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2
3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF CALIFORNIA
5

6 CHARTER TOWNSHIP OF
7 CLINTON POLICE AND FIRE
8 RETIREMENT SYSTEM,
9 individually and on behalf of all
10 others similarly situated,
11
12 Plaintiff,
13
14 v.
15 LPL FINANCIAL HOLDINGS INC.,
16 et al.,
17
18 Defendants.

Case No.: 16-cv-0685-BTM-BGS

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS AND DISMISSING
CONSOLIDATED COMPLAINT
FOR VIOLATION OF FEDERAL
SECURITIES LAWS WITH LEAVE
TO AMEND**

[ECF NO. 17]

15
16 Defendants LPL Financial Holdings, Inc., Mark S. Casady, and Matthew J.
17 Audette (collectively, "Defendants") have filed a motion to dismiss the
18 Consolidated Complaint for Violation of the Federal Securities Laws (ECF No. 16)
19 (the "Complaint"). The Court held a hearing on Defendants' motion on April 17,
20 2017. For the reasons discussed below, Defendants' motion will be granted in part
21 and denied in part, and Plaintiff's Complaint will be dismissed with leave to amend.

22 **I. BACKGROUND**

23 This is a putative securities class action filed on behalf of all purchasers of
24 common stock of LPL Financial Holdings Inc. ("LPL") between December 8, 2015
25 and February 11, 2016, inclusive (the "Class Period"). Plaintiff alleges that on
26 December 8, 2015, Defendants made false and misleading statements regarding
27 LPL's business and prospects, artificially inflating common stock prices during the
28 Class Period. The Complaint states claims for violation of section 10(b) of the

1 Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b–5, 17 C.F.R.
2 § 240.10b–5, as well as section 20(a) of the Securities Exchange Act, 15 U.S.C. §
3 78t(a).

4 LPL is an independent broker-dealer that provides a platform of brokerage
5 and investment advisory services to independent financial advisors, and generates
6 revenues primarily from fees and commissions on clients’ brokerage and advisory
7 assets. (Compl. ¶ 1.) LPL was founded in 1989 and in 2005 sold a majority stake
8 to two private equity firms, TPG Capital (“TPG”) and Hellman & Friedman LLC
9 (“Hellman”). (Id. ¶ 2.) TPG thereafter elevated defendant Mark S. Casady
10 (“Casady”) to Chairman and CEO of LPL. (Id.) Over the course of his tenure with
11 LPL, Casady has earned more than \$119 million in stock proceeds and
12 compensation. (Id. ¶¶ 2, 3, 6.)

13 In November 2010, TPG and Hellman took LPL public in an initial public
14 offering that generated approximately \$470 million. (Id. ¶ 3.) After Hellman exited
15 LPL stock in 2013, TPG became LPL’s largest shareholder. It appointed two
16 directors to LPL’s Board, former TPG partner Richard Schifter, who served as Lead
17 Director, and Richard Boyce, who served on LPL’s compensation committee. (Id.)
18 TPG also entered into a shareholder agreement that gave it “the right to obtain any
19 reports, documents, information or other materials ... which a member of the LPL
20 Board has received or has the right to receive.” (Id. ¶ 5.) Plaintiff alleges that by
21 virtue of this provision, TPG had the ability “at any time to access inside financial
22 information regarding LPL’s financial results....” (Id.)

23 From February 2013 through September 2015, LPL faced, and settled, a
24 number of regulatory actions and investigations into its business practices,
25 including allegations it failed to adequately supervise brokers’ sales of real estate
26 investment trusts (“REITs”), improperly sold risky exchange-traded funds, and
27 failed to properly supervise the sale of complex financial products. (Id. ¶ 7.)
28 Plaintiff alleges the regulatory actions and investigations put Casady’s future with

1 LPL at risk. (Id. ¶ 8.)

2 On October 29, 2015, in a move allegedly meant to reassure investors, LPL
3 announced a plan to buy back \$500 million of its own shares, a deal it called a
4 “bargain” because LPL shares were trading “at a significant discount to what we
5 believe is their intrinsic value.” (Id. ¶ 9.) This was taken as a signal of
6 management’s confidence in LPL’s outlook, and in the days following the
7 announcement, LPL’s stock price rose more than 10%. (Id. ¶ 10.)

8 On November 24, 2015, LPL announced it had entered into an agreement
9 with Goldman Sachs & Co. (“Goldman Sachs”) whereby Goldman Sachs would
10 carry out \$250 million of the \$500 million share repurchase on a schedule that LPL
11 said “will take several months to complete.” (Id. ¶ 11.)

12 Meanwhile, by “at least the beginning of December 2015,” with less than a
13 month left in the fourth quarter (“Q4”) of 2015 (“4Q15”), Plaintiff alleges LPL’s
14 internal financial results showed it was in the midst of a “disastrous” quarter. (Id.
15 ¶ 12.) Plaintiff further contends TPG had access to LPL’s “financial information”
16 by virtue of its shareholder agreement, Board connections, and relationship with
17 Casady. (Id. ¶ 13.) TPG allegedly anticipated based on LPL’s inside information
18 that once the market learned of LPL’s poor fourth-quarter performance, LPL’s
19 stock price would fall. (Id. ¶ 14.) It thus approached Goldman Sachs in late
20 November or early December 2015 to cash out more than 4 million shares of LPL
21 stock through the accelerated share repurchase program at a time when LPL stock
22 was trading at historic highs. (Id.)

