UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case 14-81057-CIV-WPD

IN RE OCWEN FINANCIAL CORPORATION
SECURITIES LITIGATION

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE is before the Court on Plaintiffs' Motion for Partial Summary Judgment (the "Motion") [DE 212],[1] filed herein on April 17, 2017. The Court has carefully considered the Motion and Statement of Facts [DE 212, 213][2], the Response brief [DE 218, 219], the Reply brief [DE 233],[3] and is otherwise fully advised in the premises.

I. BACKGROUND

The Court assumes the reader's familiarity with the background of this action. Lead Plaintiffs, Sjunde AP-Fonden ("SP7") and Jay E. Thren ("Thren"), bring this action on behalf of themselves and all those who purchased Ocwen common stock between May 2, 2013 and December 19, 2014, inclusive (the "Class Period"). On November 17, 2016, the Court granted AP7's Motion to Certify Class and added Thren as a Class Representative. [DE 158]. (Collectively, AP7 and Thren are "Plaintiffs"). Defendants are: (1) William C. Erbey; (2) Ronald M. Faris; and (3) Ocwen Financial Corporation ("Ocwen").[4] [DE 74 ¶ 1]. On September 4, 2015, the Court granted Defendants' Motion to Dismiss the Consolidated Amended Complaint (the "CAC") [DE 63]. *See* [DE 64]. The operative complaint is now the Consolidated Third Amended

[1] The Court considered the unredacted version of this Motion at [DE 214-1].
[2] The Court considered SEALED versions of the documents when applicable.
[3] The Court considered the unredacted version of the Reply brief at [234-1].
[4] Erbey and Faris will be collectively referred to as the "Individual Defendants."

Class Action Complaint ("TAC") [DE 74]. Plaintiff asserts two causes of action in the TAC: (1) Count I, for violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder against all Defendants; and (2) Count II: for violations of Section 20(a) of the Exchange Act against the Individual Defendants.[5] [DE 74].

On April17, 2017, Plaintiffs filed the instant Motion for Partial Summary Judgment seeking to narrow the issues at trial. Plaintiffs claim that Ocwen made material misrepresentations related to the nature and extent of Ocwen's policies, procedures, and practices to prevent conflicts of interest between Ocwen and "Related Companies,"[6] including misrepresentations that Erbey recused himself from the negotiation and approval of Ocwen's transactions with the Related Companies (the "Related Party Statements").[7] Based on the Related Party Statements, Plaintiffs seek partial summary judgment on certain elements of their Section 10(b) and Rule 10b-5 claims against Ocwen; Plaintiffs also seeks partial summary judgment on certain elements of their Section 20(a) claims for "control person" liability against Faris.

II. STANDARD OF REVIEW

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the

[5] Allegations in the TAC will be cited to as [¶ _]. The TAC also includes an additional false statement of material fact and allegations regarding an October 2015 SEC release naming a related company, Home Loan Servicing Solutions, Ltd. ("HLSS"), as a respondent and citing transactions between Ocwen and HLSS.

[6] Plaintiffs call these companies "Erbey Companies." *See generally*, [DE 214-1]. These companies include Altisource Portfolio Solutions,S.A. ("Altisource"), Home Loan Servicing Solutions ("HLSS"), Altisource Residential Corporation ("RESI"), and Altisource Asset Management Corporation ("AAMC"). Erbey served as Executive Chairman of Ocwen and as Chairman of each of these companies.

[7] The "Related Party Statements" are described in Plaintiffs' Statement of Facts and Defendants' Responses thereto in ¶¶ 11, 13, 15, 17-18, 20. *See* [DE 213, 219].

absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp*., 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

III. DISCUSSION

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).

Plaintiffs argue that the Court can conclude, as a matter of law, that: (i) the Related Party Statements were materially false and misleading; (ii) Ocwen and Erbey acted with scienter in making the Related Party Statements; (iii) Faris was a "control person" at Ocwen during the Class Period; and (iv) Faris acted knowingly in allowing Ocwen to issue the Related Party Transactions.

For the following reasons, the Court finds that, as a matter of law that the Related Party Statements were materially false and misleading. The remaining issues are inappropriate on summary judgment because there are genuine disputes regarding material facts.

