

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SJUNDE AP-FONDEN, individually and on
behalf of all others similarly situated,

Plaintiff,

-against-

JOSEPH J. DEPAOLO, ERIC HOWELL,
FRANK SANTORA, JOSEPH SEIBERT,
SCOTT A. SHAY, VITO SUSCA, STEPHEN
D. WYREMSKI, and KPMG LLP,

Defendants.

Case No. 1:23-cv-01921-FB-JRC

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FRANK SANTORA'S
MOTION TO DISMISS THE COMPLAINT**

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Defendant Frank Santora (“Santora”) respectfully submits this memorandum of law in support of his motion to dismiss the Corrected Consolidated Complaint (the “Complaint,” Dkt. No. 70) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Buried in its 499-paragraph complaint, Plaintiff alleges that Frank Santora made a single oral misstatement at a technology conference in March 2021.

Santora’s comments on that occasion—which addressed a Signature Bank payment application called Signet and its approval by the New York State Department of Financial Services—cannot form the basis for a securities fraud claim. Santora’s comments were true; they were his opinion; they were corporate puffery; and they were made without scienter. Plaintiff alleges no facts suggesting that he secretly disbelieved his comments. His comments caused no investor losses.

Nor is Santora liable for the statements or actions of others. At all relevant times, Santora served in an operations and technology role at the Bank. He never served as a Board member, Executive Officer, or senior manager of the Bank.

Plaintiff’s claims against Santora cannot be remedied through repleading. They should be dismissed with prejudice.

STATEMENT OF FACTS¹

Santora adopts and incorporates by reference the Statement of Facts of the Memorandum of Law in Support of Defendants Joseph J. DePaolo and Eric Howell’s Motion to Dismiss

¹ Unless otherwise indicated, these facts are taken from the Complaint, which Santora accepts as true for purposes of this Motion to Dismiss only. Where indicated, facts are also taken from public documents, which the Court may take judicial notice of as “relevant matters of public record.” *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 12-cv-2652, 2019 WL 1771786, at *5 (S.D.N.Y. Apr. 23, 2019) (cleaned up).

Consolidated Class Action Complaint (“DePaolo and Howell Mem.”) at 3-20. The section below relates specifically to Frank Santora.

I. Santora Did Not Hold a Senior Management Role

Santora joined the Signature Bank (the “Bank” or “SBNY”) in 2016. From 2018 through March 2023, he worked in an operations and technology role, supporting certain of the bank’s payment functions. Compl. ¶ 36. Although Santora was given the title “Chief Payments Officer” in September 2020, he never served in senior management. Compl. ¶ 36. He was never an Executive Officer. *See* Compl. ¶¶ 121, 423, Section IV.G. Santora never served on the Bank’s Board of Directors, Board Risk Committee, or asset/liability management committee. Compl. ¶¶ 116, 406, 408. The Complaint alleges no facts suggesting that he played a role in managing risk, managing liquidity, or devising strategy for the Bank. *See, e.g.*, Compl. ¶¶ 253, 406, 407.

Santora did not participate in the Bank’s Long Term Incentive Plan, which was designed to “reward[] Signature’s senior management.” Compl. ¶¶ 422-423. He engaged in no relevant stock transactions. Compl. ¶¶ 426-442.

Santora did not draft, review, approve, sign, or make SBNY’s public filings. *See, e.g.*, Compl. ¶¶ 205-349. Nor would it be plausible for Plaintiff to allege that he did, as he worked in operations and technology, not in finance or senior management. Santora’s name does not appear in the Bank’s public filings during the Class Period. *See, e.g.*, Declaration of Peter L. Simmons in Support of Defendants Joseph J. DePaolo and Eric Howell’s Motion to Dismiss Consolidated Class Action Complaint (“Simmons Decl.”) Exs. D, F (Form 10-Ks). He did not speak on earnings calls. Compl. ¶¶ 224-236; 244-254; 255-261; 297-308; 314-319; 460-465.

