UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE HOME LOAN SERVICING SOLUTIONS, LTD. SECURITIES LITIGATION	Case No. 16-cv-60165-WPD

OMNIBUS ORDER ON MOTIONS TO DISMISS

THIS CAUSE is before the Court on Defendant William C. Erbey's Motion to Dismiss the Amended Consolidated Class Action Complaint [DE 68] and the Motion to Dismiss the Amended Class Action Complaint by Defendants Home Loan Servicing Solutions, Ltd., John P. Van Vlack, and James E. Lauter [DE 74] (collectively, the "Motions to Dismiss"). The Court has carefully reviewed the Motions to Dismiss and is otherwise fully advised in the premises.

I. Background

This action was filed on January 29, 2016. [DE 1]. The operative complaint is the Amended Consolidated Class Action Complaint (the "Amended Complaint"). [DE 34].[1] The West Palm Beach Police Pension Fund, the City of Fort Lauderdale Police and Firefighters' Retirement System, and the Police Retirement System of St. Louis (the "Lead Plaintiffs") bring this securities fraud class action pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") on behalf of themselves and all other persons or entities who purchased or otherwise acquired stock from Defendant Home Loan Servicing Solutions, Ltd. ("HLSS") during the February 28, 2012 to January 22, 2015 class period. [¶¶ 14-15]. In addition to HLSS, Lead Plaintiffs assert claims against William C. Erbey, the founder and former Chairman of HLSS; John P. Van Vlack ("Van Vlack"),

[1] Citations to the Amended Complaint will be [¶ __].

Director, President, and CEO of HLSS; and James E. Lauter ("Lauter"), CFO and Executive Vice President of HLSS. [¶¶ 22-24].

Ocwen Financial Corporation ("Ocwen"), founded by Erbey in 1988, is a financial services company engaged in the servicing of residential special and subprime mortgage loans. [¶ 29]. Over the last decade, Ocwen has spun off several companies. [¶¶ 33-34]. These companies include Altisource Portfolio Solutions, S.A. ("Altisource"), which provides mortgage servicing technology to Ocwen; Altisource Residential Corporation ("RESI"), which acquires and owns single-family rental assets following foreclosure; and Altisource Asset Management Corporation ("AAMC"), which performs operations for RESI. [¶¶ 33-34]. HLSS was formed in 2010 for the primary business purpose of acquiring mortgage servicing rights ("MSRs") from Ocwen and immediately paying Ocwen a fee to service the mortgages. [¶ 35].[2] Erbey was named Chairman of HLSS and certain managers and board members from Ocwen were retained to serve as executives and board members at HLSS. [¶ 35].

Ocwen was the subject of a two-year long investigation by the New York Department of Financial Services (the "NYDFS"), during which a number of letters were released detailing Ocwen's regulatory compliance and which ultimately culminated in a Consent Order on December 22, 2014 (the "December 2014 Consent Order"). [¶ 9]. On October 21, 2014, the NYDFS released a letter describing "serious issues with Ocwen's systems and processes." [¶ 98]. After the close of financial markets on October 21, 2014, Moody's downgraded HLSS and several other Ocwen-Related Companies, noting that HLSS's credit rating is linked to its reliance on Ocwen. [¶ 99]. HLSS's stock price dropped

[2] The Court will refer to Altisource, RESI, AAMC, and HLSS collectively as the "Ocwen-Related Companies."

from $21.82 per share on October 20, 2014 to $18.90 per share on October 22, 2014. [¶ 100]. The December 2014 Consent Order addressed Ocwen's regulatory deficiencies, specifically in the areas of Ocwen's technology systems and conflicts of interest between the Ocwen-Related Companies. The December 2014 Consent Order mandated Erbey's resignation as Chairman of Ocwen and the Ocwen-Related Companies. [¶ 9]. HLSS's stock price fell from $20.85 per share on December 19, 2014 to $19.83 per share on December 22, 2014. [¶ 195].

