UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 18-2888-GW(MRWx)	Date	February 20, 2020
Title	*Brian Barry v. Colony NorthStar, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Terri A. Hourigan	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Douglas R. Britton Juan C. Sanchez	Brittany Rogers Matthew W. Close

PROCEEDINGS: DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT [82]

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, Defendants' Motion is TAKEN UNDER SUBMISSION. Court to issue ruling.

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Initials of Preparer JG

Barry v. Colony Northstar, Inc., et al.; Case No. 2:18-cv-2888-GW-(MRWx)
Tentative Ruling on Defendants' Motion to Dismiss

I. Background

Court-appointed Lead Plaintiff Teamsters Local 710 Pension Fund ("Plaintiff"), individually and on behalf of all others similarly situated, sues Colony NorthStar, Inc. ("CLNS"); Richard B. Saltzman, CLNS's CEO, President, and Director; Darren J. Tangen, CLNS's CFO; and David T. Hamamoto, CLNS's former Director and Executive Vice Chairman (collectively, "Defendants") for: (1) violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 ("SEC Rule 10b-5"), 17 C.F.R. § 240.10b-5; and (2) violations of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a). *See generally* Third Amended Complaint ("TAC"), Docket No. 81.

Plaintiff alleges the following: CLNS is a hybrid real estate investment trust ("REIT") that was formed in January of 2017 after a merger (the "Merger") between Colony Capital, Inc. ("Colony") and two publicly traded real estate investment companies: NorthStar Asset Management Group Inc. ("NSAM") and NorthStar Realty Finance Corp. ("NRF" and collectively, "NorthStar"). TAC ¶ 6. Generally, REITs are entities that own or finance income-producing real estate, while hybrid REITs own real estate and debt instruments secured by mortgages on real estate. *Id.* ¶ 6 n.1; ¶ 30.

Prior to the Merger, in April 2015, Colony expanded into the institutional investment management ("IM") business,[1] whereby it could generate management fees. *Id.* ¶ 36. Still, in 2016 Colony's investment management business represented just 7.6% of the company's income. *Id.* ¶ 38. Colony did not have a retail investment management segment at that time. *See id.* ¶ 40.

NRF, meanwhile, was "a diversified commercial real estate company with 85% of [its] total assets invested directly or indirectly in real estate, of which 78% [was] invested in direct real estate." *Id.* ¶ 41. And, according to Plaintiff, by 2015 NRF was struggling. *See id.* ¶¶ 42-44. As of November 2016, NRF sold off $6.6 billion of its portfolio, representing 45% of its real estate

[1] Throughout this tentative ruling, the Court will refer to institutional investment management and retail investment management. The distinction is based on the source of the capital to be managed: the institutional business represents managing capital from institutional investors whereas the retail business represents managing capital from retail investors. Typically, the retail business generates higher fees but lower volumes than the institutional investors. *See* TAC ¶ 14.

assets. *Id.* ¶ 44. NRF's portfolio focused on healthcare and hospitality real estate, sectors that CLNS's current CEO Thomas J. Barrack, Jr. – who replaced Saltzman – subsequently said are "built with such complication that they don't lend themselves to immediate third-party access and that the company would "run to the exit door every time that we can to lighten up our balance sheet load." *Id.* ¶ 45.

NSAM, the other NorthStar entity that would merge into CLNS, was a "a global asset management firm focused on strategically managing real estate and other investment platforms in the United States and internationally." *Id.* ¶ 46. Unlike Colony at that time, NSAM had a retail investment management arm that focused on earning fees by managing capital in the retail marketplace. *Id.* NSAM would access a variety of pools of capital through various vehicles, which included REITs and closed-end funds. *Id.* NSAM also managed institutional capital through the Townsend Group ("Townsend"). *See id.* ¶ 47. NSAM's single largest source of revenue in 2016 was a base fee of approximately $186.8 million for managing NRF's holdings. *Id.* ¶ 48. This fee constituted approximately 46.9% of NSAM's revenues in 2016. *See id.* In contrast, the Retail Companies represented approximately 30.7% of NSAM's revenue source in 2016. *See id.* However, as part of the Merger, NSAM's management agreement with NRF would cease upon the merger's completion, causing the relative importance of fees derived from the retail IM business to increase. *Id.* ¶ 49. Based on these sources of revenue, Plaintiff asserts that NSAM was the "crown jewel" of the Merger and that NSAM's retail investment management business was the only NorthStar entity that Colony could rely on to complete its investment management strategy. *See id.* ¶¶ 8, 40, 49.

Defendants completed the Merger in January 2017. *Id.* ¶ 6. The expressed purpose of the Merger was to "unlock" the value in the combined entities' stock price by enabling CLNS's "embedded" investment management business. *Id.* ¶¶ 6, 50. After the Merger, CLNS's IM business was a combination of Colony's institutional IM business, NSAM's retail IM business, and Townsend. *Id.* ¶ 50. Pursuant to the Merger, the executives of CLNS were the former Colony executives, with the exception of Hamamoto, who was a former NorthStar executive. *Id.* ¶¶ 6, 27. Hamamoto and the rest of the NorthStar executive leadership team made $120 million from the Merger based on change-of-control and other agreements. *Id.* ¶ 62.

After the Merger, CLNS reported Funds From Operations ("FFO") and Core FFO on a

quarterly basis.[2] *See id.* ¶¶ 8-9; 31. Prior to the Merger, the NorthStar entities reported Cash Available for Distribution ("CAD"), which is a financial metric similar to Core FFO. *Id.* ¶ 8; 32. The difference between CAD and Core FFO, as explained by Tangen, is that Core FFO "does not add back provisions for loan losses," or "use fair value accounting for certain legacy NRF assets." *Id.* ¶ 33.

A. Fourth Quarter and Fiscal Year 2016 Results and Reporting

The Class Period begins with CLNS's filing of its 2016 Annual Report on February 28, 2017. *See id.* ¶ 5. On February 28, 2017, CLNS issued a press release with the company's fourth quarter 2016 standalone financial results and a post-Merger update. *Id.* ¶ 65. For 2017, CLNS issued a Core FFO guidance range of $1.40 to $1.58 per share. *Id.*

Plaintiff alleges that Defendants' Core FFO guidance was made without a reasonable basis and omitted material facts. *See id.* ¶ 66. More precisely, Plaintiff first contends that Defendants, because of the switch from CAD to Core FFO, were losing the adjustment that had converted the loss of the $186 million NRF management fee to positive CAD using fair value accounting. *See id.* Without this adjustment, the NorthStar entities' 2016 CADs would have been lower, meaning that CLNS would need to experience substantial growth to reach its 2017 Core FFO guidance range. *See id.* Plaintiff calculates that CLNS needed to achieve Core FFO growth rates of 33% to 50% over 2016 to reach its 2017 guidance. *Id.* Plaintiff argues that this growth rate was unreachable based on Colony's 4.5% growth in 2016, the "dismal state of NRF's business," "NSAM's nearly non-existent retail fundraising," and the discovery of a conflict between NSAM's Townsend business and Colony's legacy institutional investment management business requiring the sale of Townsend. *Id.* Furthermore, Defendants projected only $115 million in synergies from the Merger, less than the $186 million loss from the losing the Fair Value Adjustment, and 75% of synergies had already been achieved before the Class Period started. *Id.*

The February 28, 2017 press release stated: "[t]he updated 2017 guidance included in this press release is subject to the cautionary statements and limitations described in the Cautionary Statement Regarding Forward-Looking Statements section at the end of this press release." *Id.*

[2] "The National Association of Real Estate Investment Trusts defines FFO as net income or loss calculated in accordance with Generally Accepted Accounting Principles ("GAAP"), excluding extraordinary items, as defined by GAAP, gains and losses from sales of depreciable real estate and impairment write-downs associated with depreciable real estate, plus real estate-related depreciation and amortization, and after similar adjustments for unconsolidated partnerships and joint ventures." TAC ¶ 31 n.4. Core FFO is FFO "adjusted . . . for certain items." *Id.* ¶ 31.

