted).

24 Plaintiffs contend that general allegations that securities purchases are “traceable” to a
25 false registration statement are sufficient to allege statutory standing, citing to In re Petrobras Sec.
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27 ⁹ Because the claim here is in regards to statutory standing under the Securities Act rather
28 than Article III standing, this claim is properly considered under Fed. R. Civ. Pro. 12(b)(6) rather
than Rule 12(b)(1). See In re Century Alum. Co. Sec. Litig., 729 F.3d 1104, 1109 (9th Cir. 2013).

1 Litig., No. 14-cv-9662 (JSR), 2015 WL 4557364 at *13 (S.D.N.Y. July 30, 2015). In other
2 circuits, the question of statutory standing for Securities Acts claims appears to be somewhat
3 unsettled, and courts in those circuits have deemed general allegations to be sufficient. See In re
4 Ariad Pharm., Inc., 98 F. Supp. 3d 147, 168-69 (D. Mass. 2015) (collecting cases and declining to
5 follow In re Century “[i]n the absence of additional guidance or evidence that the Ninth Circuit is
6 not an outlier among circuits on the issue”). The Ninth Circuit, however, has explicitly rejected
7 general allegations as sufficient pleadings of statutory standing in light of the changes to pleading
8 standards effected by Bell Atlantic Corp. v. Twombly, 550 U.S. 554 (2007) and Ashcroft v. Iqbal,
9 556 U.S. 662 (2009). See In re Century, 729 F.3d at 1107.

10 Plaintiffs do not argue or allege that they purchased their shares directly from defendants.
11 Instead, they allege generally that “Plaintiff Oklahoma Police acquired Magnachip stock pursuant
12 and/or traceable to the Registration Statement for the 2/13 Offering” TAC, ECF No. 114 at ¶ 251.
13 They assert this can be shown because they purchased their shares on the day of the 2/13 Offering
14 (February 6, 2013) and for the same offering price (\$14.50). OPPRS Opposition, ECF No. 138 at
15 29. However, these same allegations were rejected by the Ninth Circuit in In re Century, 729 F.3d
16 at 1107-08. In that case, the plaintiffs alleged that they “purchased Century Aluminum common
17 stock directly traceable to the Company’s Secondary Offering,” and argued that additional
18 allegations regarding “the dates on which and the prices at which they purchases their shares, as
19 well as allegations concerning the trading volume of Century Aluminum stock on certain days,”
20 was sufficient to meet their statutory standing burden. Id. The Ninth Circuit disagreed, holding
21 that the plaintiffs’ shares “could have come from the secondary offering, but the ‘obvious
22 alternative explanation’ is that they could instead have come from the pool of previously issued
23 shares,” and therefore their allegations were not sufficient to rise above being “‘merely consistent
24 with’” their assertion that their shares were traceable to the secondary offering. Id. (quoting
25 Twombly, 550 U.S. at 567, and Iqbal, 556 U.S. at 678).

26 Accordingly, Plaintiffs have failed to sufficiently allege statutory standing for their
27 Securities Act claims.
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1 In sum, Plaintiffs’ section 11 and 12(a)(2) claims against Avenue Capital are dismissed
2 because they are time-barred, and in the alternative, because Plaintiffs lack statutory standing. It
3 may be the case that Plaintiffs can amend their complaint with further facts to sufficiently plead
4 statutory standing, but no possible amendment may cure the fact that Plaintiffs’ claims are time-
5 barred by virtue of Magnachip’s March 11, 2013 announcement, the subsequent complaint by
6 Lead Plaintiff, and market coverage. Therefore, these claims are dismissed with prejudice

7 **2. Section 15 claims**

8 Section 15, much like Section 20(a) for Exchange Act claims, allows plaintiffs to also
9 bring claims against parties who are “control persons” for a primary violation of the Securities
10 Act. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1578 (9th Cir. 1990) (en banc) (stating
11 that the “controlling person analysis” for Section 15 is the same as Section 20(a)). Plaintiffs must
12 therefore allege (1) a primary violation of federal securities laws and (2) that the defendant
13 exercised actual power or control over the primary violator. Howard v. Everex Sys., Inc., 228
14 F.3d 1057, 1065 (9th Cir. 2000). The Court has concluded that Plaintiffs have failed to allege a
15 primary violation under section 11 or 12(a)(2). Their section 15 claims are therefore also
16 dismissed with prejudice.

17 **CONCLUSION**

18 For the foregoing reasons, the Court reaches the following conclusions: (1) in light of the
19 Notice of Settlement, the motions to dismiss in regards to all Defendants except Avenue Capital
20 are denied without prejudice to their re-filing if the settlement agreement is not approved;
21 (2) Defendants’ motions to dismiss are denied as to Plaintiffs’ claims against Avenue Capital
22 under sections 20(a) and 20A of the Exchange Act; and (3) Defendants’ motions to dismiss are

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granted with prejudice as to Plaintiffs' claims against Avenue Capital under sections 12(a)(2) and 15 of the Securities Act.

IT IS SO ORDERED.

Dated: March 4, 2016



JON S. TIGAR
United States District Judge