A. Material Falsity of "Related Party Statements"

"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). The "appropriate primary inquiry" is "into the meaning of the statement to the reasonable investor and its relationship to truth." *FindWhat Investor Group*, 658 F.3d at 1305 (quoting *Texas Gulf Sulphur Co.*, 401 F.2d at 862). A statement is misleading only if it "conveyed to the public a false impression." *FindWhat Investor Group*, 658 F.3d at 1305 (citation omitted).

Rule 10b–5 prohibits not only literally false statements, but also any omissions of material fact "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b). By voluntarily revealing one fact about its operations, a duty arises for the corporation to disclose such other

facts, if any, as are necessary to ensure that what was revealed is not "so incomplete as to mislead." *FindWhat Investor Group*, 658 F.3d at 1305 (internal quotation marks omitted).

However, "[r]equiring that disclosures be 'complete and accurate' does not mean that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise." *Id.* (citation, alterations, and ellipsis omitted). A corporation has a duty to neutralize only the "natural and normal implication" of its statements. *Id.*

Under Section 10(b) and Rule 10b–5, "a plaintiff must show that the [defendant's] statements were misleading as to a material fact." *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (emphasis omitted). "The test for materiality in the securities fraud context is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *See SEC v. Merch. Capital*, LLC, 483 F.3d 747, 766 (11th Cir. 2007) (quotation marks omitted); *see Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1027–28 (11th Cir. 2003) (holding that the statement, "as our Company's strong performance continues," to be non-actionable puffery, which, as a matter of law, would not induce reliance).

Plaintiffs argue that the first element under section 10(b) of the Act and Rule 10b–5 is met, as a matter of law; the Court agrees. Plaintiffs argue that the following representations made by Defendants were false: (i) Ocwen did not have "policies, procedures and practices" in place during the Class Period that required Erbey to recuse himself from transactions between Ocwen and Related Companies ("Related Party Transactions"); and (ii) Erbey was participating in the negotiation and/or approval of transactions between Ocwen and the Related Companies before and during the Class Period. PSOF ¶¶ 28-66.[8]

[8] The Plaintiff's statements of facts and Defendants' responses thereto include various citations to specific portions of the record. Any citations herein to the statements of facts and responses thereto should be construed as incorporating those citations to the record. Plaintiff's Statement of Facts is cited as

Defendants allege that the statements made concerning the Related Party Transactions were true. Defendants argue that they accurately represented Ocwen's measures to protect against potential conflicts of interest and accurately described how Erbey recused himself from negotiations and approvals of Related Party Transactions. [DE 218 at 3]. The Court analyzes the Related Party Statements in detail and finds that, as a matter of law, the Related Party Statements were materially misleading.

1. Related Party Statements

The Court examines four Related Party Statements that Plaintiffs claims were materially misleading: (1) 2012 10-K stated that Ocwen "adopted policies, procedures, and practices to avoid potential conflicts involving significant transactions with related parties . . . including Mr. Erbey's recusal from negotiations regarding credit committee and board approvals for such transactions." PSOF ¶ 11;[9] (2) similarly, the 2013 10-K stated that Ocwen had "adopted policies, procedures and practices to avoid potential conflicts with respect to our dealings with [Related Companies], including [Erbey] recusing himself from negotiations regarding, and approvals of, transactions with these entities." *Id.* ¶ 17;[10] (3) at Ocwen's Investor Day Conference on December 3, 2013, Erbey stated that Ocwen had "robust related party transaction approval process[es]. Any related party transactions between the companies I actually recuse myself from that decision." *Id.* ¶ 15; and (4) on April 22, 2014, Ocwen filed a proxy statement on Form 14A with the SEC which stated that Erbey "recuses himself from decisions pertaining to any transactions between [the Related Companies]." *Id.* ¶ 20.

"PSOF ¶_" [DE 214-2] (unredacted) [DE 213] (redacted) and Defendants' Response thereto is cited as "DSOF ¶_" [DE 219].

9 It is undisputed that the statement in the 2012 10-K was incorporated into several other statements by Ocwen. PSOF ¶ 13, DSOF ¶ 13.

10 It is undisputed that the statement in the 2012 10-K was incorporated into several other statements by Ocwen. PSOF ¶ 18, DSOF ¶ 18.