II. Santora’s Single Statement

The Complaint alleges that Santora misled investors through oral comments made at a Wells Fargo technology forum on March 5, 2021 (the “Wells Fargo Forum”). Compl. ¶¶ 135, 218.

Santora’s comments related solely to the New York State Department of Financial Services’s (“NY DFS’s” or “DFS’s”) approval and support for Signet, SBNY’s digital payments platform—and not to its regulators’ overall view of the Bank. Compl. ¶ 58. As alleged, Signet was a proprietary application that “enabled SBNY customers to settle USD payments globally 24 hours a day/7 days a week/365 days a year within the Bank with fellow SBNY customers.” *Id.*

A. DFS’s Initial Approval of Signet

The Bank offered Signet to its customers only after it sought and received authorization from DFS in 2018. DFS announced its “approval” and “support” for Signet in a prominent press announcement on December 4, 2018 titled: “DFS Continues to Lead Responsible Innovation in New York’s Fintech Industry with New Virtual Currency **Approval** for Commercial Banking Transactions” (the “DFS Press Release”) (emphasis added) (attached as Simmons Decl. Ex. QQQ). The Press Release quoted DePaolo as follows: “It is gratifying to have **the support** of . . . the Department of Financial Services[.]” *Id.* at 1. (emphasis added).

In particular, the DFS Press Release stated:

DFS’s approval [of Signet] follows a comprehensive and rigorous review of Signature Bank’s application and is **subject to significant regulatory conditions all of which will be subject to examination and inspection by DFS examiners as well as independent consultants** to ensure important protections for New York markets and consumers are being met.

Id. (emphasis added).

B. DFS’s Ongoing Approval of Signet

After the Bank launched Signet, DFS conducted examinations and inspections of Signet, as promised in the Press Release. *Id.* Signet passed these examinations—as shown by Bank’s ongoing disclosure of Signet’s operation. *See* Simmons Decl. Ex. C (2020 Form 10-K) at 11, 13; Simmons Decl. Ex. F (2021 Form 10-K) at 10, 11. Thus, DFS approved Signet’s continued operation. The Complaint does not allege otherwise.

C. Santora's Comments Related to DFS's Approval of Signet

Santora's comments addressed DFS's approval of Signet—not the Bank's overall relationship with DFS or any other regulator. This is obvious from the full transcript of the conference. *See* Simmons Decl. Ex. GG.

The host of the Forum mentioned Signet in his opening remarks. *Id.* at 5. The ensuing discussion focused on Signet and its approval by DFS. Compl. ¶¶ 215-217. DePaolo noted, “When we got **approval** for Signet, we kept [DFS] informed all along, prior to **approval** and subsequent to getting **approval**.” Compl. ¶ 216 (emphasis added).

The host then asked a question about Signet. Compl. ¶ 217. In response, Santora stated:

I think we all have comments on this. **But I – for one, I** embrace regulation, right? **I think** it's great because regulation brings transparency, legitimacy. It brings stability to the industry and that's what's really going to grow this industry and then grow our share of the industry. As Joe said earlier, when we built **Signet**, we went right away to our regulator, which is Department of Financial Services in New York. And they are at the forefront of litigation in the digital asset space. They created the BitLicense requirements. They're very savvy, and they want to be the premier regulator in the space. And as a result, they want to see the innovation take place in the banks in which they regulate, which is us, right? *So we've developed a very strong partner with them. And we communicate. We collaborate on products and services. They're comfortable with us. They know our risk and compliance framework. They are happy to work with us to have the innovation come out of our bank because they want this.* They want this industry to grow. It's a great industry for New York, for the country. And they're on the forefront of designing robust regulatory framework here. And we're right on the front lines working with them on this, and **I consider** those guys partners. And everything we do with **Signet**, we work hand in hand with them. And we were able to get this thing [Signet] off the ground in less than a year. And anyone who's dealt with regulators know that if you said that 3 years ago, they'd say impossible. But **I think** it's the testament to the partnership that we have that we're able to innovate and deliver timely in this space. **So for me, I** embrace regulation in this industry.