On January 12, 2015, the *Los Angeles Times* reported that the California Department of Business Oversight (the "CDBO") intended to suspend Ocwen's mortgage license. [¶ 107]. HLSS stock dropped from $16.09 per share on January 12, 2015 to $12.95 per share on January 13, 2015. On January 14, 2015, Moody's downgraded HLSS's rating, explaining that "[t]he rating actions reflect the continued regulatory scrutiny of Ocwen." [¶ 110]. Standard & Poor's ("S&P") similarly downgraded its outlook on HLSS from stable to negative on January 16, 2015, "based on the risk that the company's sole subservicer, Ocwen, could lose the right to servicing mortgages in California" and "Ocwen's broader regulatory challenges." [¶ 111]. On January 23, 2015, Ocwen entered into a Consent Order with the CDBO, which in part suspended Ocwen's ability to acquire additional MSRs for loans secured by properties in California. [¶¶ 90-91, 112]. That same day, in response to Ocwen's violation of various laws and regulations, the hedge fund BlueMountain Capital Management ("BlueMountain"), a holder of HLSS bonds, sent notices of default to HLSS and Ocwen concerning certain notes that HLSS serviced. [¶ 113]. HLSS's stock price dropped from $15.35 per share on January 22, 2015 to $13.76 per share on January 23, 2015. By January 30, 2015, the stock price had fallen to $12.06 per share.

On October 5, 2015, the Securities and Exchange Commission (the"SEC") issued the Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "SEC Order") [DE 34-1]. The SEC Order addressed "two sets of misstatements made by HLSS from 2012 to 2014, one concerning related party transactions and the other concerning valuation of company assets." [SEC Order ¶ 1].

II. Standard of Review

a. Section 10(b) Claim

To state a claim for securities fraud under Section 10(b) of the Act and Rule 10b–5, a plaintiff must allege six elements: "(1) a material misrepresentation or omission; (2) made with scienter; (3) a connection with the purchase or sale of a security; (4) reliance on a misstatement or omission; (5) economic loss; and (6) a causal connection between the material misrepresentation or omission and the loss, commonly called loss causation." *Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1352 (11th Cir. 2008) (quotation omitted). To survive a motion to dismiss, a claim brought under Section 10(b) of the Act or Rule 10b–5 must satisfy: (1) the federal notice pleading requirements; (2) the special fraud pleading requirements found in Fed. R. Civ. P. 9(b), *see Ziemba v. Cascade Int'l, Inc*., 256 F.3d 1194, 1202 (11th Cir. 2001); and (3) the additional pleading requirements imposed by the Private Securities Litigation Reform Act (the "PSLRA"), *see Phillips v. Scientific–Atlanta, Inc*., 374 F.3d 1015, 1016 (11th Cir. 2004).

Under the federal notice pleading standards, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The court must construe the reasonable inferences from well-pleaded facts in the

light most favorable to the plaintiff. *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011). Additionally, Rule 9(b) requires that, for complaints alleging fraud or mistake, "a party must state with particularity the circumstances constituting fraud or mistake," although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Rule 9(b) dictates that the complaint must allege:

> (1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendant obtained as a consequence of the fraud.

FindWhat Investor Grp., 658 F.3d at 1296.

The PSLRA imposes additional heightened pleading requirements. For Section 10(b) and Rule 10b–5 claims predicated on allegedly false or misleading statements or omissions, the PSLRA provides that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4(b)(1). Specifically, the complaint must "plead with particularity facts giving rise to a strong inference that the defendants either intended to defraud investors or were severely reckless when they made the alleged materially false or incomplete statements." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008) (quotation marks omitted).

b. Judicial Notice

"In determining whether to grant a Rule 12(b)(6) motion, the Court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Watson v. Bally Mfg. Corp*., 844 F. Supp. 1533, 1535 n. 1 (S.D. Fla. 1993), *aff'd*, 84 F.3d 438 (11th Cir. 1996). When a plaintiff refers to documents in the complaint that are "central to the plaintiff's claims," the Court "may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require the conversion of the motion into a motion for summary judgment." *Brooks v. Blue Cross & Blue Shield of Florida, Inc*., 116 F.3d 1364, 1369 (11th Cir. 1997). Additionally, the Eleventh Circuit has expressly held that a court may judicially notice relevant documents legally required by, and publicly filed with, the Securities and Exchange Commission ("SEC"). *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276–81 (11th Cir. 1999). As the Eleventh Circuit stated, the "usual rules for considering 12(b)(6) motions are thus bent to permit consideration of an allegedly fraudulent statement in context." *Harris v. Ivax Corp*., 182 F.3d 799, 802 n.2 (11th Cir. 1999); *Hubbard v. BankAtlantic Bancorp, Inc*., 625 F. Supp. 2d 1267, 1279 (S.D. Fla. 2008). The Court has considered such documents, including the December 2014 Consent Order and the SEC Order, when appropriate.