Defendants do not dispute the content of these statements, but they dispute Plaintiffs' accuracy in presenting the entire picture. In the 10-K statements in 2012 and 2013, Defendants included that there "can be no assurance that such measures will be effective, that we will be able to resolve all conflicts with Altisource or that the resolution of any such conflicts will be no less favorable to us than if we were dealing with a third party." DSOF ¶ 11. At Ocwen's Investor Day Conference, Defendants similarly try to temper the promise of recusal and "robust . . . approval process[es]" with another statement, this time directing investors to SEC filings "for an elaboration of the factors and risks associated with each company." *Id.* ¶ 15. Finally, regarding the April 22, 2014 proxy statement filed with the SEC, Defendants outline other measures designed to avoid potential conflicts of interest that were described in the proxy statement. *Id.* ¶ 20.

The Court finds the four Related Party Statements are clear; it is plain that Ocwen, through its 10-Ks and proxy statement, assured investors of policies, practices and procedures to avoid conflicts with Related Companies. It is also clear from Erbey's statement at the Investor Day Conference, as well as the 10-Ks and proxy statement, that Erbey and Ocwen told investors that Erbey recused himself from Related Party Transactions. Once a company assures investors that a policy or practice exists, attempts to point out risks or explain that the policy or practice may be ineffective do not negate the fact that the assurance was made.

After finding that Ocwen and Erbey told investors about the existence of policies and practices, the remaining issues on the element of material misrepresentation are: (1) was there in fact a policy requiring Erbey's recusal from Related Party Transactions; and (2) did Erbey fail to recuse himself from Related Party Transactions? If the answer to either of those questions is no,

then Ocwen and Erbey made false statements to investors. The Court finds that the answer to both questions is no.

2. Was there a policy requiring Erbey's recusal from Related Party Transactions?

Ocwen and Erbey assured investors that they had a policy requiring Erbey's recusal from Related Party Transactions. It is clear that this policy, if it existed, was not written. *See* PSOF ¶ 28 (citing Faris' testimony that there wasn't a written policy requiring Erbey's recusal). It appears that Ocwen did not produce a written policy concerning recusal from Related Party Transactions until February 24, 2015, which is after the Class Period. *Id.* ¶ 29.

Defendants contend that their written ethics codes required that personnel "should never act in a manner that could cause you to lose your independence and objectivity or that could adversely affect the confidence of our customers/clients, suppliers, directors, or fellow employees in the integrity of Ocwen or its procedures." DSOF ¶ 28. Another policy for Ocwen's Senior Financial Officers required that "[a]ny material transaction or relationship that reasonably could be expected to give rise to a conflict must be reported to the Audit Committee." *Id.* These policies do not require the recusal of Erbey from Related Party Transactions. Defendants produced a document presented to Ocwen's Board of Directors on February 13, 2013 [DE 218-7 at 6] that refers to a policy requiring Erbey's recusal, but it is unclear what policy is referenced and whether the policy *requires* Erbey's recusal. *See* [DE 218-7 at 8] ("Consistent with Company policy governing Related Party Transactions, Mr. Erbey recused himself from involvement in price negotiations with Buyer and Ocwen's Credit Committee deliberations.").

Erbey and Britti testified that the ethics policies, excerpted above, required Erbey's recusal. Erbey's testimony is as follows: "Q: There was a written policy? A. Yes. Q: And where was that written policy? A: That was in our policies and procedures related to related persons. It

also related to conduct – code of conduct and business ethics, that if you had a conflict, you were required to basically have that resolved by the independent audit committee of the board." Erbey Tr. [DE 215-45 at 32]. Britti testified that the ethics policy is the written policy requiring Erbey's recusal. Britti Tr. [DE 215-49 at 62-64]. An amorphous policy that requires all personnel to conduct themselves in a manner that would not cause harm does not require Erbey's recusal, and a policy that requires Senior Officers to report to the audit committee also does not require Erbey's recusal.

It does not appear that Ocwen had a specific policy, written or otherwise, that required Erbey's recusal from Related Party Transactions. Defendants' clearly represented to shareholder that Ocwen's policies required Erbey's recusal, and that is not the case on the face of these policies. As a matter of law, the policies before the Court did not require Erbey's recusal. Therefore, Ocwen and Erbey's statements were misrepresentations.