Compl. ¶ 218 (italics are as shown in Complaint; underlining is added for emphasis here).

III. Santora Received No MRBAs or SRs

Plaintiff alleges that Santora’s comments misled investors because “Regulators were far from ‘comfortable’ with the Bank” as “the Bank had open with its chief Regulators, the FDIC and the NYDFS, 3 MRBAs and 61 SRs[.]” Compl. ¶ 219.

However, the Complaint does not—and cannot—allege that Santora had received, or otherwise knew about, any of the regulatory communications in question at the time of his comments. *See, e.g.*, Compl. ¶ 87 (NY DFS Report with liquidity target review was presented to “senior management” on June 16, 2020); Compl. ¶ 91 (FDIC NY Regional Office provided Supervisory Letters to “senior management and Board” on October 19, 2020 and January 19, 2021). Instead, the regulators “communicated [their findings] to SBNY’s Board and senior management,” which, even according to Plaintiff, did not include Santora. Compl. ¶ 79.

The Complaint is devoid of any other factual allegations specific to Santora.

IV. SBNY Disclosed Regulatory Risks in Public Filings

In its public filings, the Bank fully disclosed the risk that regulators could issue MRBAs and SRs. For example, the Bank’s Form 10-K for the year 2021 filed on March 1, 2022 disclosed:

[W]e are subject to ongoing examination by the FDIC, the DFS, the SEC, the CFPB, self-regulatory organizations and various state authorities. Our banking operations, sales practices, trading operations, record-keeping, supervisory procedures and financial position may be reviewed during such examinations to determine if they comply with the rules and regulations designed to protect clients and protect the solvency of banks and broker-dealers. **Examinations may result in the issuance of a letter to us noting perceived deficiencies and requesting us to take corrective action.**

Simmons Decl. Ex. F at 57 (emphasis added); Simmons Decl. Ex. D (2022 Form 10-K) at 55.

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff’s factual allegations must “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

555 (2007). “[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The PSLRA requires that the complaint “specify each statement alleged to have been misleading” and “the reason or reasons why the statement is misleading,” and to “state with particularity facts giving rise to a strong inference” of scienter. 15 U.S.C. § 78u-4(b).

I. Counts I and II Rely On Impermissible Group Pleading as to Santora

Plaintiff alleges in threadbare fashion that Santora is responsible for the oral and written statements of six other Signature Bank employees that he had no role in drafting, approving, making, or disseminating. *See, e.g.*, Compl. ¶¶ 400, 403, 410-11, 417, 419 (containing conclusory allegations directed at collective “Defendants” without specific allegations about Santora). These allegations constitute impermissible group pleading.

Santora is not liable for oral statements made by others. *Levy v. Maggiore*, 48 F. Supp. 3d 428, 449 (E.D.N.Y. 2014). Nor can he be liable for written statements made by others, including public filings, because he did not draft them, make them, or have “ultimate authority” over them. *Janus Cap. Grp. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Plaintiff does not—and cannot—allege facts suggesting otherwise.

Santora is not liable under the group pleading doctrine because he was not a “clearly cognizable corporate insider[] with [an] active daily role[]” in the day-to-day management of the Bank. *Orlan v. Spongetech Delivery Sys., Inc., Sec. Litig.*, No. 10-cv-4093, 2012 WL 1067975, at *9 (E.D.N.Y. Mar. 29, 2012). He was not a senior manager or Executive Officer, and he was not a member of the Board of Directors, Board Risk Committee, or asset/liquidity committee. Threadbare allegations that all Defendants were “top executives” with “high level positions” and “access to . . . all Regulator findings and periodic reports” (Compl. ¶¶ 417-419) are “insufficient”

as a matter of law. *Behrendsen v. Yangtze River Port and Logistics Ltd.*, No. 19-cv-00024, 2021 WL 2646353, at *10 (E.D.N.Y. June 28, 2021).