¶ 68. The press release further explained that its projections involved risks and uncertainties, listing thirteen different factors that might cause actual results to differ from the projections.[3] *Id.*

During CLNS's earnings call on March 1, 2017, an analyst asked Saltzman for a breakdown of retail versus institutional fundraising within the $2 billion of new fundraising assumed for 2017. *Id.* ¶ 70. Saltzman responded, "[w]ell, we haven't been transparent about that, so yes, there is a mix of institutional and retail. I'm probably not going to comment on it per se at this point." *Id.* Saltzman reiterated the Company's 2017 Core FFO guidance during this call, stating that they "anticipated core FFO earnings [in the] range of $1.40 to $1.58 per share" and that "our guidance only assumes $2 billion of new fundraising in 2017." *Id.* ¶ 75. Tangen, who also participated in the earnings call, recognized during that call that NRF's Fair Value Adjustment affected CLNS's guidance. *Id.* ¶ 73. Because of their involvement in the Merger, Saltzman and Tangen would have both known that NRF had negative 40% CAD growth in 2016, NSAM had

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[3] In full, the warnings stated:

> Forward-looking statements involve known and unknown risks, uncertainties, assumptions and contingencies, many of which are beyond our control, and may cause actual results to differ significantly from those expressed in any forward-looking statement. Factors that might cause such a difference include, without limitation, [1] our failure to achieve anticipated synergies in and benefits of the completed merger among NorthStar Asset Management Group Inc., Colony Capital, Inc. and NorthStar Realty Finance Corp. [the "Synergies Warning"], [2] Colony NorthStar's liquidity, including its ability to complete identified monetization transactions and other potential sales of non-core investments [the "Liquidity Warning"], [3] whether Colony NorthStar will be able to achieve a streamlined organization as a leading diversified equity REIT with a concentration in select areas demonstrating the most favorable supply/demand dynamics globally that further benefits from an embedded best-in-class investment management operation in the anticipated timeframe or ever [the "Streamlined Organization Warning"], [4] the timing of and ability to deploy available capital [the "Deploying Capital Warning"], [5] the timing of and ability to complete repurchases of Colony NorthStar's stock [the "Stock Repurchase Warning"], [6] Colony NorthStar's ability perform on the RMZ [the "RMZ Warning"], [7] Colony NorthStar's leverage, including the timing and amount of borrowings under its credit facility, increased interest rates and operating costs, adverse economic or real estate developments in Colony NorthStar's markets [the "Leverage Warning"], [8] Colony NorthStar's failure to successfully operate or lease acquired properties, decreased rental rates, increased vacancy rates or failure to renew or replace expiring leases, defaults on or non-renewal of leases by tenants [the "Property Warning"], [9] the impact of economic conditions on the borrowers of Colony NorthStar's commercial real estate debt investments and the commercial mortgage loans underlying its commercial mortgage backed securities [the "Borrower Warning"], [10] adverse general and local economic conditions [the "Economic Conditions Warning"], [11] an unfavorable capital market environment [the "Capital Market Warning"], [12] decreased leasing activity or lease renewals [the "Lease Warning"], and [13] other risks and uncertainties detailed in our filings with the Securities and Exchange Commission ("SEC") [the "Catchall Warning"]. All forward-looking statements reflect the Company's good faith beliefs, assumptions and expectations, but they are not guarantees of future performance. Additional information about these and other factors can be found in Colony NorthStar's reports filed from time to time with the Securities and Exchange Commission.

Id. ¶ 68.

0.9% CAD growth in 2016, and NSAM had lost its $186 million management agreement with NRF. *Id.* ¶¶ 72-74. In fact, NorthStar/RXR had produced lower returns than a 10-year Treasury note, which was yielding around 2.4%, while charging fees as high as 11.25%. *Id.* ¶ 79. On the call, Saltzman acknowledged "headwinds in 2016" in institutional and retail capital raising, but he stated that "the tide appears to have turned for both institutional and retail placements based upon the momentum we're now experiencing in both markets." *Id.* ¶ 76. He described the environment for capital fundraising as "positive." *Id.* The introductory comments to CLNS's 4Q 2016 earnings call explained that: "Potential risks and uncertainties that could cause the Company's business and financial results to differ materially from these forward-looking statements are described in the Company's periodic reports filed with the SEC from time to time." *Id.* ¶ 81. And in the 1Q 2017 call, Defendants stated that "investment management fundraising across both our institutional and retail platforms" was a "top strategic priorit[y]" on which they had focused since the Merger. *Id.* ¶ 88. Defendants certified pursuant to the Sarbanes-Oxley Act that CLNS had sufficient disclosure controls in place "to ensure that the material information relating to [CLNS], including its consolidated subsidiaries, [was] made known to us by others within those entities." *Id.* ¶¶ 87-88.

On February 28, 2017, CLNS filed its annual report for the fiscal year ended December 31, 2016 (the "10-K"). *Id.* ¶ 89. The 10-K presented the historical financial results of the standalone entities, including for NSAM's retail companies. *Id.* Of the five retail companies, only two had an active offering period. *Id.* ¶ 90. The footnotes to the table stated that fundraising for one of the funds was expected "to accelerate in 2017," and that another fund was to "begin raising capital from third parties in the first half of 2017." *Id.* The 10-K also referenced the potential for a conflict of interest involving Townsend. *Id.* ¶ 91. Plaintiff attacks Defendants' statements about acceleration, momentum, tide, and environment as inaccurate because fundraising was actually down year-over-year and investors were unwilling to pay CLNS's high fees. *See id.* ¶¶ 78, 92. The 10-K explained that:

> The following factors, among others, could cause actual results and future events to differ materially from those set forth or contemplated in the forward-looking statements:
>
> - the market, economic and environmental conditions in the industrial real estate, single-family rental, healthcare, commercial real estate debt and equity, investment management and hospitality sectors;
> - any decrease in our net income and funds from operations as a result of the Mergers (as defined in Item 1. - Business), or our other acquisition activity;
> - our ability to manage and integrate following the Mergers and our other

acquisitions effectively and maintain consistent standards and controls and realize the anticipated benefits of the acquisitions;

- our exposure to risks to which we have not historically been exposed, including liabilities with respect to the assets acquired through the Mergers and our other acquisitions;
- our business and investment strategy, including the ability of the businesses in which we have a significant investment to execute their business strategies;
- our ability to grow our business by raising capital for the companies that we manage;
- the ability to realize substantial efficiencies and synergies as well as anticipated strategic and financial benefits, and the impact of legislative, regulatory and competitive changes;
- performance of our investments relative to our expectations and the impact on our actual return on invested equity, as well as the cash provided by these investments and available for distribution;
- the impact of adverse conditions affecting a specific asset class in which we have investments;
- the impact of economic conditions on third parties on which we rely;
- adverse domestic or international economic conditions and the impact on the commercial real estate or real-estate related industries;
- actions, initiatives and policies of the U.S. and non-U.S. governments and changes to U.S. or non-U.S. government policies and the execution and impact of these actions, initiatives and policies;
- our ability to obtain and maintain financing arrangements, including securitizations;
- the availability of attractive investment opportunities;
- our ability to satisfy and manage our capital requirements;
- the general volatility of the securities markets in which we participate;
- changes in interest rates and the market value of our target assets;
- our ability to maintain our qualification as a real estate investment trust for U.S. federal income tax purposes;
- our ability to maintain our exemption from registration as an investment company under the Investment Company Act of 1940, as amended;
- the availability of qualified personnel; and
- our understanding of our competition.

Id. ¶ 95.