23 Before TPG’s sale of LPL stock was publicly disclosed, on December 8,
24 2015, LPL participated in a conference sponsored by Goldman Sachs at which
25 Casady and Matthew Audette, who had been hired in September 2015 to serve as
26 LPL’s CFO, “provided investors a near-end-of-fourth quarter financial update.” (Id.
27 ¶ 15.) The update was provided through a slide presentation, during which
28 Casady, Audette, and “the company” made the allegedly materially false

1 statements on which this action is based. The Complaint groups the statements
2 into five categories:

- 3 1. Statements reassuring the market that the financing of LPL's repurchase
4 plan was viable so long as LPL's future earnings and cash flows could
5 service the debt (e.g., that LPL's "earnings stream ... is quite steady" and
6 LPL was "still on track" to meet its 2015 expense guidance) (¶¶ 56-59);
- 7 2. Statements regarding LPL's net new advisory assets (e.g., "we are
8 averaging about \$1.5 billion a month" in net new advisory assets) (¶¶ 60-
9 66);
- 10 3. Statements regarding the level of LPL's brokerage and advisory assets
11 under management (AUM) (e.g., that LPL's "asset levels [had] recover[ed]
12 nicely" and LPL had "good advisory asset growth overall") (¶¶ 67-72);
- 13 4. Statements that LPL's gross profit would decline "slightly" in 4Q15 (¶¶ 73-
14 81); and
- 15 5. Statements reassuring investors that LPL would have financial "flexibility"
16 to execute the share repurchase (¶¶ 82-85).

17 Defendants' statements allegedly misrepresented, or failed to disclose,
18 weaknesses in LPL's financial performance as of the December 8th presentation.
19 (Id. ¶ 16.) That day, LPL's stock closed at \$45.06/share, near its highest level in
20 two years. (Id.)

21 On December 10, 2015, and contrary to LPL's claim that the \$250 million
22 accelerated share buyback would take several months to complete, LPL
23 announced it had already completed the accelerated buyback, allowing TPG to
24 cash out 4.3 million shares at \$43.27/share. (Id. ¶ 17.) More than three-quarters
25 of the buyback spending went to TPG. (Id.)

26 On February 11, 2016, LPL announced its 4Q15 and fiscal year 2015
27 ("FY2015") financial results that allegedly revealed the false nature of its December
28 8, 2015 statements. (Id. ¶ 18.) Contrary to the positive picture portrayed during

1 the Goldman Sachs conference, LPL's gross profits had fallen substantially during
2 4Q15; net new advisory assets were only \$3.1 billion, \$1.4 billion less than
3 anticipated; and earnings were dragged down by unexpectedly weak advisory and
4 brokerage asset performance. (Id.) Allegedly as a result of the news of LPL's
5 weaker than expected performance, on February 12, 2016, LPL's stock dropped
6 \$8.76, nearly 35% in one day, on record volume, to close at \$16.50/share. (Id. ¶
7 19.) Had TPG's shares been repurchased by LPL at this point, LPL would have
8 saved \$115 million. (Id.) Although the market suffered a general downturn during
9 the Class Period, LPL's performance was substantially weaker in comparison with
10 its market and industry peers. (¶¶ 26-31.)

11 **II. LEGAL STANDARD**

12 Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful "[t]o
13 use or employ, in connection with the purchase or sale of any security registered
14 on a national securities exchange or any security not so registered ... any
15 manipulative or deceptive device or contrivance...." 15 U.S.C. § 78j(b). Under
16 Rule 10b-5, which implements section 10(b), it is unlawful "[t]o make any untrue
17 statement of a material fact or to omit to state a material fact necessary in order to
18 make the statements made, in light of the circumstances under which they were
19 made, not misleading." 17 C.F.R. § 240.10b-5(b).

20 To state a claim for violation of Section 10(b) or Rule 10b-5, a plaintiff must
21 allege "(1) a material misrepresentation or omission by the defendant; (2) scienter;
22 (3) a connection between the misrepresentation or omission and the purchase or
23 sale of a security; (4) reliance upon the misrepresentation or omission; (5)
24 economic loss; and (6) loss causation." Matrixx Initiatives, Inc. v. Siracusano
25 ("Matrixx"), 563 U.S. 27, 37-38 (2011) (quoting Stoneridge Inv. Partners, LLC v.
26 Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008)).