II. Count II Fails to State a Claim for Scheme Liability

Count II alleges that Santora violated Rules 10b-5(a) and (c) under a scheme liability theory. Compl. ¶ 491. This claim fails as a matter of law. Santora adopts and incorporates by reference the arguments of Defendants DePaolo and Howell on scheme liability. *See* DePaolo and Howell Mem. at 58-60.

As to Santora, Plaintiff fails to allege a single “deceptive or manipulative act.” *In re Turquoise Hill Res. Ltd. Sec. Litig.*, 625 F. Supp. 3d 164, 247 (S.D.N.Y. 2022). Santora’s alleged misstatement at the Wells Fargo Forum does not suffice because “misstatements and omissions—without more” cannot form the basis for scheme liability. *SEC v. Rio Tinto PLC*, 41 F.4th 47, 49 (2d Cir. 2022). Plaintiff also fails to plead scienter as to Santora, as described below at 13-15.

III. Count I Fails to State a Claim for Misstatement or Omission Under Rule 10b-5(b)

Plaintiff alleges that the Santora’s comments at the Wells Fargo Forum were misleading because they “created the false impression with investors that the Bank was in good standing with Regulators and that Defendants had developed positive relationships with those Regulators.” Compl. ¶ 219.

“To succeed on a claim under Section 10(b)/Rule 10b-5 thereunder, a plaintiff must plausibly allege: ‘(1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.’ *Ulbricht v. Ternium S.A.*, No. 18-cv-6801, 2020 WL 5517313, at *4 (E.D.N.Y. Sept. 14, 2020) (quoting *Singh v. Cigna Corp.*, 918 F.3d 57, 62 (2d Cir. 2019)).

Count I fails to state an actionable claim against Santora under Rule 10b-5(b) because (A) Santora made no actionable misstatement or omission; (B) Santora lacked scienter; and (C) Plaintiffs fail to plead loss causation. Because these failures are incurable through amendment, the claim should be dismissed with prejudice.

A. Santora Made No Material Misstatement or Omission

Santora made no material misstatement or omission because (1) his comments at the Wells Fargo Forum were true; (2) they were inactionable opinion; (3) they were inactionable puffery; and (4) they were immaterial.

1. Santora's Comments at the Wells Fargo Forum Were True

To plead an actionable misstatement or omission, a plaintiff “must do more than say that the statements were false and misleading; [he] must demonstrate with specificity why and how that is so.” *Gray v. Wesco Aircraft Holdings, Inc.*, 454 F. Supp. 3d 366, 381 (S.D.N.Y. 2020) (cleaned up).

Santora's oral comments at the Wells Fargo Forum accurately described, in general terms, the positive working relationship that the Bank had with DFS concerning Signet at that time. His description is entirely consistent with DFS's Press Release about Signet and DFS's ongoing approval of Signet thereafter.

The DFS Press Release announced DFS's “approval” and “support” of Signet. Simmons Decl. Ex. QQQ at 1. This approval followed a “comprehensive and rigorous review” of Signet. *Id.* After the initial review, DFS promised it would subject Signet to “significant regulatory conditions all of which will be subject to examination and inspection by DFS examiners as well as independent consultants.” *Id.* at 1. The Bank passed these reviews—otherwise it could not have continued to operate Signet as it did throughout the Class Period. *See* Simmons Decl. Ex. C at 11, 13; Simmons Decl. Ex. D at 8, 15; Simmons Decl. Ex. F at 10, 11 (2020-2022 Form 10-Ks

noting Signet’s ongoing operation). On this basis, Santora reasonably and truthfully asserted that DFS was “comfortable with” the Bank regarding Signet, and that “they know our risk and compliance framework.” Compl. ¶ 218.