III. Discussion

While the Amended Complaint consists of only two counts, it contains a number of theories of liability. Plaintiffs allege that Defendants misrepresented to investors that: (1) Ocwen had adequate servicing capabilities; (2) no legal or contingent matters existed that

would materially impact HLSS's business or financials; (3) HLSS maintained adequate internal controls and risk management policies or procedures; (4) related party transactions between the Ocwen-Related Companies, specifically HLSS and Ocwen, were conducted at arms-length; and (5) HLSS's accounting practices and procedures complied with United States Generally Accepted Accounting Principles ("GAAP"). The Court has generally adhered to Defendants' method of categorizing the allegations and has addressed only the arguments specifically advanced by Defendants in their Motions to Dismiss.

a. The Servicer Statements: Representations that Ocwen had adequate servicing capabilities

The "Servicer Statements," [¶¶ 156-161], are various representations made between February 2012 and September 2014 touting Ocwen's servicing capabilities. The Servicer Statements include remarks that HLSS "view[s Ocwen's servicing capabilities] as superior relative to other servicers," that Ocwen is "a high quality residential mortgage loan servicer," and that Ocwen is a "leader" and "best in class servicer." [¶¶ 156-161]. Plaintiffs allege that the falsity of the statements is demonstrated by the various investigations and discipline applied to Ocwen, culminating in the December 2014 Consent Order. [¶ 162].

"Reasonable investors do not base their investing decisions on corporate 'puffery'—generalized, non-verifiable, vaguely optimistic statements." *Mogensen v. Body Cent. Corp.*, 15 F. Supp. 3d 1191, 1211 (M.D. Fla. 2014) (internal quotation marks omitted). The Servicer Statements are non-actionable puffery. *See Cutsforth v. Renschler*, 235 F. Supp. 2d 1216, 1252 (M.D. Fla. 2002) (statements regarding merger touting "effective integration" and "great emphasis placed on taking advantage of the benefits of integration" mere puffery); *see also In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 GEB, 2006 WL 3095951, at *17 (D.N.J. Oct. 30, 2006) (statement in Form 10-K that software product

allowed company "to rapidly and efficiently deliver high quality and cost effective large-scale technology deployment solutions to its clients" mere puffery). On this basis, the Servicer Statements are dismissed as to all Defendants.

b. The Contingency Statements: Representations that no legal or contingent matters existed that would materially impact HLSS's business or financials and the Risk Management Statements: Representations that HLSS maintained adequate internal controls and risk management policies or procedures

The "Contingency Statements" include statements in 2012, 2013, and 2014 SEC filings signed by the Individual Defendants that, in the context of "various claims, legal actions, and complaints arising in the ordinary course of business," "[t]here are currently no probable matters outstanding that, in the opinion of management, will have a material effect on our Consolidated Balance Sheets, Statements of Operations and Statements of Cash Flows" and "[t]here are also currently no reasonably possible matters outstanding that, in the opinion of management, will have a material effect on our Interim Condensed Consolidated Financial Statements." [¶¶ 163-164]. Plaintiffs allege that these statements were materially false because: (1) as the SEC Order reveals, HLSS was under investigation for related party transactions; (2) as the SEC Order reveals, HLSS was under investigation for improperly valuing its Rights to MSRs (its most important asset) for several years; and (3) Ocwen, HLSS's most important partner, was undergoing investigations relating to various aspects of its business.