27 At the pleading stage, a complaint asserting claims for violation Section 10(b)
28 or Rule 10b-5 must satisfy the dual heightened pleading requirements of Federal

1 Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of
2 1995 (“PSLRA”). City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align
3 Tech., Inc., 856 F.3d 605, 613 (9th Cir. 2017). Under Rule 9(b), the complaint
4 must “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P.
5 9(b). Securities fraud complaints are additionally subject to the “more exacting
6 pleading requirements” of the PSLRA, which require that the complaint “plead with
7 particularity both falsity and scienter.” Zucco Partners, LLC v. Digimarc Corp., 552
8 F.3d 981, 990 (9th Cir. 2009) (internal quotation marks and citation omitted). As
9 to falsity, the complaint must “specify each statement alleged to have been
10 misleading, the reason or reasons why the statement is misleading, and, if an
11 allegation regarding the statement or omission is made on information and belief,
12 the complaint shall state with particularity all facts on which that belief is formed.”
13 15 U.S.C. § 78u–4(b)(1). As to scienter, the complaint must “state with particularity
14 facts giving rise to a strong inference that the defendant acted with the required
15 state of mind.” 15 U.S.C. § 78u–4(b)(2)(A).

16 Section 20(a) of the Securities Exchange Act of 1934 imposes liability on
17 “controlling person[s].” 15 U.S.C. § 78t(a). To establish liability under Section
18 20(a), a plaintiff must first allege a violation of Section 10(b) or Rule 10b–5. Lipton
19 v. Pathogenesis Corp., 284 F.3d 1027, 1035 n.15 (9th Cir. 2002) (citation omitted).

20 **III. REQUEST FOR JUDICIAL NOTICE**

21 In support of their motion, Defendants filed a request for judicial notice
22 (“RJN”) of fourteen documents attached as Exhibits A through N. See Req. Jud.
23 Not. (ECF No. 17-2), Decl. Gallagher (ECF No. 17-3) ¶¶ 1-14 & Exs. A-N (ECF
24 Nos. 17-4 to 17-17). The documents include a transcript of Defendants’ October
25 29, 2015 earnings call (Exhibit G), slides from the December 8, 2015 presentation
26 (Exhibit I), a transcript of the December 8, 2015 presentation (Exhibit J), a
27 transcript of Defendants’ February 11, 2016 earnings call (Exhibit M), and various
28 filings submitted by LPL to the United States Securities and Exchange Commission

1 (“SEC”) (Exhibits A-F, H, K, L, and N). Plaintiff does not oppose the RJN.

2 A court presented with a motion to dismiss a securities class action complaint
3 must consider the complaint in its entirety, “as well as other sources courts
4 ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, including
5 documents incorporated into the complaint by reference, and matters of which a
6 court may take judicial notice.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551
7 U.S. 308, 323 (2007). SEC filings are subject to judicial notice on a motion to
8 dismiss. See Dreiling v. Am. Express Co., 458 F.3d 942, 946 n.2 (9th Cir. 2006).
9 All of the documents submitted with the RJN are either judicially-noticeable SEC
10 filings, or, as in the case of the transcripts and slide presentation, are incorporated
11 by reference in the Complaint . See In re Amgen Inc. Sec. Litigation, 544 F. Supp.
12 2d 1009, 1024 (C.D. Cal. 2008) (taking judicial notice of a transcript of a meeting,
13 details of which were set forth in complaint, pursuant to doctrine of incorporation
14 by reference). Accordingly, the Court grants Defendants’ RJN.

15 **IV. DISCUSSION**

16 Defendants contend Plaintiff has failed to plead falsity with particularity and
17 has failed to raise a strong inference of scienter. Mem. P. & Auth. in Supp. of
18 Defs.’ Mot. (“Defs.’ Mot.”) at 9-24. As discussed below, the Court finds that the
19 Complaint’s allegations do not create a strong inference of scienter and that certain
20 of Defendants’ allegedly false statements are inactionable.

21 A. Scienter

22 Plaintiff’s Complaint alleges the following “indicia of scienter”: (1) that the
23 individual defendants were beholden to TPG (¶¶ 87-94); (2) their
24 misrepresentations involved LPL’s core operations and occurred near quarter-end
25 (¶¶ 95-99); (3) the magnitude of LPL’s financial disappointments in contrast with
26 defendants’ representations (¶ 100-102); (4) Defendants’ “reasons for the miss are
27 demonstrably false” (¶¶ 103-107); (5) TPG had access to inside information about
28 LPL’s anticipated 4Q15 financial results (¶¶ 108-109); and (6) the suspect timing

1 of the share repurchase (§§ 110-119). The gravamen of Plaintiff's scienter theory
2 is that LPL was in a state of financial decline in early December 2015; that TPG
3 knew this by virtue of its access to LPL's inside information, and wanted to take
4 advantage of Goldman Sachs' \$250 million loan to liquidate shares of LPL before
5 the market reacted to LPL's anticipated poor fourth quarter performance; and
6 Casady and Audette were motivated to help TPG by concealing the allegedly true
7 state of LPL's affairs because Boyce and Schifter, both former TPG partners and
8 current LPL Board members, had the ability to affect their compensation and
9 employment with LPL.