Plaintiff’s sole basis for the assertion that Santora’s comments were false is the allegation that “[a]s of March 2021 the Bank had open with its chief Regulators, the FDIC and NYDFS, 3 MRBAs and 61 SRs.” Compl. ¶ 219. This assertion fails for several reasons.

First, Plaintiff does not—and cannot—allege that Santora received or otherwise knew about (or recklessly disregarded) any of these MRBAs or SRs at the time of the Wells Fargo Forum. *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 571 (S.D.N.Y. 2014) (Where a plaintiff asserts the falsity of a statement, the plaintiff must plead that the statement was “both objectively false and disbelieved by the defendant at the time it was expressed”) (internal citations omitted). Santora cannot be liable for omitting facts that he did not know about.

Second, even if Santora had known about the MRBAs and SRs, he cannot be liable for omitting them, because he was prohibited by law from disclosing them, as argued by Defendants Howell and DePaolo and incorporated by reference herein. *See* DePaolo and Howell Mem. at 23.

Third, Santora’s comments addressed DFS’s view of Signet—not the Bank’s overall relationship with DFS, or any other regulator. The context of his remarks makes this clear. He spoke at a Forum that addressed Signet, following comments made by DePaolo about Signet, and in response to a question about Signet. Referring back to DePaolo’s earlier comment about Signet, Santora noted that “when we built Signet, we went right away to our regulator, which is the Department of Financial Services in New York[.]” Compl. ¶ 218. Given this context, Plaintiff cannot plausibly assert that Santora’s comments related to the Bank’s overall relationship with its

regulators. *Iqbal*, 556 U.S. at 686 (“[T]he Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.”).

Finally, even if Santora’s comments are construed to suggest that the Bank was “in good standing” overall and had “positive relationships” with regulators as a general matter, that comment was not materially false or misleading. As argued by DePaolo and Howell in their Memorandum of Law (DePaolo and Howell Mem. at 48-51), which arguments Santora adopts and incorporates by reference herein, at the time of the Wells Fargo Forum (and up through the eve of the Bank’s closure), the FDIC consistently gave the Bank an overall score of “2”—meaning it was “fundamentally sound” with “no material supervisory concerns.” *See* Simmons Ex. FF (FDIC Manual) § 1.1-23; *see also* Simmons Ex. B (OIG Report) at 18.

This failure to plead falsity with particularity is fatal to the misrepresentation claim.

2. Santora’s Comments Are Inactionable Opinion

Even if Santora’s comments were inaccurate, they were inactionable opinion.

Santora is liable for stating his opinion only if (1) he did not honestly hold the opinion; (2) the opinion included an embedded statement of fact that is false; or (3) the opinion omitted material facts necessary to make the opinion not misleading to a reasonable person reading the statement fairly and in context. *Tongue v. Sanofi*, 816 F.3d 199, 209-210 (2d Cir. 2016).

Santora began his comments as follows: “**I know we all have comments** on this. But **I, for one**, I embrace regulation . . . **I think it’s great** because regulation . . . brings stability to the industry . . .” Compl. ¶ 218. He concluded his comments by noting that “everything we do **with Signet**, we work hand in hand with them [DFS] . . . **But I think** it’s the testament to the partnership that we have . . . in this space. **So for me, I embrace** the regulation in this industry.” *Id.*

It could not be more apparent from Santora’s repeated use of “I think” and similar language that he was expressing his opinion at the Wells Fargo Forum. The Second Circuit recently held

that the use of “language like ‘we believe’ or ‘we think’ is *sufficient*—not *necessary*—to render a statement one of opinion rather than fact.” *In Re Philip Morris Int’l Inc. Sec. Litig.*, 89 F.4th 408, 418 (2d Cir. 2023) (emphasis in original).