The "Risk Management Statements," made in public filings between May 2012 and April 2014, represent that HLSS had adequate "disclosure controls and procedures . . . to ensure that material information" would be uncovered, and describe such risk management procedures. [¶¶ 138-140, 144-146]. HLSS stated that "Ocwen assumes all operating risk,"

that the HLSS-Ocwen relationship had "[s]olid downside protection," and that HLSS's management conducted an evaluation and on that basis the President and Chief Financial Officer concluded that HLSS's "disclosure controls and procedures (1) were designed and functioning effectively to ensure that material information relating to HLSS, including its consolidated subsidiaries, is made known to our President and Chief Financial Officer . . . and (2) were operating effectively." [¶¶ 141-143]. Plaintiffs allege that these statements were materially false and misleading because, as evidenced by the SEC Order, HLSS did not have adequate internal controls and procedures for various reasons. [¶ 147]. Moreover, Plaintiffs allege that the falsity of the statements is shown by the December 2014 Consent Order's admission by Ocwen that its controls, identical to those of HLSS, were ineffective and that its "REALServicing" loan software was deficient. [¶ 147].

Defendants argue that Plaintiffs have failed to plead scienter as to the Contingency Statements as they relate to the third indicator of falsity, Ocwen's investigations, and as to the Risk Management Statements as they relate to Ocwen's internal controls. Section 10(b) and Rule 10b–5 require a showing of either an "intent to deceive, manipulate, or defraud," or "severe recklessness." *Mizzaro v. Home Depot, Inc*., 544 F.3d 1230, 1238 (11th Cir. 2008). "Severe recklessness" is a term reserved for those highly unreasonable omissions or misrepresentations that involve an "extreme departure" from the standards of ordinary care and that present a danger of misleading buyers or sellers which is either known to the defendant or is "so obvious" that the defendant must have been aware of it. *Id*.

The PSLRA raised the standard for pleading scienter in a securities fraud action. Specifically, "the complaint shall, with respect to each act or omission alleged to violate this chapter, *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) (emphasis added). A "strong inference" of scienter means an inference that is "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 324 (2007). In making the scienter inquiry, "courts must consider the complaint in its entirety," counting any omissions and ambiguities in the complaint against an inference of scienter. *Id.* at 322, 326. "Although factual allegations may be aggregated to infer scienter, scienter must be alleged with respect to each defendant and with respect to each alleged violation of the statute." *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011). The inquiry is "inherently comparative" because courts "must take into account plausible opposing inferences." *Id*. at 323.

Defendants argue that Plaintiffs simply do not allege that HLSS and the Individual Defendants knew about, but did not reveal, undisclosed misconduct at Ocwen, a separate corporation, resulting in HLSS's alleged misrepresentations. The Amended Complaint alleges that: "[b]ecause the management of HLSS came directly from Ocwen, and Erbey was simultaneously the Chairman of HLSS and Ocwen, Defendants were fully aware of the misconduct occurring at Ocwen" and "[b]ecause of their personal participation in Ocwen's deficient internal processes and compliance failures, Defendants knew, or were severely reckless in not knowing, that Ocwen's misconduct would inevitable impact HLSS." [¶¶ 195, 198]. Merely holding a high level position is not a compelling indicia of scienter. *See Mogensen v. Body Cent. Corp.*, 15 F. Supp. 3d 1191, 1224 (M.D. Fla. 2014) (stock ownership and high level position insufficient to establish scienter); *In re Smith Gardner Sec. Litig.*, 214 F. Supp. 2d 1291, 1303 (S.D. Fla. 2002) ("Mere allegations that Defendants

held senior management positions, had access to inside information, and therefore must have known of the falsity of certain statements is insufficient to plead scienter."). This applies with even greater force here where Van Vlack and Lauter did not hold Ocwen positions during the vast majority of the Class Period. *See* [¶¶ 23-24]. Importantly, Plaintiffs' repeated reference to "Defendants" throughout the Amended Complaint and specifically with respect to the scienter section flies in the face of the requirement that scienter be alleged with respect to *each* Defendant for *each* alleged violation. Even though the Amended Complaint contains significantly more allegations pertaining specifically to Erbey, it is unclear which allegations are meant to establish scienter with respect to the Ocwen-related aspects of the Contingency and Risk Management Statements. The Court finds that Plaintiffs have failed to adequately plead scienter for the Contingency Statements and the Risk Management Statements as they relate to the Ocwen allegations.

c. The Restatement Allegations: Representations that HLSS's accounting practices and procedures complied with GAAP

The "Restatement Allegations" address HLSS's representations throughout the class period that its financial statements were prepared in conformity with GAAP. [¶¶ 166-169, 173, 176, 187, 188]. On August 18, 2014, HLSS disclosed in its 2013 Form 10-K/A that it had determined that some recorded amounts relating to its Rights to MSRs were not in accordance with GAAP, and made corresponding adjustments for the years 2012 and 2013 and for the first quarter of 2014. [¶¶ 54, 190-194]. Ultimately, the SEC determined that HLSS violated Section 13(b)(2)(A) of the Exchange Act, as explained in the SEC Order. [¶ 166].