10 Defendants raise a number of challenges to Plaintiff's theory of scienter,
11 including that its core operations allegations are too vague, that certain admissions
12 by Defendants fail to create a strong inference of scienter, and that the Complaint
13 relies on what amounts to a flawed theory that Defendants had a motive to help
14 TPG. The Court finds Defendants' challenge to Plaintiff's core operations theory
15 persuasive, and concludes the theory's flaws are significant enough to warrant
16 dismissal of the Complaint.

17 "Scienter is defined as a mental state embracing intent to deceive,
18 manipulate, or defraud." Reese v. Malone, 747 F.3d 557, 568 (9th Cir. 2014)
19 (citation and internal quotation marks omitted) (abrogated on other grounds by
20 Align Tech., 856 F.3d at 620). A complaint stating claims under Section 10(b) or
21 Rule 10b-5 must "allege that the defendants made false or misleading statements
22 either intentionally or with deliberate recklessness." Zucco Partners, LLC, 552
23 F.3d at 991 (quoting In re Daou Systems, Inc., 411 F.3d 1006, 1014-15 (9th Cir.
24 2005)). "[A]n actor is [deliberately] reckless if he had reasonable grounds to
25 believe material facts existed that were misstated or omitted, but nonetheless
26 failed to obtain and disclose such facts although he could have done so without
27 extraordinary effort." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 390 (9th Cir.
28 2010) (quoting Howard v. Everex Sys., Inc., 228 F.3d 1057, 1064 (9th Cir. 2000).

1 The PSLRA requires a plaintiff to plead “with particularity facts giving rise to
2 a strong inference that the defendant acted with the required state of mind.” 15
3 U.S.C. § 78u-4(b)(2)(A). The inference of scienter “must be more than merely
4 plausible or reasonable—it must be cogent and at least as compelling as any
5 opposing inference of nonfraudulent intent.” Tellabs, 551 U.S. at 314. Under
6 Tellabs, courts must review “all the allegations holistically” to determine whether
7 they give rise to the required strong inference of scienter. Id. at 326; Matrixx
8 Initiatives, Inc. v. Siracusano, 563 U.S. 27, 48 (2011); In re Verifone Holdings, Inc.
9 Sec. Litig., 704 F.3d 694, 701-02 (9th Cir. 2012). The relevant inquiry is “whether
10 *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter,
11 not whether any individual allegation, scrutinized in isolation, meets that standard.”
12 Id. at 323 (emphasis in original); Matrixx Initiatives,, 563 U.S. at 48; In re Verifone
13 Holdings, Inc. Sec. Litig., 704 F.3d 694, 701-02 (9th Cir. 2012).

14 The “core operations” inference refers to a theory of scienter whereby “facts
15 critical to a business’s ‘core operations’ or an important transaction” are inferred to
16 be “known to a company’s key officers....” S. Ferry LP, No. 2 v. Killinger, 542 F.3d
17 776, 783 (9th Cir. 2008). Such allegations may satisfy the scienter requirement in
18 three circumstances:

19 First, the allegations may be used in any form along with other
20 allegations that, when read together, raise an inference of scienter that
21 is “cogent and compelling, thus strong in light of other explanations.”
22 Tellabs, 127 S.Ct. at 2510. [...] Second, such allegations may
23 independently satisfy the PSLRA where they are particular and
24 suggest that defendants had actual access to the disputed information,
25 as in Daou and Oracle. Finally, such allegations may conceivably
26 satisfy the PSLRA standard in a more bare form, without
27 accompanying particularized allegations, in rare circumstances where
28 the nature of the relevant fact is of such prominence that it would be
“absurd” to suggest that management was without knowledge of the
matter.

Id. at 785-86.

1 Plaintiff's core operations allegations do not satisfy any of the three
2 alternatives. First, they are not sufficiently particular to create a strong inference
3 of scienter on their own. To raise a strong inference of scienter, allegations that
4 management had knowledge of negative internal reports should "include adequate
5 corroborating details," such as the "sources of [plaintiff's] information with respect
6 to the reports, how [plaintiff] learned of the reports, who drafted them, ... which
7 officers received them," and "an adequate description of their contents." In re
8 Vantive Corp. Sec. Litig., 283 F.3d 1079, 1087-88 (9th Cir. 2002); disapproved on
9 other grounds by South Ferry LP, 542 F.3d at 783-84. Here, Plaintiff alleges that
10 "LPL's gross profits, net new advisory assets, alternative investment revenues and
11 its level of brokerage and advisory assets were key financial metrics that were
12 closely followed by the Company [and] its management" (Compl. ¶ 95), that these
13 metrics were "tracked monthly... if not even more often on a weekly or daily basis"
14 (¶ 96), and that to prepare for the December 8th conference, "Defendants
15 consulted the recent LPL books and records" and thus "had substantial knowledge
16 as to the Company's fourth quarter performance" (¶ 98). These allegations provide
17 no factually detailed information such as the name, date, or content of any report
18 allegedly reviewed by Defendants prior to the December 8th conference. See In
19 re Vantive, 283 F.3d at 1088 (finding core operations allegations insufficient where
20 Plaintiff failed to "cite to any specific report, to mention any dates or contents of
21 reports, or to allege [its] sources of information about any reports"). Also, although
22 it alleges that Defendants tracked LPL's "key financial metrics," the Complaint does
23 not indicate what those financial metrics were as of early December 2015 or
24 otherwise provide any description of LPL's financial state at the time of the
25 December 8th conference. Without such information, the allegation that
26 Defendants prepared for the conference by reading "recent LPL books and
27 records" is an empty one, because the Complaint fails to convey what information
28 those books and records would have contained. In sum, Plaintiff's core operations