Even setting aside Santora’s repeated use of “I think,” his comments at the Wells Fargo Forum express “an inherently subjective . . . assessment” that is “sufficient to render it one of pure opinion.” *Id.* (quoting *Omnicare Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 186 (2015)) (internal quotation marks omitted); *see also In re Citigroup Sec. Litig.*, No. 20-cv-9132, 2023 WL 2632258, at *18 (S.D.N.Y. Mar. 24, 2023) (statement that bank was “rebuilding [its] relationship with regulators” was “clearly subjective,” and was not false or misleading simply because regulator later brought an action against the bank); *In re Express Scripts Holdings Co. Sec. Litig.*, 773 F. App’x 9, 13 (2d Cir. 2019) (statements that company’s relationship with largest customer was “great” and “very, very solid” were “expressions of puffery and optimism,” as well as non-actionable opinions).

Plaintiff alleges no facts suggesting that Santora did not honestly “hold” his opinion. *Tongue*, 816 F.3d at 209-210. When read in context, it is clear that he did.

Because repleading cannot remedy this flaw, Count I should be dismissed with prejudice. *See Emerson v. Mut. Fund Series Trust*, 393 F. Supp. 3d 220, 252 (E.D.N.Y. 2019) (“Dismissal with prejudice is appropriate because it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”) (internal citation omitted).

3. Santora’s Comments Were Puffery and Therefore Immaterial

Santora’s comments at the Wells Fargo Forum were inactionable corporate puffery because they were “too general to cause a reasonable investor to rely” on them. *ECA & Loc. 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009). Puffery is immaterial as a matter of law. *In re Citigroup*, 2023 WL 2632258, at *18.

Santora’s comments are full of aspirational generalities, including: “So we’ve developed a very strong partner with them. And we communicate. We collaborate on products and services. They’re comfortable with us. They know our risk and compliance framework. They are happy to work with us to have the innovation come out of our bank because they want this.” Compl. ¶ 218.

The Second Circuit has held that similar public statements by a bank about its “highly disciplined” risk management and “its standard-setting reputation for integrity” were inactionable puffery. *ECA*, 553 F.3d at 205-206; *see also In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 170 (2d Cir. 2021) (statements that the company was “pretty confident” and “pretty positive” about the prospect of renewing partnerships “are best characterized as inactionable corporate puffery”); *see also In re Lottery.com, Inc. Sec. Litig.*, No. 22-cv-07111, 2024 WL 454298, at *16 (S.D.N.Y. Feb. 6, 2024) (statements about company’s regulatory compliance are non-actionable puffery and “too general to cause a reasonable investor to rely on them”) (internal citations omitted); *In re Telefonaktiebolaget LM Ericsson Sec. Litig.*, No. 22-cv-1167, 2023 WL 3628244, at *10 (E.D.N.Y. May 24, 2023) (collecting cases where “numerous district courts in this Circuit have found general policy- and compliance-related statements . . . to be unactionable.”).

These cases are directly on point to Santora’s comments. The claim should be dismissed with prejudice because this failing cannot be overcome through amendment. *See Emerson*, 393 F. Supp. at 252.

4. Santora’s Comments Were Otherwise Immaterial

Santora’s comments were immaterial in light of the Bank’s risk disclosures to investors.

The Bank repeatedly disclosed the risk that regulators frequently examined the Bank and might issue letters “noting perceived deficiencies and requesting us to take corrective action”—namely, MRBAs and SRs. Simmons Decl. Ex. C (Form 10-K for 2020) at 56, Ex. F (Form 10-K for 2021) at 57. In the context of these disclosures, Santora’s non-disclosure of MRBAs and SRs

was immaterial. *In re Synchrony*, 988 F.3d at 170-71 (affirming District Court’s dismissal of claims based on alleged misrepresentations that “were properly contextualized when viewed with the total mix of publicly disclosed information,” explaining that “[plaintiff] may not cherry pick certain public statements for its complaint and divorce them from the universe of disclosed information to plausibly allege fraud.”).