Defendants argue that the Restatement Allegations fail because Plaintiffs have not adequately alleged loss causation. "To show loss causation in a § 10(b) claim, a plaintiff

must offer proof of a causal connection between the misrepresentation and the investment's subsequent decline in value." *Meyer v. Greene*, 710 F.3d 1189, 1195 (11th Cir. 2013) (quoting *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997)). In a fraud-on-the-market case, such as here, *see* [¶¶ 214-216], plaintiffs may demonstrate loss causation circumstantially by:

> (1) identifying a "corrective disclosure" (a release of information that reveals to the market the pertinent truth that was previously concealed or obscured by the company's fraud); (2) showing that the stock price dropped soon after the corrective disclosure; and (3) eliminating other possible explanations for this price drop, so that the factfinder can infer that it is more probable than not that it was the corrective disclosure—as opposed to other possible depressive factors—that caused at least a "substantial" amount of the price drop.

Id. at 1196-97 (quoting *FindWhat*, 658 F.3d at 1311-12). Loss causation may be established through a series of partial disclosures by which "the truth gradually leaked out into the marketplace." *Id.* at 1197.

Defendants argue that following the August 18, 2014 restatement, HLSS's stock price actually increased $1.08 per share, from $21.21 to $22.29. Therefore, Defendants contend, it cannot serve as a corrective disclosure. *See Waters v. Gen. Elec. Co.*, No. 08 CIV. 8484 RJS, 2010 WL 3910303, at *8 (S.D.N.Y. Sept. 29, 2010), *aff'd sub nom. GE Inv'rs v. Gen. Elec. Co.*, 447 F. App'x 229 (2d Cir. 2011) ("The Court cannot find, and Plaintiffs have not cited, a single Section 10b–5 case in which the plaintiff prevailed on a motion to dismiss when the stock price *increased* after an announcement revealing an alleged fraud."). The only case cited by Plaintiffs, *In re Connetics Corp. Sec. Litig.*, No. C 07-02940 SI, 2008 WL 3842938, at *11 (N.D. Cal. Aug. 14, 2008), is distinguishable. The court in that case found that loss causation was adequately alleged despite the fact that the stock price increased after a May 3, 2006 corrective disclosure in light of allegations by the plaintiffs that the disclosure "must have been leaked to the market in

time to affect trading on May 3rd itself, when stock prices declined after heavy trading." *In re Connetics Corp. Sec. Litig.*, No. C 07-02940 SI, 2008 WL 3842938, at *11 (N.D. Cal. Aug. 14, 2008). There are no similar allegations here. The Court agrees that the Amended Complaint does not allege a loss as a result of the August 18, 2014 restatement's disclosures.

In the Reply, Plaintiffs argue that they have alleged several other partial disclosures: (1) the October 21, 2014 NYDFS Letter; (2) the December 2014 Consent Order; and (3) the January 23, 2015 announcement of the CBDO settlement and BlueMountain's first Notice of Default. [¶¶ 100, 105, 108, 115, 210-11]. While it need not "precisely mirror the earlier misrepresentation," a corrective disclosure "must at least relate back to the misrepresentation and not to some other negative information about the company." *Meyer*, 710 F.3d at 1197 (quoting *In re Williams Sec. Litig.—WCG Subclass*, 558 F.3d 1130, 1140 (10th Cir. 2009)). The allegations do not indicate that the October 21, 2014 DFS letter,[3] the December 2014 Consent Order, nor the January 23, 2015 announcement related back to the misrepresentations that HLSS's financial statements were prepared in conformity with GAAP or any attendant investigatons. Rather, each of those three events addresses Ocwen's regulatory compliance. Thus, the Restatement Allegations are dismissed because Plaintiffs have failed to plead loss causation for the misrepresentations that HLSS's financial statements were performed in accordance with GAAP.