Additionally, Plaintiff contends that the statement about Townsend starting to raise funds in the first half of 2017 was false because Defendants ended up selling Townsend based on the conflict of interest that arose. *Id.* ¶ 93. Specifically, Plaintiff points out that Defendants stated that "conflicts may exist" with Townsend, whereas in September 2017 Defendants issued a press release explaining that "by the closing of the Colony Capital/NorthStar merger . . . it became clear

that the market perceived a conflict with Colony's institutional investment management business." *Id.* ¶¶ 93, 99-100. Defendants had met with Hamamoto in March 2016 to discuss conflicts of interest arising from the potential merger. *Id.* ¶ 97.

B. First Quarter 2017 Results and Reporting

On May 9, 2017, Defendants reported that CLNS's Core FFO for the first quarter of 2017 was $0.31 per share – or $0.04 below the average quarterly result necessary to reach the low-point guidance. *Id.* ¶ 103. Nonetheless, Saltzman stated that CLNS "remain[ed] on track to achieve [its] 2017 full year goals for core FFO including synergies, new investor client capital formation, and simplification; notwithstanding some seasonal and other timing related performance differences in the first quarter." *Id.* Tangen also stated that CLNS remained on track to reach its guidance. *Id.* ¶ 109. Tangen attributed the results to seasonal impacts, but noted:

> Additional core FFO upside exists from reaching full capital deployment and expected ramp up over the course of the year from other investments and businesses, including retail investment management. For these reasons, we believe we remain on track to achieve the full year 2017 core FFO guidance range presented on our last call.

Id. Saltzman further described "seeing positive momentum in the overall retail marketplace as well as in our own fundraising," "acceleration in the pace of fundraising," and building products that were "highly attractive to a very broad group of financial advisers and their clients. *Id.* ¶ 110.

Plaintiff claims that statements about being "on track" were false and misleading because the shortfall in Core FFO in the first quarter demonstrated that neither NRF nor NSAM would provide the 33% to 50% of growth needed to reach the guidance. *Id.* ¶¶ 104. According to Plaintiff, statements about momentum and acceleration were false because Defendants were liquidating NRF's real estate assets and experiencing low retail IM fundraising results at NSAM. *Id.* Of the two active retail funds, NorthStar/RXR had raised $5.2 million in 1Q 2017 (compared with $6.5 million in 4Q 2016), and NorthStar Capital Income Fund had not raised any third-party capital. *Id.* ¶ 113. The press release contained a cautionary statement similar to that contained in footnote 3. *Id.* ¶ 106. And the introductory comments to CLNS's 1Q 2017 earnings call explained that "[p]otential risks and uncertainties that could cause the Company's business and financial results to differ materially from these forward-looking statements are described in the Company's periodic reports filed with the SEC from time to time." *Id.* ¶ 115.

C. Second Quarter 2017 Results and Reporting

As to the second quarter, CLNS reported a Core FFO of $0.35 per share and a breakdown

of retail investment results by fund. *Id.* ¶ 120. CLNS also issued a press release showing that CLNS "and its share of affiliates raised approximately $285 million of third-party capital from institutional clients and retail investors." *Id.* Retail capital raised during the quarter totaled $59.1 million, with $34.6 million coming from CLNS's three closed funds and $24.4 million coming from the two active funds. *Id.* Of those two, NorthStar/RXR and the NorthStar Capital Income Fund were reported to have raised $12.4 million and $12.1 million, respectively. *Id.* The following day, during the call to discuss the results, Saltzman recognized "industry challenges" facing the retail investment management business but stated that the company "remain[ed] optimistic" that it would "continue to institutionalize and rebound." *Id.* ¶ 121. The press release stated that the capital raised was composed "of third party capital from . . . retail investors." *Id.* ¶¶ 125-26.

Plaintiff argues the statements about the fundraising totals of the retail funds were misleading because they did not disclose that CLNS itself was the source of 50% of the increased investment. *Id.* ¶ 122. While the report did note that the figures included "amounts contributed by CLNS," Plaintiff contends that the sheer proportion of CLNS's investment makes the statement misleading because it created the impression that retail fundraising was increasing faster than it actually was. *Id.* Plaintiff also claims that the statements about optimism lacked a basis because, without the investment by CLNS itself, fundraising was down year-over-year. *Id.* ¶ 123. Plaintiff argues that Defendants Saltzman and Tangen knew that CLNS had made an undisclosed contribution of $12.1 million to the funds, rendering Saltzman's expression of "optimism" that the retail IM business would "continue to institutionalize and rebound" false and misleading. *Id.* ¶¶ 125-26. Saltzman and Tangen were each identified as "key personnel" responsible for the funds' success. *Id.*

D. Third Quarter 2017 Results and Reporting

On November 9, 2017, CLNS announced its third quarter results, which included a Core FFO of $0.33 per share, and again broke down retail fundraising by fund. *Id.* ¶ 127. CLNS issued a press release noting that CLNS "and its share of affiliates raised approximately $327 million of third-party capital from institutional and retail investors." *Id.* However, retail capital raised during the quarter had declined to $47.8 million, $34.4 million of which came from dividend reinvestments in CLNS's three closed funds, leaving just $13.4 million raised from the two active funds. *Id.* Of those two, NorthStar/RXR and the NorthStar Capital Income Fund were reported to have raised $4.9 million and $8.7 million, respectively. *Id.* On the earnings call, Saltzman stated

> In terms of operating performance for the quarter, we generated core FFO of $193 million or $0.33 per share, which covered our dividend of $0.27 per share after adjusting for $0.06 per share of net gain contribution in the quarter. A solid quarterly result, but admittedly, cumulative year-to-date core FFO has been below our beginning of the year target. As we invest on more than $1 billion of dry powder and grow our investment management business through complementary coinvesting and related fund placements, we expect to fill that gap over time.

Id. ¶ 128. Plaintiff asserts that this comment was tethered to CLNS's 2017 Core FFO guidance. *Id.* ¶ 129.

Plaintiff again attacks the fundraising results as a misrepresentation because CLNS itself contributed most of the investment in at least one of the retail funds. *Id.* ¶ 130. Plaintiff asserts that Saltzman and Tangen knew that CLNS had made an undisclosed contribution of $6.3 million to the funds, making the fundraising totals false and misleading. *Id.* ¶¶ 131-32. The press release quoted Saltzman as stating that the capital raised was composed "of third-party capital from . . . retail investors." *Id.* Further, Plaintiff argues that the statement that CLNS expected to "fill that gap" to reach Core FFO guidance was misleading because CLNS had exhausted the legacy assets that were generating capital gains, and because CLNS would need to generate $0.41 per share of Core FFO to reach the low end of the guidance. *Id.* ¶ 133. Plaintiff asserts that Saltzman's comment regarding "fill[ing] that gap" was tethered to CLNS's 2017 Core FFO guidance. *Id.* By 3Q 2017, CLNS had exhausted the legacy assets that were generating the capital gains that bolstered CLNS's reported Core FFO the prior two quarters. *Id.* CLNS had previously announced that approximately 20% of its Core FFO would be attributable to one-off asset-sale gains, or $0.28 per share of the low end of CLNS's $1.40 to $1.58 Core FFO guidance. *Id.* By the end of the third quarter, however, CLNS had already recorded gains of $0.28 per share. *Id.* And given that it results in the three previous quarters it had produced Core FFO of $0.99 per share, CLNS would have needed to produce $0.41 per share to reach the low end of its guidance range. *Id.* With 597.8 million shares, CLNS had to produce $245 million in Core FFO in 4Q 2017 just to reach the bottom end of the guided range, which the combined companies had not achieved in any quarter for at least a year before the Class Period. *Id.* Plaintiff claims that it was unreasonable to expect the investment management business to make up the shortfall because fundraising totals, without CLNS's investment, had been well below the pace necessary to meet the guidance. *Id.* ¶ 134. The introductory comments to CLNS's 3Q 2017 earnings call explained: "Potential risks and uncertainties that could cause the Company's business and financial results to differ materially

from these forward-looking statements are described in the Company's periodic reports filed with the SEC from time to time." *Id.* 137. According to Plaintiff, Saltzman and Tangen knew that the statements about "fill[ing] that gap" between "cumulative year-to-date Core FFO [and] . . . our beginning of the year target" were false and misleading." *Id.* ¶¶ 139-40.