Moreover, as noted above, at the time of the Wells Fargo Forum (and up through the eve of the Bank’s closure), the FDIC consistently gave the Bank an overall score of “2”—meaning it was “fundamentally sound” with “no **material** supervisory concerns.” *Supra*, at 10. Accordingly, based on the FDIC’s own standards, omission of the MRBAs and SRs was immaterial.

B. Plaintiff Fails To Plead Scienter

Plaintiff fails to “state with particularity facts giving rise to a strong inference” that Santora acted with scienter. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 308 (2007) (citing 15 U.S.C. § 78u-4(b)(2)). A strong inference of scienter “must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *ECA*, 553 F.3d at 198 (cleaned up).

The inference that Santora’s comments at the Wells Fargo Forum constituted his genuine understanding of DFS’s view is more compelling than the inference that Santora intended to defraud investors by misleading them. Santora knew of the DFS’s original and ongoing approval of Signet, but he did not know of the MRBAs and SRs.

Furthermore, Plaintiff has failed to establish scienter by pleading facts to show either “(1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness.” *Id.*

1. Plaintiff Fails to Plead Motive and Opportunity

Plaintiff fails to allege that Santora “benefitted in some concrete and personal way from the purported fraud.” *Id.* (citation omitted). Santora did not participate in the Long-Term Incentive compensation plan, and he did not engage in any relevant stock transactions. Compl. ¶¶ 422-442. Santora is entirely absent from Complaint’s lengthy discussion of motive and opportunity as to other defendants. *Id.*

2. Plaintiff Fails to Plead Conscious Misbehavior or Recklessness

If Plaintiff cannot show “motive and opportunity,” Plaintiff must “raise a strong inference of scienter under the “strong circumstantial evidence prong, though the strength of the circumstantial allegations must be correspondingly be greater.” *ECA*, 553 F.3d at 198-99 (cleaned up). Plaintiff must “allege a degree of scienter approaching a knowledgeable participation in the fraud or a deliberate and conscious disregard of facts,” and must “detail specific contemporaneous data or information known to the defendants that was inconsistent with the representation in question.” *Janbay v. Canadian Solar, Inc.*, No. 20-cv-4430, 2012 WL 1080306, at *11 (S.D.N.Y. Mar. 30, 2012) (cleaned up)

Plaintiff entirely fails to meet this elevated standard. Santora’s comments represented his genuine and well-founded belief that DFS supported Signet, based on DFS’s initial and ongoing approval of Signet. Plaintiff alleges no facts that would, if true, demonstrate that he knowingly or recklessly disregarded contrary facts.

As argued by Defendants DePaolo and Howell (and incorporated by reference herein), the mere existence of negative regulatory information or communication does not create an inference of scienter. *See* DePaolo and Howell Mem. at 48-51.

Santora also adopts and incorporates by reference DePaolo's and Howell's arguments on scienter concerning confidential witnesses (*see* DePaolo and Howell Mem. at 51-52); and KPMG's clean audit opinions. *See* DePaolo and Howell Mem. at 53-54.

Because Plaintiff fails to allege a strong inference of scienter, Count I (misstatement or omission) and Count II (scheme liability) both fail as a matter of law.

C. Plaintiff Fails to Plead Loss Causation

For the reasons cited by Defendants DePaolo and Howell in their memorandum of law at 55 to 58, and incorporated by reference herein, Plaintiffs fail to plead loss causation.²

CONCLUSION

For the foregoing reasons, the claims against Santora should be dismissed with prejudice.

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Respectfully submitted,
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² The Complaint against Santora should also be dismissed for lack of standing. Santora incorporates by reference DePaolo's and Howell's argument on this point. *See* DePaolo and Howell Mem. at 21 n.9 (citing the FDIC's Memorandum of Law in Support of its Motion to Dismiss).