d. Related Party Statements: Representations that related party transactions between HLSS and Ocwen companies were conducted at arms-length

The "Related Party Statements," made between April 2013 and August 2014, represent that HLSS had a policy and procedure for monitoring possible related party transactions, including disclosure to the Company's General Counsel for assessment and

[3] While the Amended Complaint does not plead that any of the other NYDFS Letters are partial corrective disclosures of the Restatement Allegations, the Court notes that they similarly do not related back to the HLSS statements regarding GAAP compliance.

recommendation and prior written approval of the Audit Committee of the Board of Directors before related persons could participate in any transaction or situation that may pose a conflict of interest. [¶ 148]. HLSS specifically stated in multiple 2014 public filings that "[w]e have adopted policies, procedures and practices to avoid potential conflicts with respect to our dealings with Ocwen and Altisource, including Mr. Erbey recusing himself from negotiations regarding, and approvals of, transactions with these entities. We also manage potential conflicts of interest through oversight by independent members of our Board of Directors." [¶¶ 153-154]. During a December 2013 conference for the Ocwen-Related Companies, HLSS stated that the companies "have separate Board and separate management," that "Robust Related Party Transaction Approval Policies" exist, and that it fosters "[t]ransparency in inter company [sic] relationships through public company disclosures." [¶ 151]. Erbey stated at the conference that he "would like to stress, first of all, that these companies are not affiliates, that they are independent companies," that "we have robust related party transaction approval process," and that "any related party transaction between the companies, I actually recuse myself from that position." [¶ 152]. Plaintiffs argue that admissions in the December 2014 Consent Order and SEC Order establish the falsity of these statements. [¶ 155].

The December 2014 Consent Order states that "the Department's review of Ocwen's mortgage servicing companies . . . uncovered a number of conflicts of interest between Ocwen and [the Ocwen-Related Companies]" and that "Erbey has not in fact recused himself from approvals of several transactions with the related parties." [Dec. 2014 Consent Order ¶¶ 20-21]. The December 2014 Consent Order goes on to say that "Mr. Erbey, who owns approximately 15% of Ocwen's stock, and nearly double that percentage of the stock

of Altisource Portfolio, has participated in the approval of a number of transactions between the two companies or from which Altisource received some benefit, including the renewal of Ocwen's forced placed insurance program in early 2014." [Dec. 2014 Consent Order ¶ 21]. With respect to related party transactions, the SEC Order explained that "contrary to its public disclosures, HLSS had no written policies or procedures concerning recusals for related party transactions," that "the Chairman approved many transactions between HLSS and Ocwen in both his HLSS- and Ocwen-related capacities," and that "the practice at HLSS for recusals was not consistent with its public disclosures." [SEC Order ¶¶ 1, 3, 13]. The SEC Order specifically details a number of "Flow Transactions" between HLSS and Ocwen, wherein HLSS purchased Rights to MSRs from Ocwen in 2012 and 2013, and a 2014 transaction between HLSS and Ocwen involving early buy-out loans, which Erbey approved. [SEC Order ¶¶ 14-21].

"A statement is misleading if in light of the facts existing at the time of the statement a reasonable investor, in the exercise of due care, would have been misled by it." *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1305 (11th Cir. 2011) (quoting *SEC v. Texas Gulf Sulphur Co*., 401 F.2d 833, 863 (2d Cir. 1968)) (alterations and ellipsis omitted). Erbey challenges the falsity of several of the Related Party Statements. In support, Erbey points out that the Flow Transactions referenced in the SEC Order occurred prior to the alleged recusal misrepresentations. The SEC Order also references the transaction between HLSS and Ocwen concerning early buyout loans, however, which Erbey approved via e-mail in February 2014 to members of both HLSS and Ocwen senior management. Thus, the Court rejects Erbey's argument and will not dismiss the Related Party Statements for failure to allege falsity.