E. Fourth Quarter and Full Year 2017 Results and Reporting

Finally, on March 1, 2018, the last day of the Class Period, CLNS released its fourth quarter and full year results for 2017. *Id.* ¶ 147. CLNS's full year Core FFO was $1.16 per share – 17% to 27% below its guidance of $1.40 to $1.58. *Id.* CLNS also announced impairment charges of $375 million related to the company's investment management segment. *Id.* Ultimately, Defendants recognized that the broker-dealer distribution business was disappointing:

> Retail broker-dealer distribution was another area of very disappointing results. The industry generally remains in enormous transition for major regulatory headwinds, including the newly implemented fiduciary rule, as well as a change in product constructs, more conservative, 40 Act in interval funds that operate with less leverage and offer more liquidity options. Capital raising in 2017 from these channels totaled only $137 million, down from past levels of an excess of $1 billion per year.

Id. ¶ 148. Saltzman also recognized that the Merger had not brought the hoped-for success:

> The NorthStar merger, which closed a little over 1 year ago, has not produced the math tha[t] we anticipated when we completed the transaction. It was a merger that was supposed to be earnings neutral at worst. And so far, it has proven to be earnings dilutive. Furthermore, the merger integration has taken longer than expected. We believe that we are largely at the end of that process, and we have much greater confidence around the go-forward anticipated results from the inherited NorthStar businesses that have been the primary source of our underperformance in 2017.

Id. ¶ 149.

CLNS also disclosed that it was reducing its dividend from $1.08 per share in 2017 to $0.44 per share in 2018:

> Let me next focus on our go-forward business, including the resetting of our dividends. Based on the confidence we have around our new baseline of recurring earnings, excluding gains, combined with a generally conservative bias we have toward preserving cash at this juncture of the real estate and economic cycles. Earlier today, via our earnings release, we announced expected dividend level of $0.44 per share for the calendar year 2018. This is a meaningful reduction from $1.08 per share we paid in 2017.

Id. ¶ 150.

On March 1, 2018, CLNS's stock price fell nearly 23%. *Id.* ¶ 151. Certain analysts blamed

the drop on "an unexpectedly sizable dividend cut," "weak results in 3rd party fundraising," and the Merger proving to be "a dud." *Id.* ¶ 152.

F. Scienter allegations

In addition to the foregoing, Plaintiff alleges that Defendants had scienter by virtue of their receipt of information reflecting the true facts regarding CLNS. *Id.* ¶ 155. More specifically, Plaintiff asserts that Defendants had actual knowledge that CLNS's Core FFO guidance lacked a basis because Defendants described the difference between NorthStar's CAD and the new Core FFO, such that they would have realized that CAD adjusted the loss of the $186 NRF agreement into a positive that would not carry over into Core FFO. *Id.* ¶ 156-57. Defendants, according to Plaintiff, also knew that NRF had liquidated 45% of its assets by November 2016 and continued to sell thereafter. *Id.* ¶ 157. Further, Defendants knew by January 2017, one month before CLNS offered the guidance, that Townsend conflicted with CLNS's institutional investment management business and would need to be sold. *Id.* ¶ 158. The sale of these assets meant that NSAM would not be in position to provide the growth CLNS needed to reach its Core FFO guidance. *Id.*

Plaintiff argues that Defendants also had scienter because investment management was one of CLNS's "top strategic priorities." *Id.* ¶ 160. In the November 14, 2016 "Registration Statement" for the merger, CLNS projected $1.5 billion in retail investment management fundraising. *Id.* Additionally, Plaintiff claims that Defendants' statements about regulatory changes in the investment management industry reflected their focus on the business. *Id.* ¶ 161. According to Plaintiff, Defendants were aware of the "deleterious implications" of the regulatory changes. *Id.* ¶ 162

In February 2017, CLNS cut the fees on a "T-share" class that NorthStar had introduced in October 2015. *Id.* ¶ 161. Plaintiff avers that the T-share was designed to minimize the appearance of the fees that NorthStar was charging investors, reducing up-front sales commissions while adding other fees to compensate for the reduction. *Id.* The February 2017 cut in fees, Plaintiff contends, could not have been effectuated without the involvement of Defendants, and would further hinder CLNS's ability to meet guidance. *Id.* ¶¶ 161, 165.

Regarding retail investment management's ability to provide sufficient growth to meet the Core FFO guidance, Plaintiff alleges that CLNS's vaguely-disclosed investment in its own funds demonstrated that third-party investing was insufficient. *Id.* ¶ 163.

Plaintiff also alleges that certain financial incentives demonstrate Defendants' scienter.

For example, Saltzman and Tangen's annual cash bonus was tied to "the amount of third-party capital raised, a key strategic objective for the Company." *Id.* ¶ 166.

Lastly, Plaintiffs argue that the departures of Hamamoto and Daniel Gilbert – who was the chief investment and operating officer of NSAM before the Merger and head of the retail platform at CLNS after – and the sales of their shares suggest scienter. *Id.* ¶¶ 141-46; 167-73. As to Hamamoto, CLNS announced on November 9, 2017 that his departure was a "personal life choice decision," and that his resignation would be effective on January 11, 2018, one day after the one year anniversary of the Merger. *Id.* ¶¶ 141-42. Plaintiff contends that the departure was contrary to rhetoric about maintaining continuity of management after the Merger and to the spirit of Hamamoto's employment agreement with CLNS because he announced his resignation two months before the vesting date on his Merger-related stock. *Id.* Hamamoto had previously been characterized as a key part of CLNS's "cohesive" management team with an "unwavering commitment" to CLNS and its shareholders. *Id.* ¶ 141. Further, Plaintiff alleges that Hamamoto sold nearly 57% of his unrestricted CLNS shares a month after announcing his resignation, suggesting that he knew the stock price was inflated. *Id.* ¶ 143. Similarly, Gilbert announced his resignation on December 15, 2017, effective January 11, 2018. *Id.* ¶ 145.

G. Procedural History

This Court previously granted Defendants' motion to dismiss the First Amended Complaint. *See* Minutes of Defendants' Motion to Dismiss Consolidated Amended Complaint ("First MTD Ruling"), Docket No. 59. In the First MTD Ruling, the Court concluded that Plaintiff had not sufficiently alleged any actionable misstatements. *See generally* First MTD Ruling. Plaintiff submitted a Second Amended Complaint, which the Court also dismissed. *See* Minutes of Defendants' Motion to Dismiss Second Amended Complaint ("Second MTD Ruling"), Docket No. 74. In the Second MTD Ruling, the Court Concluded that Plaintiff had again failed to allege any actionable misstatements. *See generally* Second MTD Ruling.

Defendants now move to dismiss the TAC in its entirety. *See generally* Motion to Dismiss TAC ("Motion"), Docket No. 82. Plaintiff opposes. *See generally* Opposition to Motion to Dismiss ("Opp'n), Docket No. 84. Defendants filed a reply. *See generally* Reply ISO Motion ("Reply"), Docket No. 85.[4]

[4] Defendants request that the Court judicially notice a group of exhibits. *See* Request for Judicial Notice ("RJN"), Docket No. 83. Most of the exhibits are documents that CLNS publicly filed with the SEC. Plaintiff responded that

II. Legal Standard

A. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a Rule 12(b)(6) motion, a court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Further, in deciding a Rule 12(b)(6) motion a court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

A court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a Rule 12(b)(6) motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of L.A.*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

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it does not oppose the RJN but notes that "judicial notice should not be taken of the truth of their contents." *See* Response to RNJ, Docket No. 85, at 1. The Court would grant the RJN and agrees with Plaintiff's position that courts do not take judicial notice of the truth of the contents of the documents. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). All citations to "Ex." in this tentative ruling refer to the exhibits attached to the declaration filed in support of the RJN.