3. Did Erbey fail to recuse himself from Related Party Transactions that occurred during the Class Period?

Erbey stated that "*Any* related party transactions between the companies I actually recuse myself from that decision." PSOF ¶ 15 (emphasis added). Ocwen's proxy statement on Form 14A stated that Erbey "recuses himself from decisions pertaining to *any* transactions between [the Related Companies]." *Id.* ¶ 20 (emphasis added). Any means every, and every means all. Therefore, if Erbey failed to recuse himself from even one Related Party Transaction, then these statements are misrepresentations.[11]

[11] The Court recognizes case law indicating that a 10b-5 violation should not be found in instances where a defendant attempted to adhere to established policy but, on rare occasions, had imperfect adherence to announced policy. *See Lewy v. Skypeople Fruit Juice, Inc.*, 2012 WL 3957916, at *20 (S.D.N.Y. Sept. 10, 2012) (contrasting where a defendant "endeavored to adhere to, the announced policy" with instances where "violation of the policy was either repeated or constant."). The Court finds that Erbey failed to recuse himself from Related Party Transactions often enough to make the Related Party Statements misleading.

The parties cite numerous transactions between Ocwen and the Related Companies; the parties differ in their characterization of Erbey's involvement in many of these transactions. It is clear from the record evidence that Erbey did not recuse himself from several flow transactions with HLSS. PSOF and DSOF ¶¶ 37-43. Defendants admit that Erbey approved several of these transactions but argue that recusal was not necessary because the transactions were "administrative and mechanical." However, the statements at issue do not have an exception for "administrative and mechanical" transactions. Erbey said that he recused himself from all Related Party Transactions; that is not true. Therefore, Ocwen and Erbey's statements were misrepresentations.

4. Were the Related Party Statements material?

Having determined that Ocwen and Erbey's statements were misrepresentations, the next question is whether those misrepresentations were material. Applying the test for materiality requires the Court to ask "whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *Merch. Capital*, LLC, 483 F.3d at766. Materiality is typically considered a mixed question of law and fact, but summary judgment is appropriate where "the misstatement is so obviously important to an investor that reasonable minds cannot differ on the question of materiality." *SEC v. Monterosso*, 786 F. Supp. 2d 1244, 1263 (S.D. Fla. 2011) (internal quotations omitted).

Erbey and Ocwen assured investors that Ocwen had a policy in place that required Erbey's recusal from Related Party Transactions and that Erbey, in fact, recused himself from all such transactions. Given Erbey's positions among the Related Companies, a reasonable person would be concerned about conflicts of interest. Furthermore, concerns over Erbey's conflicts were documented in newspapers and prompted regulatory actions from the SEC and NYDFS. It is well-documented that people were worried about Erbey's conflicts of interest. Therefore, a reasonable person would rely on Erbey's and Ocwen's statements made to assuage those

concerns. In this backdrop, the misrepresentations about Erbey's recusal are "so obviously important to an investor that reasonable minds cannot differ as to the question of materiality." *See Monterosso*, 786 F. Supp. 2d at 1263. As a matter of law, the Related Party Statements were material misrepresentations.

5. Whether the Related Party Statements were made with scienter is a question of fact for the jury.

To prove scienter, 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 "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*. While scienter is ordinarily an issue of fact, there are causes in which summary judgment may be appropriate." *Monterosso*, 756 F.3d at 1335 (citations omitted). Erbey told investors that he would recuse himself from the approval of all Related Party Transactions, yet he approved Related Party Transactions during the Class Period. Therefore, Erbey's false statements were a departure from the standard of care. However, it is a question of fact whether Erbey's actions were an *extreme* departure from standards of ordinary care, and whether the danger of misleading investors is so obvious that Erbey must have known. Therefore summary judgment is inappropriate on this issue.

B. It is premature to decide the "control person" liability of Faris.

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)). Here, it would be premature to determine whether Faris is a control person under section 20(a). The Court will make this determination after a finding is made on the 10b-5 violations.

IV. CONCLUSION

The Court finds that as a matter of law, the Related Party Statements were materially misleading. All other issues in Plaintiffs' Motion for Summary Judgment are inappropriate for summary judgment due to genuine disputes about material facts.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that the Motion [DE 212] is **GRANTED IN PART** as set forth above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 12th day of June, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record