Next, Defendants argue that scienter has not been established for the Related Party Statements. The non-Erbey Defendants argue that the SEC Order, which was issued under non-scienter based Section 13 of the Exchange Act, does not purport to allege scienter against any of the Defendants. Further, Defendants argue that Plaintiffs have not alleged that any of the Related Party Transaction allegedly approved by Erbey and referred to in the SEC Order resulted in unfair prices to HLSS or a benefit to any of the Defendants at the expense of Plaintiffs. Plaintiffs point out that the SEC Order is not the only source from which they draw scienter allegations. Plaintiffs have alleged that Erbey was not only simultaneously the Chairman of HLSS and Ocwen, but that he was at the epicenter of all of the Ocwen-Related Companies, that he was forced to resign, that regulatory documents indicate that he engaged in improper transactions with Altisource, that he had significant holdings in several Ocwen-companies, and that the magnitude and duration of the wrongdoing described in the Amended Complaint was substantial. [¶¶ 195, 200, 202, 203]. Considering the Complaint in its entirety, the Court finds that Plaintiffs have adequately alleged scienter for the Related Party Statements as to Erbey, and consequently HLSS,[4] but not as to Van Vlack or Lauter.

Defendants argue that Plaintiffs have failed to satisfy loss causation as to the Related Party Statements. The lengthy Amended Complaint and parties' briefs are unclear as to which events are being proffered as partial disclosures of the Related Party Statements. The Court will not go through each in turn, as it now determines that Plaintiffs have succeeded in alleging at least one corrective disclosure for the Related Party Statements—the

[4] The scienter of a corporation's agent may be imputed to the corporation. *See Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008).

December 2014 Consent Order. First, Defendants argue that the December 2014 Consent Order does not relate back to the HLSS Related Party Statements because it only addressed Erbey's failure to recuse at Ocwen, including in transactions involving Altisource, but did not address any related party transactions with HLSS. The December 2014 Consent Order, however, states that "Mr. Erbey has not in fact recused himself from approvals of several transactions with the related parties"; in a footnote to the prior paragraph, "the related parties" are defined to include HLSS. Second, Defendants argue that Plaintiffs have failed to plead that it was a "substantial" or "significant" cause of the decline in price. *See Meyer*, 710 F.3d at 1196. The Court finds that Plaintiffs have alleged enough at this stage. The Court will not dismiss the Related Party Statements for failure to allege loss causation.

e. Attribution of Statements to Erbey Under *Janus*

Erbey argues that under *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), he is not liable for any alleged misstatements that are not attributable to him. In *Janus*, the Supreme Court held that statements in an investment fund's prospectus could not be said to have been made by its investment advisor where that advisor was a legally separate entity from the investment fund. *Id.* at 145, 148. As explained in *Janus*:

> the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed.

Id. at 142-43. Further, "the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it." *Id.* at 144. The Court rejects Erbey's argument. The Amended Complaint adequately alleges that Erbey had ultimate

control over the alleged misstatements. Erbey may challenge the factual accuracy of such control at summary judgment or trial.

f. Section 20(a) Claims

Under Section 20(a) of the Exchange Act, to state a claim for controlling person liability against a defendant, it must be alleged that the defendant had (1) the power to control the general affairs of the entity primarily liable for the Section 10(b) or Rule 10b–5 violation at the time of the violation, and (2) the power to control or influence the specific policy that resulted in the primary violation under Section 10(b) or Rule 10b–5. *In re Unicapital Corp. Sec. Litig*., 149 F.Supp.2d 1353, 1367 (S.D. Fla. 2001) (citing *Brown v. Enstar Group, Inc*., 84 F.3d 393, 396 (11th Cir. 1996)). "[A] controlling person need not commit an intentional violation of the Act to be liable under section 20(a)." *Laperriere v. Vesta Ins. Grp., Inc*., 526 F.3d 715, 724 (11th Cir. 2008). As the Court has not granted the Defendants' Motions to Dismiss in their entirety as to the Section 10(b) and Rule 10b-5 claims, the Court rejects Defendants' argument that Plaintiffs have failed to state Section 20(a) claims because they have failed to plead a primary violation under Section 10(b) and Rule 10b-5.

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Motions to Dismiss [DE 68, 74] are **GRANTED in part** and **DENIED in part** as explained above;
2. Plaintiffs may file a Second Amended Complaint on or before July 5, 2016. Should Plaintiffs fail to file a Second Amended Complaint, Defendants shall

respond to the remaining allegations in the Amended Complaint on or before July 19, 2016.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of June 2016.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:

Counsel of Record