1 allegations are not particular enough on their own to establish that Defendants had
2 reasonable grounds to believe at the time of their December 8th presentation that
3 LPL's state of affairs differed materially from their representations. See In re
4 Oracle, 627 F.3d at 390 (“[A]n actor is [deliberately] reckless if he had reasonable
5 grounds to believe material facts existed that were misstated or omitted, but
6 nonetheless failed to obtain and disclose such facts although he could have done
7 so without extraordinary effort.”).

8 Nor is this a circumstance in which the Court can conclude “the nature of the
9 relevant fact is of such prominence that it would be ‘absurd’ to suggest that
10 management was without knowledge of the matter.” Id. Plaintiff argues LPL's core
11 financial metrics were prominent facts that Defendants should be presumed to
12 have known. However, this argument overlooks the fact that the Complaint does
13 not allege facts characterizing the present state of the LPL's core financial metrics
14 as of early December 2015. No matter how important LPL's gross profits, net new
15 advisory assets, and other allegedly “key” metrics may have been to the
16 company's operations, without information indicating where those metrics stood at
17 or near the time Defendants were preparing to give their presentation, the
18 Complaint falls short of establishing what material facts Defendants should be
19 presumed to have known.

20 Plaintiff compares this case to Rihn v. Acadia Pharmaceuticals, Inc., No.
21 15cv00575 BTM(DHB), 2016 WL 5076147, at *9 (S.D. Cal. Sept. 19, 2016), in
22 which this Court found the complaint's allegations sufficient to show a strong
23 likelihood the disputed information was known to defendants. However, Rihn is
24 distinguishable. In Rihn, defendants admitted facts from which it was possible to
25 determine the true state of the company's affairs at the time defendants made their
26 alleged misstatements, including that the company had determined its
27 manufacturing and quality control systems were substantially incomplete just
28 before describing the same systems as “on track” for submission of a new drug

1 application. Id. at *6, *9. Here, by contrast, the Complaint provides no factual
2 allegations quantifying LPL’s current financial state at or shortly before the time of
3 Defendants’ alleged misstatements. Plaintiff contends Casady’s knowledge is
4 demonstrated by his admission during a February 11, 2016 that “LPL had ‘insight
5 into the quarter ... and knew we would have challenges....” (Compl. ¶ 22.)
6 However, unlike the admissions in Rihn, Casady’s admission that he knew there
7 would be “challenges” is too vague with regard to the timing and content of what
8 was actually known to create a strong inference that Defendants materially
9 misstated LPL’s affairs on December 8th, or acted with deliberate recklessness in
10 doing so.

11 Finally, even when reviewed holistically, the flaws in the Complaint’s core
12 operations allegations undermine the strength of its scienter theory as a whole.
13 Plaintiff’s allegations are similar to scienter allegations the Ninth Circuit found
14 insufficient in Lipton v. Pathogenesis Corp., 248 F.3d 1027, 1036 (9th Cir. 2002).
15 There, Plaintiff alleged that negative internal reports indicated flat demand for the
16 company’s product, but they failed to identify the reports “much less plead, in any
17 detail, the contents of any such report or the purported data.” Id. The Ninth Circuit
18 held that without such information, it was unable to “ascertain whether there is any
19 basis for the allegations that the officers had actual or constructive knowledge of
20 flat patient demand that would cause their optimistic representations to the
21 contrary to be consciously misleading.” Id. (internal quotation and citation omitted).
22 Similarly, here, Plaintiff does not allege facts describing LPL’s financial state on
23 December 8, 2015, or the content of any reports reviewed by Defendants. Instead,
24 it starts with LPL’s 4Q15 results and works backwards, alleging that because LPL’s
25 fourth quarter results were “disappointing,” its results as of December 8th must
26 also have been poor, because “[i]t defies belief that ... LPL’s finances could have
27 changed so drastically ... between Defendants statements on December 8, 2015”
28 and December 31, 2015. (Id. ¶ 102). At oral argument, Plaintiff presented charts

1 of two possible scenarios for LPL's net new advisory assets in 2015, one showing
2 they "fell off a cliff" between December 8th and December 31st (a scenario Plaintiff
3 contends is unlikely), and one showing the decline happened before the December
4 8th conference (the scenario Plaintiff regards as more likely). Oral Argument, Pl.'s
5 Ex. 1 at pp. 11, 12. Yet while Plaintiff's theory of scienter relies on the probability
6 that the latter scenario is the one that occurred, Plaintiff provides no supporting
7 data or analysis explaining why the scenario it advances is the more likely one.
8 Without allegations quantifying LPL's financial data as of December 8th, it is not
9 possible to determine what Defendants actually or constructively knew regarding
10 LPL's finances, or whether their "optimistic representations to the contrary" were
11 "consciously misleading." Id.; see In re Oracle Corp. Sec. Litig., 627 F.3d at 389
12 ("the fact that Oracle's forecast turned out to be incorrect does not retroactively
13 make it a misrepresentation").