B. Federal Rule of Civil Procedure 9(b)

Federal Rule of Civil Procedure 9 requires a heightened pleading standard when alleging fraud in federal court. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The allegations must contain "an account of the time, place, and specific content of the false representation as well as the identities of the parties to the misrepresentation." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citation omitted). "The plaintiff must plead facts explaining why the statement was false when it was made." *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001). "This requirement has long been applied to securities fraud complaints." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009). Under the Private Securities Litigation Reform Act ("PSLRA"), a securities fraud complaint must "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, . . . state with particularity all facts on which that belief is formed." *Id.* at 990-91.

C. Exchange Act Section 10(b) and SEC Rule 10b-5

"Under Section 10(b) of the [Exchange Act], it is unlawful '[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.'" *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 793 (9th Cir. 2017) (quoting 15 U.S.C. § 78j(b)). SEC Rule 10b-5 makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. To plead a violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, a plaintiff must sufficiently allege: (1) a material misrepresentation or omission by the defendant, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance on the misrepresentation or omission, (5) economic loss, and (6) loss causation. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

"At the pleading stage, a complaint stating claims under [S]ection 10(b) and [SEC] Rule 10b-5 must satisfy the dual pleading requirements of Federal Rule of Civil Procedure 9(b) and the PSLRA." *Zucco Partners, LLC*, 552 F.3d at 990. The PSLRA requires that Plaintiffs plead with particularity both falsity and scienter. *In re Atossa Genetics Inc. Secs. Litig.*, 868 F.3d at 794

(citing *Reese v. Malone*, 747 F.3d 556, 568 (9th Cir. 2014)).

To sufficiently plead scienter, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). "[I]n determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007).

> [T]he inference of scienter must be more than merely 'reasonable' or 'permissible' – it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive [a Rule 12(b)(6) motion] only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.

Id. at 324.

"In [the Ninth Circuit], the required state of mind is a mental state that not only covers intent to deceive, manipulate, or defraud, but also deliberate recklessness." *In re Quality Sys., Inc. Secs. Litig.*, 865 F.3d 1130, 1144 (9th Cir. 2017) (internal quotation marks omitted). "Deliberate Recklessness" is tough to define, but courts in this circuit "continue to view it as a form of intentional or knowing misconduct." *Zucco Partners*, 552 F.3d at 991 (quoting *In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970 (9th Cir. 1999) *abrogation on other grounds recognized by South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008)).

> More specifically, although facts showing mere recklessness or a motive to commit fraud and opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness. Rather, the plaintiff must plead a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it

Zucco Partners, 552 F.3d at 991 (citations and internal quotation marks omitted).

III. Discussion

A. False or Misleading Statements

1. Core FFO Guidance

A central premise in Plaintiff's case is that CLNS's Core FFO Guidance was misleading because it was made without a reasonable basis. *See TAC* ¶¶ 9-15. In general, Plaintiff alleges that the three entities combined in the Merger could not produce the Core FFO Guidance range

without significant growth. *Id.* Plaintiff continues that the retail investment management sector of the business was the only possible avenue for such growth, but that the state of the retail investment management market was so bad that it could not possibly generate the required revenue to reach the Core FFO Guidance. *Id.* In its First MTD Ruling, the Court found that Plaintiff had not adequately alleged facts demonstrating that the retail investment management business was "critical" to CLNS's overall success and ability to reach Core FFO guidance. First MTD Ruling at 14. In the Second MTD Ruling, the Court found that Plaintiff's additional allegations "more fully explained the connection between the retail investment management business and Core FFO." Second MTD Ruling at 13. The Court sees no reason to disturb that conclusion. However, in the Second MTD Ruling, the Court stated that "even if Plaintiff has pleaded that retail investment management is important to Core FFO, it does not necessarily follow that Defendants' 2017 Core FFO Guidance range constitutes an actionable misstatement for the purposes of this securities fraud case." *Id.* Ultimately, the Court found that the statements alleged by Plaintiff relating to the Core FFO guidance fell within the PSLRA's safe harbor rule and were thus not actionable. The Court will now address whether the TAC includes new allegations that would make the statements fall outside of the safe harbor rule.

The PSLRA's safe harbor provision exempts, under certain circumstances, a forward-looking statement, which is "any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions underlying or related to any of these issues." *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (internal quotation marks omitted). The safe harbor provision applies:

> [I]f the forward-looking statement is "(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement," or (ii) if it is not identified as a forward-looking statement and not accompanied by cautionary language, unless the statement was "made with actual knowledge . . . that the statement was false or misleading."

Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc., 759 F.3d 1051, 1058 (9th Cir. 2014) (quoting 15 U.S.C. § 78u-5(c)(1). "The PSLRA's safe harbor is designed to protect companies and their officials from suit when optimistic projections of growth in revenues and earnings are not borne out by events." *Quality Sys.*, 865 F.3d at 1142. The PSLRA forward-looking safe harbor provides that a speaker "shall not be liable" for "an untrue statement of a material fact or omission of a

material fact necessary to make the statement not misleading" if: a forward-looking statement is properly identified and accompanied by meaningful cautionary language; or the plaintiff fails to prove that the person making the statement had "actual knowledge" of its falsity. 15 U.S.C. § 78u–5(c)(1)(A)-(B). The Ninth Circuit has held that either one of the test's prongs, on its own, sufficiently shields a speaker, such that if the first prong is met, the scienter of the speaker is irrelevant. *See In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112-13 (9th Cir. 2010).

As an initial matter, Plaintiff begins by arguing that the standard of the bespeaks caution doctrine, rather than only the PSLRA's safe harbor provision, should apply here. *See* Opp'n at 6. The bespeaks caution doctrine is a judicially created tool, while the safe harbor provision is the "statutory version" of the bespeaks caution doctrine. *See In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 798 (9th Cir. 2017). The Ninth Circuit has explained that "'[d]ismissal on the pleadings under the bespeaks caution doctrine . . . requires a stringent showing: There must be sufficient cautionary language or risk disclosure such that reasonable minds could not disagree that the challenged statements were not misleading.'" *Id.* (quoting *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005)) (alteration in original).

The Ninth Circuit has not directly clarified the relationship between the bespeaks caution doctrine and the PSLRA's safe harbor provision. Plaintiff points to *Atossa*, in which the Ninth Circuit stated: "[w]e measure the protective function of forward-looking cautionary language using the 'bespeaks caution' doctrine." *Atossa*, 868 F.3d at 798. According to Plaintiff, the Ninth Circuit in *Atossa* signaled that courts should apply the same "stringent" standard under both the PSLRA safe harbor provision and the bespeaks caution doctrine. Indeed, some district courts have concluded that the two concepts provide identical protections and can be applied "without differentiation." *See, e.g.*, *Westley v. Oclaro, Inc.*, 897 F. Supp. 2d 902, 917 (N.D. Cal. 2012); *In re New Century*, 588 F. Supp. 2d 1206, 1225 n.19 (C.D. Cal. 2008).

However, this Court is not convinced that the Ninth Circuit in *Atossa* intended to collapse the PSLRA safe harbor provision and the bespeaks caution doctrine into one test. First, *Atossa* did not involve forward-looking statements at all. Instead, *Atossa* involved a company marketing a medical device for breast cancer screening; the company misleadingly implied that the FDA had already approved its devices for such use. *Atossa*, 868 F.3d at 790-93. Therefore, the statements at issue were not forward-looking and were only subject to the bespeaks caution doctrine, not the PSLRA safe harbor provision. *Id.* at 798. Second, the Court acknowledged as much when it

separately analyzed the safe harbor provision. *Id.* The panel explained:

> Nor does the PSLRA's safe harbor, which is a "statutory version" of the bespeaks caution doctrine[, apply]. *Emplrs. Teamsters Local Nos. 175 & 505 Pension Tr. Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004). The PSLRA's safe harbor provision exempts from liability forward-looking statements accompanied by certain cautionary language. *See* 15 U.S.C. § 77z-2; *Quality Systems*, 865 F.3d 1130. But the misleading part of Atossa's Form 8-K filing—how it characterized the FDA's warning letter—concerned only past facts, not statements about the future. The filing therefore falls outside of the PSLRA's safe harbor.

Id. In other words, the Ninth Circuit first analyzed the applicability of the bespeaks caution doctrine and then the PSLRA safe harbor provision, analyzing the two as distinct tests and recognizing that the PSLRA safe harbor provision did not apply to the challenged statements. If the two standards were really the same, there would have been no reason for the Ninth Circuit to separately analyze them.

Other district courts have found that the PSLRA safe harbor provision is not identical to the bespeaks caution doctrine. *See, e.g., In re Broadcom Corporation Securities Litigation*, 2004 WL 3390052, at *1 n.1 (C.D. Cal. Nov. 23, 2004) ("The Court does not apply the bespeaks caution doctrine because the safe harbor requires a different, less fact-specific analysis."); *In re Copper Mt. Sec. Litig.*, 311 F. Supp. 2d 857, 882 (N.D. Cal. 2004) ("[T]he PSLRA does not require a listing of *all* factors that might make the results different from those forecasted. Instead, the warning must only mention *important* factors of similar significance to those actually realized."); *In re Egalet Corp. Sec. Litig.*, 340 F. Supp. 3d 479, 504 n.15 (E.D. Pa. 2018); *Nat'l Junior Baseball League v. PharmaNet Dev. Grp., Inc.*, 720 F. Supp. 2d 517, 533-34 (D.N.J. 2010) (PSLRA safe harbor provision "relax[es] the standard of the bespeaks caution doctrine"). This is because "the stricter language of the 'bespeaks caution' doctrine is noticeably absent" from the PSLRA safe harbor provision. *Nat'l Junior Baseball League*, 720 F. Supp. 2d at 534. Courts distinguishing the two protections find that while the bespeaks caution doctrine allows dismissal of claims only if "reasonable minds could not disagree" that challenged statements "were not misleading," *Atossa*, 868 F.3d at 798, the safe harbor provision protects forward-looking statements accompanied by certain cautionary language even if those statements were misleading, *see Steamfitters Local 449 Pension Plan v. Molina Healthcare, Inc.*, 2018 WL 6787349, at *2 (C.D. Cal. Dec. 13, 2018), *appeal filed*, No. 19-55050. The Court finds these distinctions to be applicable here. Finally, as the court recognized in *Broadcom*, the legislative history of the PSLRA safe harbor provision supports the conclusion that it differs meaningfully from the bespeaks caution

doctrine. 2004 WL 3390052, at *1 n.1. The House conference report states that while the PSLRA safe harbor provision "is based on aspects of . . . the judicial[ly] created 'bespeaks caution' doctrine," the PSLRA "permits greater flexibility to those who may avail themselves of safe harbor protection." H.R. CONF. REP. 104-369, 43, 1995 U.S.C.C.A.N. 730, 742. Given the Ninth Circuit's separate treatment of the two protections, the Ninth Circuit's failure to import the "stringent showing" language to the safe harbor provision, and the legislative history suggesting that the PSLRA safe harbor provision is a more forgiving standard, the Court would find that the heightened standard of the bespeaks caution doctrine does not apply here.

As the Court previously explained, CLNS's statements about projected Core FFO are clearly forward-looking. "A forward-looking statement is 'a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items.'" *Id.* (quoting 15 U.S.C. § 78u–5(i)(1)(A)). Thus, the only question is whether the statements were identified as such and accompanied by sufficient cautions. The Court would continue to conclude that the Core FFO guidance was accompanied by sufficient cautionary language.

Turning to the specific statements made by Defendants, Plaintiff first attacks Defendants' comments made during the March 1, 2017 earnings call. In that call, Defendants cautioned, in part: "Potential risks and uncertainties that could cause the Company's business and financial results to differ materially from these forward-looking statements are described in the Company's periodic reports filed with the SEC from time to time." TAC ¶ 81. Relying on *In re Apple Computer, Inc., Sec. Litig.*, No. C-01-3667 CW, 2003 WL 26111982 (N.D. Cal. Aug. 13, 2003), Plaintiff argues that Defendants were required to refer call participants to specific documents rather than SEC filings generally. In *Apple*, the defendant had similarly stated that more information could be found in Apple's SEC filings. *Id.* at *2. The court in *Apple* found this language to be insufficient, stating:

> [Defendant's] statement simply refers to a generic class of documents, "Apple's SEC filings," of which there are likely a significant number. It "identifies" no specific documents or page numbers or even a date on which the relevant documents were filed. Investors cannot be expected to sift through the entire historical record of Apple's SEC filings.

Id; *see also Lomingkit v. Apollo Educ. Grp. Inc.*, No. CV-16-00689-PHX-JAT, 2017 WL 633148, at *18 (D. Ariz. Feb. 16, 2017).

However, *Apple* and *Lomingkit* appear to be outliers. The Ninth Circuit has found very

similar warnings to be sufficient to the one at issue here. For example, in *Intuitive Surgical*, the defendant warned, in part: "Actual results may differ materially from those expressed or implied, as a result of certain risks and uncertainties. These risks and uncertainties are described in detail in the company's [SEC] filings." 759 F.3d at 1059. The Ninth Circuit found this cautionary language to be sufficient. District courts have followed suit. *See, e.g.*, *In re Fusion-io, Inc. Sec. Litig.*, No. 13-CV-05368-LHK, 2015 WL 661869, at *13 (N.D. Cal. Feb. 12, 2015) (finding reference to company's "registration statements and reports filed with the SEC" sufficient to invoke safe harbor); *Steamfitters Local 449 Pension Plan v. Skechers U.S.A., Inc.*, No. 17 CIV. 8107 (AT), 2019 WL 4640217, at *4 (S.D.N.Y. Sept. 23, 2019) (finding references to "the company's filings with the U.S. Securities and Exchange Commission, including . . . all other reports filed with the SEC as required by federal securities laws" sufficient to invoke safe harbor); *Union Asset Mgmt. Holding AG v. Sandisk Corp.*, No. 15-CV-01455-VC, 2016 WL 406283, at *3 (N.D. Cal. Jan. 22, 2016) (finding reference to the defendant's "SEC filings" sufficient to invoke safe harbor); *In re SolarCity Corp. Sec. Litig.*, 274 F. Supp. 3d 972, 993 (N.D. Cal. 2017) (same). As such, the Court would find that Defendants adequately "identif[ied] the document . . . contain[ing] the additional information" relating to the forward-looking statements in the March 1, 2017 earnings call. 15 U.S.C. §78u-5(c)(2)(B)(ii).

Plaintiff also argues that the cautionary statements were "boilerplate" and lacked the necessary specificity to qualify for the safe harbor rule. *See* Opp'n at 9-10. The Court has already considered and rejected these arguments in the First MTD Ruling at 18-19 and the Second MTD Ruling at 18-19. Broadly, the cautionary language in the March 1, 2017 earnings call was similar to language found by the Ninth Circuit to be sufficient in *Intuitive Surgical*, 759 F.3d at 1059, and *Cutera*, 610 F.3d at 1112. Plaintiff has not presented any new facts that would convince the Court to deviate from its previous rulings on the matter. The Court would therefore find that the Core FFO Guidance statements fall within the PSLRA's safe harbor provision.