14 The rest of Plaintiff's scienter allegations do not make up for this omission.
15 Although the Court agrees with Plaintiff that the timing of LPL's buyback of shares
16 from TPG is suspicious, particularly in light of its previous statement that the
17 buyback would take months, the strength of the inference of wrongdoing created
18 by the timing of the stock repurchase is undermined by the absence of allegations
19 describing the state of LPL's finances in late November or early December 2015,
20 when the buyback was being planned. TPG's alleged right to access LPL's inside
21 information is of little significance in the absence of allegations describing the
22 content of LPL's inside information. As currently stated, Plaintiff's allegations point
23 more strongly to innocent inferences, such as that TPG's decision to exit LPL stock
24 was based on anticipated headwinds applicable across the financial services
25 industry, rather than part of a fraudulent scheme originating with LPL's inside
26 information and carried out with the participation of Casady and Audette.

27 Therefore, as currently pled, Plaintiff's allegations do not create an inference
28 of scienter that is "at least as compelling as any opposing inference of

1 nonfraudulent intent,” Tellabs, 551 U.S. at 322, and Plaintiff’s claims under Section
2 10(b) and Rule 10b–5 must be dismissed. Dismissal will be with leave to amend.

3 B. Falsity

4 Defendants challenge some of their alleged misstatements as inactionable
5 puffery, as predictions that proved true, and as misinterpretations of statements
6 that, when viewed in context, fail to support Plaintiff’s claims. The Court agrees
7 with Defendants’ arguments in part.

8 1. Puffery

9 Defendants challenge two series of statements as inactionable puffery.

10 First, Plaintiff alleges the following statements from the December 8th
11 presentation were false and misleading:

- 12 • Audette told investors that although the “markets went down a fair bit,”
13 he “did see market levels and asset levels recover nicely,” and added,
14 “we’re up at the end of October [2015] to \$483 billion [AUM] versus
15 \$462 billion at the end of the [third] quarter [of 2015] so nice rebound
16 there.” (Compl. ¶ 69.)
- 17 • Casady said LPL had “good advisory asset growth overall” and
18 “fundamentally, this year [FY 2015] is like any other in terms of the
19 gross amount [of advisors] and what’s different is that we do have the
20 smaller producers leaving.” (Id.)

21 These statements were allegedly false because in reality, the growth rate of LPL’s
22 AUM was declining and performing substantially short of expectations in
23 comparison with the performance of the S&P 500 index. (Id. ¶¶ 70-72.)

24 Defendants contend Audette’s and Casady’s descriptions of LPL’s asset
25 levels and recovery as “nice” or “good” are too vague to be actionable. Defs.’ Mot.
26 at 14 (citing In re Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010); In re
27 Mellanox Tech., Ltd. Sec. Litig., 2014 WL 7204864, at *4 (N.D. Cal. 2014)). Such
28 language is sometimes called “puffery,” a term that connotes “mildly optimistic,
subjective assessment[s]” of a corporation by its own executives, which the Ninth
Circuit has held “hardly amounts to a securities violation.” In re Cutera, 610 F.3d

1 at 1111. In In re Cutera, the Ninth Circuit held “investors do not rely on vague
2 statements of optimism like ‘good,’ ‘well-regarded,’ or other feel good monikers.”
3 Id. In In re Mellanox, the district court concluded the statement “it’s a very, very
4 nice growth of our FDR products within that market” was inactionable puffery.
5 2014 WL 7204864, at *4. Here, Audette’s statements that he “did see market
6 levels and asset levels recover nicely” and there was a “nice rebound,” and
7 Casady’s statement that LPL had “good advisory asset growth overall,” are like the
8 “feel good” statements deemed inactionable in In re Cutera and In re Mellanox.
9 Defendants’ motion is therefore granted with prejudice as to those statements.

10 Second, Defendants move to dismiss Audette’s statement that “I would just
11 add that our debt plan and debt structure and buyback plan was designed and built
12 with having the flexibility to be dynamic as we execute it over time.” (Compl. ¶ 82.)
13 The statement allegedly led investors to believe LPL’s earnings would be “strong
14 enough to carry substantial debt loads” when in fact it knew its earnings were
15 falling, jeopardizing its ability to comply with debt covenants. (Id. ¶¶ 83, 84.)
16 Defendants maintain that phrases like “financial flexibility” have been held
17 inactionable puffery. Mot. at 17:17-18 (citing In re Airgate PCS, Inc. Sec. Litig.,
18 389 F. Supp. 2d 1360, 1379 (N.D. Ga. 2005); Newcal Indus. Inc. v. Ikon Office
19 Solution, 513 F.3d 1038, 1053 (9th Cir. 2008)). In In re Airgate, the court evaluated
20 statements describing an anticipated merger as a “strategic combination” that gave
21 “additional operating efficiencies, financial flexibility, and growth potential” and
22 found them to be “too general to be material.” 389 F. Supp. 2d at 1379. In Newcal,
23 the Ninth Circuit stated that “the difference between a statement of fact and mere
24 puffery rests in the specificity or generality of the claim” and held that a statement
25 that a company would deliver “flexibility” in their contracts was a general assertion
26 that “is classic puffery.” 513 F.3d at 1052-53. The Court agrees that by this
27 measure, Audette’s statement about LPL’s “flexibility” is too unquantifiable to be
28 actionable, and therefore grants Defendants’ motion with prejudice as to the

1 foregoing statement.