2. "On Track" and "Fill that Gap" Statements

Defendants next argue that their statements that CLNS was "on track" to reach Core FFO guidance and that the company "expect[ed] to fill that gap [between the 2017 Core FFO guidance projection and the results over the first three quarters of 2017,]" were not false and/or fell under the PSLRA forward-looking safe harbor. TAC ¶¶ 103, 108-09, 128; Motion at 12-16. The Court has already addressed these statements twice, in the First MTD Ruling and the Second MTD

Ruling. Each time, the Court found that these statements were forward-looking and were accompanied by meaningful cautionary language. *See* First MTD Ruling at 16-17; Second MTD Ruling at 15-19. Plaintiff conceded in response to the first MTD that the "fill that gap" statement was forward looking, a concession that the Court noted was "correct[]." First MTD Ruling at 16. In the Second MTD Ruling, the Court reaffirmed that conclusion. Second MTD Ruling at 15. Regarding the "on track" statement, the Court found that even if it was false, it was forward-looking and accompanied by meaningful cautionary language, and thus covered by the safe harbor rule. Second MTD Ruling at 16-19. Again, the Court finds that Plaintiff has not introduced new factual allegations that would throw into question the Court's prior conclusions. Nevertheless, the Court will briefly address Plaintiff's arguments below.

To start, Plaintiff argues that the "on track" statements made by Defendants were not forward-looking. Opp'n at 12. Plaintiff cites a slew of cases finding "on track" statements not forward-looking. *Id.* at 12-13. As courts in this Circuit have recognized, "[t]he authority on whether statements that a company is 'on track' are forward-looking statements is split." *Szymborski v. Ormat Techs., Inc.*, 776 F. Supp. 2d 1191, 1198 (D. Nev. 2011). "What the case law agrees upon is that context is critical to determining whether statements are forward[-]looking." *In re ECOtality, Inc. Sec. Litig.*, No. 13-03791-SC, 2014 WL 4634280, at *6 (N.D. Cal. Sept. 16, 2014). Considering the context of the "on track" statements, the Court continues to find them forward-looking. As the Court explained in its past ruling:

> [I]t is impossible to separate the statement from the projection it references. Put another way, by stating that CLNS was "on track" to meet guidance despite a $0.04 shortfall, Defendants are simply stating that they expect to make back up that four cents in the future. In essence, Defendants are stating that they stand by their previous projections. Considering that financial projections are the archetypical forward-looking statement, the Court is inclined to conclude that the statement about being on track to meet financial projections is forward-looking. *See Avaya*, 564 F.3d at 255.

Second MTD Ruling at 16. As such, the Court finds the "on track" statement to be forward-looking.

Plaintiff has also not put forward any new facts that would change the Court's conclusion that Defendants' "fill that gap" statement was forward-looking. In full, Defendants stated:

> In terms of operating performance for the quarter, we generated core FFO of $193 million or $0.33 per share, which covered our dividend of $0.27 per share after adjusting for $0.06 per share of net gain contribution in the quarter. A solid quarterly result, but admittedly, cumulative year-to-date core FFO has been below

> our beginning of the year target. As we invest on more than $1 billion of dry powder and grow our investment management business through complementary coinvesting and related fund placements, we expect to fill that gap over time.

TAC ¶ 128. Crucially, the statement reads "we *expect* to fill that gap *over time*." *Id.* (emphasis added). The Ninth Circuit has explained that "statements related to future *expectations*" are forward-looking. *Intuitive Surgical*, 759 F.3d at 1059 (emphasis added). Here, Defendants' language clearly relates to its expected future performance. As the Court explained in the Second MTD Ruling, "[t]he statement recognizes the current state of affairs (a gap in reaching guidance), but then expresses that it expects to fill that gap in the future." Second MTD Ruling at 15. Viewing the facts in the light most favorable to Plaintiff, nothing in the TAC alters the Court's conclusion that the "fill that gap" statement is forward looking.

Plaintiff also argues that the cautionary language accompanying the "on track" and "fill that gap" statements was insufficient. However, Plaintiff has not put forward any new facts showing that such is the case. At this point, the Court has repeatedly held that these statements were accompanied by sufficient cautionary language.

Defendants made the challenged statements during a May 10, 2017 earnings call and related press release (issued May 9, 2017) about CLNS's first quarter 2017 results. *See* TAC ¶¶ 106, 115. In both instances, Defendants noted that the information contained forward-looking statements. Ex. I at 341; Ex. J at 390. The press release noted:

> Forward-looking statements involve known and unknown risks, uncertainties, assumptions and contingencies, many of which are beyond the Company's control, and may cause the Company's actual results to differ significantly from those expressed in any forward-looking statement. Factors that might cause such a difference include, without limitation, *our failure to achieve anticipated synergies in and benefits of the completed merger among NorthStar Asset Management Group Inc., Colony Capital, Inc. and NorthStar Realty Finance Corp., Colony NorthStar's liquidity, including its ability to complete identified monetization transactions and other potential sales of non-core investments*, whether Colony NorthStar will be able to maintain its qualification as a real estate investment trust, or REIT, for U.S. federal income tax purposes, the timing of and ability to deploy available capital, the timing of and ability to complete repurchases of Colony NorthStar's stock, Colony NorthStar's ability maintain inclusion and relative performance on the RMZ, Colony NorthStar's leverage, including *the timing and amount of borrowings under its credit facility, increased interest rates and operating costs, adverse economic or real estate developments in Colony NorthStar's markets*, Colony NorthStar's failure to successfully operate or lease acquired properties, decreased rental rates, increased vacancy rates or failure to renew or replace expiring leases, defaults on or non-renewal of leases by tenants,

> the impact of economic conditions on the borrowers of Colony NorthStar's commercial real estate debt investments and the commercial mortgage loans underlying its commercial mortgage backed securities, *adverse general and local economic conditions, an unfavorable capital market environment*, decreased leasing activity or lease renewals, and other risks and uncertainties detailed in our filings with the U.S. Securities and Exchange Commission ("SEC"). All forward-looking statements reflect the Company's good faith beliefs, assumptions and expectations, but they are not guarantees of future performance. Additional information about these and other factors can be found in Colony NorthStar's reports filed from time to time with the SEC.

TAC ¶ 106 (emphasis added). Similarly, on the earnings call, a representative of CLNS stated:

> [P]lease note that on this call certain information presented contains forward-looking statements. These statements are based on management's current expectations and are subject to risks, uncertainties and assumptions. Potential risks and uncertainties that could cause the company's business and financial results to differ materially from these forward-looking statements are described in the company's periodic reports filed with the SEC from time to time. All information discussed on this call is as of today, May 10, 2017, and Colony NorthStar does not intend and undertakes no duty to update future events or circumstances.

TAC ¶ 115.

As explained in the First and Second MTD Rulings, the Court would find this cautionary language sufficient. *See* First MTD Ruling at 18-19 (citing *Intuitive Surgical*, 759 F.3d at 1059 (upholding cautionary language similar to that used on CLNS's earnings calls) and *Cutera*, 610 F.3d at 1112 (same)); Second MTD Ruling at 17-19. Plaintiff continues to argue that the cautionary language's failure to mention risks in the retail investment management sector rendered the statements inadequate, but as the Court previously noted, "the PSLRA does not require a listing of all factors that might make the results different from those forecasted. Instead, the warning must only mention important factors of similar significance to those actually realized." *In re Copper Mt. Sec. Litig.*, 311 F. Supp. 2d 857, 882 (N.D. Cal. 2004). As explained above, the Court declines to apply the "bespeaks caution" standard described in *Atossa* to these statements. *See* Opp'n at 13 (citing *Atossa*, 868 F.3d at 798, in arguing that the cautionary language was not sufficient to qualify for safe harbor). The Court would find that the emphasized language from the press release's cautionary statement to be sufficient. It described the potential risk of not realizing the expected benefits from the merger and described general challenges in the various business sectors. Thus, the Court would conclude that Defendants' statements about being on track and expecting to fill the gap are protected under the PSLRA's safe harbor.