2 2. Allegedly False Prediction that Proved True

3 Defendants say the following statement by Audette proved to be true: “our
4 2015 core G&A guidance is 7.5% to 8.5% and, in dollars, roughly \$700 million, that
5 [sic] \$697 million to \$703 million. **We’re still on track.**” Mot. at 14:24-15:4
6 (emphasis in original).

7 Defendants rely on a subsequent press release from February 11, 2016,
8 which indicates that LPL ended the fourth quarter of 2015 with G&A expense
9 results of \$695 million (a better result, because it meant lower expenses). The
10 press release is part of LPL’s SEC filings submitted with Defendants’ RJN (Ex. L),
11 and it supports Defendants’ contention that Audette did not falsely portray that LPL
12 was “on track.” Plaintiff’s opposition brief does not address this issue or attempt
13 to explain how Audette’s statement can be construed as misleading in light of the
14 G&A expense results reported in the press release, nor does the Complaint contain
15 specific allegations showing how Audette was misleading in characterizing LPL as
16 “on track” to meet its expense guidance. Since Plaintiff does not oppose the
17 accuracy of the press release, the Court grants Defendants’ motion to dismiss as
18 to the foregoing statement. See, e.g., In re Metricom Secs. Litig., No. C 01-4085
19 PJH, 2004 U.S. Dist. LEXIS 7834, at *47-55, *111-113 (N.D. Cal. Apr. 29, 2014)
20 (dismissing securities claims where judicially noticeable documents demonstrated
21 truth of the underlying statements).

22 Defendants also challenge Audette’s prediction of a “likely” decline in gross
23 profits as a forward-looking statement subject to the PSLRA’s safe harbor
24 protections. Defs.’ Mot. at 16 n.6. “The PSLRA’s safe harbor provision exempts,
25 under certain circumstances, a forward-looking statement, which is any statement
26 regarding (1) financial projections, (2) plans and objectives of management for
27 future operations, (3) future economic performance, or (4) the assumptions
28 underlying or related to any of these issues.” Police Ret. Sys. v. Intuitive Surgical,

1 Inc., 759 F.3d 1051, 1058 (9th Cir. 2014) (citation and internal quotation marks
2 omitted). “The safe harbor applies if the forward-looking statement is ‘(i) identified
3 as a forward-looking statement, and is accompanied by meaningful cautionary
4 statements identifying important factors that could cause actual results to differ
5 materially from those in the forward-looking statement,’ or (ii) if it is not identified
6 as a forward-looking statement and not accompanied by cautionary language,
7 unless the statement was ‘made with actual knowledge . . . that the statement was
8 false or misleading.” Id. (quoting 15 U.S.C. § 78u-5(c)(1)).

9 Here, the Court agrees Audette’s prediction of a “likely” decline in gross
10 profits is a forward-looking statement. The Complaint supports this conclusion,
11 since it characterizes the statement as indicating an “expected sequential gross
12 profit decline” (Compl. ¶ 74), a reference to future results. The Court has already
13 found Plaintiff’s allegations insufficient to show Audette acted with deliberate
14 recklessness, a lesser standard than the “actual knowledge” of falsity required
15 under the PSLRA’s safe harbor. Accordingly, the Court grants Defendants’ motion
16 with leave to amend as to the foregoing statement by Audette.

17 3. Alleged Mischaracterization of Audette’s Statements

18 Defendants claim Plaintiff has taken Audette’s statements out of context, and
19 that properly understood, they were true. The Court disagrees.

20 a) Audette’s Impressions of LPL

21 The Complaint quotes Audette as saying:

22 “Being here for these two months [October and November 2015] and
23 spending a lot of time, ... ***I think it’s a lot more powerful and
24 compelling than I thought from the outside.*** Third, and what Mark
25 kind of hinted to on the capital plan side, being at a place where there’s
26 a lot less approvals necessary to go ***execute on a capital plan in the
27 best interest of shareholders.*** So, the way we speak about it, a
28 capital-lite model, ***an earnings stream that is quite steady and
produces cash flow over time.*** Hopefully, the last two months have
shown that that opportunity absolutely was there. ***We’re executing it
all well.***

1 * * *

2 ... **with respect to expenses and the capital plan, is largely just**
3 **reiterating that what we said on the earnings call is we are still on**
4 **track to do and that's still our guidance.** And just quickly, to highlight
5 probably the most notable ones in the first two sub bullet points in the
6 top half of the page on expenses; that our 2015 core G&A guidance is
7 7.5% to 8.5% and, in dollars, roughly \$700 million, that \$697 million to
8 \$703 million. **We're still on track.**

9 And then, specifically for next year, 2016, core G&A in that \$715 million
10 to \$730 million range, which is that 2% to 4% growth. So that largely –
11 not largely – that remains on track. So, no news here. **Just reiterating**
12 **that what we said on the call is still the case.**

13 (Compl. ¶ 57 (emphasis in original).) Plaintiff alleges that contrary to Audette's
14 statements, LPL was "having a disastrous Q4" and was unlikely to produce the
15 cash flow necessary to support the debt needed to fund the \$500 million share
16 buyback. (*Id.* ¶¶ 58-59.)