3. Descriptions of Investment Management Business

The TAC also alleges that the following statements concerning trends in the investment management sector were false and misleading: "the tide appears to have turned for both institutional and retail placements based upon the momentum we're now experiencing in both markets," TAC ¶ 76,"the environment is as positive as it is," *id.*, "[CLNS] was finally seeing positive momentum in the overall retail marketplace as well as in our own fundraising," *id.* ¶ 110, "[CLNS saw] strong progress in building the selling groups in [its] current offerings and a commensurate acceleration in the pace of fundraising," *id.*, "[CLNS's products] are structured to be highly attractive to a very broad group of financial advisers and their clients," *id.*, and "[CNLS was] optimistic that the retail investment management business will continue to institutionalize and rebound," *id.* ¶ 121.

The Court considered these arguments in the First and Second MTD Rulings, concluding that they constituted inactionable puffery. *See* First MTD Ruling at 20; Second MTD Ruling at 19-20. Puffery consists of general statements of corporate optimism that are not capable of objective verification. *See Or. Pub. Emples. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014). This is because "[w]hen valuing corporations, . . . investors do not rely on vague statements of optimism like 'good,' 'well-regarded,' or other feel good monikers." *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1143 (9th Cir. 2017) (internal quotation marks and citation omitted). "[P]rofessional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives." *Id.*

Rather than raising new factual allegations that would cure the defects in the First and Second Amended Complaints, Plaintiff primarily re-argues the issue based on the same facts. The Court continues to find that these statements are inactionable puffery, for the reasons described more fully in the First and Second MTD Rulings. It is clear from the context of the statements about tide, momentum, positive environment, strong progress, and optimism about rebounding that Defendants were describing the general fundraising environment and expressing optimism about the segment going forward. These statements constitute puffery. Similarly, the Court would continue to find that Defendants' statements that the tide had turned and the corporation was experiencing positive momentum are essentially unverifiable.[5] Considering the context, those

[5] However, one might argue that the first referenced statement (*i.e.* "the tide appears to have turned for both institutional and retail placements based upon the momentum we're now experiencing in both markets") is actually not merely puffery as it is based on a purported fact. That is, the premise of the assertion − that "the tide appears to have turned" − rests on the existence of the "momentum" that CLNS was at that point supposedly experiencing in

statements of general optimism about the business are not actionable in this securities fraud action. *See Bodri v. GoPro, Inc.*, 252 F. Supp. 3d 912, 924-25 (concluding statements such as "core business is enjoying terrific momentum as we charge forward into attractive adjacent markets," and "the momentum we are seeing with Session out of the gates . . . is a testament to the strength of GoPro's brand," were puffery); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1064 (N.D. Cal. 2012) (holding that statements such as "[company has] strong demand metrics and good momentum," were not actionable); *In re: iPass, Inc. Securities Litigation*, No. C 05-00228-MHP, 2006 WL 496046, *4 (N.D. Ca. Feb. 28, 2006) ("Under the preceding standard, the business momentum statement is puffery because it is not linked to any particular facet of defendants' business."). Plaintiff specifically highlights Defendants' statement that the corporation was experiencing "strong progress in building the selling groups in [its] current offerings and a commensurate acceleration in the pace of fundraising" as verifiable. TAC ¶ 110. The Court agrees that this is a close call, but the Court is inclined to find that read in context, the "acceleration" statement is similarly an expression of corporate optimism tied to the "strong progress" comment. Similar to the "terrific momentum" described in *Bodri* and Defendants' own description of "positive momentum," the Court concludes that Defendants' description of "acceleration" was merely a general statement of corporate optimism. *See Quality Sys.*, 865 F.3d at 1143. *But see Grossman v. Novell, Inc.*, 120 F.3d 1112, 1123 (10th Cir. 1997) (finding that defendant's statement, "we have not slowed down the effort to create new products, we've accelerated it" was objectively verifiable and thus not puffery). The Court remains inclined to find that the challenged statements are "feel good monikers" that reasonable investors would not have relied on, rather than objectively verifiable facts.

4. Expected Capital Raising and Future Acceleration Statements

The TAC also alleges that statements about the NorthStar retail funds' expected capital raise were misleading. *See* TAC ¶¶ 90, 93; Opp'n at 16-17. The Court continues to find that the statements are, on their face, forward-looking: "[CLNS] *expects* the capital raise to accelerate in 2017"; "[CLNS] *expects* the NorthStar Capital Fund to begin raising capital from third parties in the first half 2017"; "[CLNS] *expects* NorthStar/Townsend Investment to begin raising capital in

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both the institutional and retail markets. If, in fact, there was no momentum in those two markets (or the momentum was negative), there would be no basis for a claim that the tide appears to have turned. Defendants should address this point at the hearing.

the first half 2017." TAC ¶¶ 90, 93 (emphasis added). As the statements were made in CLNS's annual report for 2016, they are accompanied by a comprehensive list of cautionary statements; the Court has already explained its reasons for finding those cautionary statements adequate.[6]

5. Fundraising Figures

Plaintiff continues to challenge CLNS's reported retail fundraising results through the second and third quarters of 2017. *See* TAC ¶¶ 122, 127, 130. Plaintiff does not raise new factual allegations that change the Court's analysis of this argument. Plaintiff alleges that the results were misleading because CLNS failed to disclose the amount of the investment in the funds that came from CLNS itself. *Id.* Plaintiff recognizes that CLNS footnoted the results with the disclosure that the results "include[d] amounts contributed by CLNS," but takes issue with the fact that "nearly all of the capital raised by the NorthStar Capital Income Fund" was from CLNS. *Id.* ¶ 122. Plaintiff also recognizes that the particular fund, NorthStar Capital Income Fund, disclosed in its SEC filings that CLNS was the source of most of its funds. *Id.* Still, Plaintiff argues that Defendants' concurrent statements about expecting to start bringing in third-party investing render the omission of CLNS's investment amount misleading.

"To be actionable under the securities laws, an omission must be misleading; in other words it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *See Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (citing *McCormick v. The Fund American Cos.,* 26 F.3d 869, 880 (9th Cir.1994)). Here, the Court continues to conclude that the omitted fact about the amount invested in its own funds did not describe a state of affairs so materially different from reality that the omission would give rise to a securities fraud claim. As Plaintiff concedes, Defendants disclosed that some of the funds raised were from CLNS. While very little was raised in the second quarter from third parties for the single fund that Plaintiff focuses on, *see* TAC ¶ 122, the amount increased in the third quarter. Here, requiring Defendants to release the amount of its investments in one or two funds that formed just one portion of a single business segment "would bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268,

[6] Further, even if the statements were not forward looking and accompanied by meaningful cautionary language, the Court finds that Plaintiffs have not alleged facts showing that Defendants knew the statements were false at the time they were made. *See* Second MTD Ruling at 21.

1277 (9th Cir. 2017). The Court continues to find that Defendants' statement was not materially misleading, given that Defendants pointed out that the fundraising figures "include[d] amounts contributed by CLNS" and that further explanations of the figures could be found in Defendants' publicly filed documents. *See* Ex. L at 527; Ex. N at 522.

B. Scienter

Because the Court would conclude that Plaintiff has failed to sufficiently allege any actionable misrepresentations, the Court need not engage in a new analysis of the parties' scienter arguments.

C. Section 20(a) Claims

To state a claim for control person liability under Section 20(a) of the Exchange Act, a plaintiff must first allege an underlying violation of Section 10(b). *See Zucco Partners*, 552 F.3d at 990, 1008 (affirming dismissal of Section 20(a) claims where plaintiffs failed to allege violation of Section 10(b)). Defendants argue that Plaintiff's Section 20(a) claim fails "[b]ecause Plaintiff has failed to state a claim under Section 10(b)." Motion at 25. Because the Court has found that Plaintiff has failed to state a claim under Section 10(b) and SEC Rule 10b-5, the Court would dismiss Plaintiff's second cause of action as well.

IV. Conclusion

Based on the foregoing discussion, the Court would **GRANT** the motion to dismiss the TAC.