17 Relying on Exhibit J, the transcript of the December 8th presentation,
18 Defendants argue that when his statements are viewed in context, it becomes
19 apparent Audette was actually talking about why he took the job at LPL rather than
20 characterizing LPL's current financial performance. *See id.*; RJN Ex. J at 333.
21 However, the transcript does not support Defendants' contention. Audette spoke
22 right after Casady, who had just made introductory comments about LPL's outlook
23 for 2016. RJN Ex. J at 332. When Casady finished, Audette was asked "[D]o you
24 have anything to add to that [Casady's comments] in terms of what you're looking
25 to do in 2016? And then, as you've kind of been brought on board, what kind of
26 surprised you positively about LPL and what do you think the company needs to
27 do better at?" *Id.* at 333. At the start of his response, Audette said, "maybe a good
28 framework for that would be just laying out the things that ... really enticed me to
come to the company ... I think I can use those to give a little bit of color." *Id.* He
went on to describe how LPL had looked to him from the outside—essentially, why
he had joined LPL—while adding comments about the impressions he had

1 developed of LPL from the inside having “[been] here a little bit over two months....”
2 Id. He was talking about two things at once: why he decided to join LPL, and how
3 it seemed to him to be performing now that he was on the inside. The Complaint
4 does not mischaracterize his response.

5 Defendants also contend Audette’s comments about LPL’s “steady” earnings
6 stream and that LPL had been “executing it all well” over “the last two months”
7 merely described LPL’s capital structure and plan in general, and did not address
8 its November or December 2015 financial performance. Defs.’ Mot. at 11:9-24
9 (citing RJN Ex. J). However, Audette’s response is not so clearly limited in scope
10 as Defendants contend. While Audette said LPL had an “earnings stream that is
11 quite steady and produces cash flow over time,” RJN Ex. J at 333—a statement
12 which, on its own, might be characterized as describing its capital model—he went
13 on to say “[h]opefully, the last two months have shown that ... we’re executing it
14 all well.” The latter statement can reasonably be interpreted as a description of
15 LPL’s recent financial performance.

16 b) Audette’s statements regarding LPL’s net new advisory
17 assets

18 Plaintiff claims Audette made the following allegedly false statement during
19 LPL’s December 8, 2015 presentation: “[N]et new advisory assets continue to flow
20 in well. And we are averaging about \$1.5 billion a month. And you see that we had
21 that in October [2015]. . . . [W]e are averaging about \$1.5 billion [per month].”
22 (Compl. ¶ 61.) He made the statement while referencing a slide titled “LPL Q4
23 2015 Mid-Quarter Operational Update.” (Id. ¶ 62.) Plaintiff alleges that Audette’s
24 statement, when considered in connection with the slide, conveyed that LPL “had
25 no reason to believe that net new advisory assets for December 2015 would
26 deviate from the stated \$1.5 billion per month average,” when in fact LPL’s fourth
27 quarter performance garnered a total of only \$3.1 billion, \$1.4 billion short of
28 expectations.

1 Defendants point out that the slide itself states “October net new advisory
2 assets totaled \$1.5B,” RJN, Ex. I at 316, and contend this proves Audette oral
3 commentary referred only to financial results for October, not November or
4 December. Mot. at 12:17-13:8. However, Defendants’ focus on the slide is too
5 narrow. Plaintiff relies not only on the slide’s text, but also on Audette’s
6 contemporaneous verbal comment that “we are averaging about \$1.5 billion a
7 month... you see that we had that in October [2015]. . . . [W]e are averaging about
8 \$1.5 billion [per month].” ¶ 61; see Ex. J at 334. Audette spoke in the present
9 tense – “we *are averaging*”—such that his statements can reasonably be
10 interpreted as commenting on LPL’s current performance, as compared to what
11 LPL “*had* ... in October.” Id. (emphasis added). Plaintiff’s allegation is that
12 Audette’s verbal comments, combined with the slide’s title, “LPL Q4 2015 Mid-
13 Quarter Operational Update,” suggested he was addressing ongoing quarterly
14 results (that is, November and mid-December performance) rather than just
15 October results. Defendants’ focus on the fact that the slide itself reported only
16 October results thus misses the mark.

17 C. Section 20(a)

18 Since the Court finds Plaintiff has not alleged a violation of Section 10(b) or
19 Rule 10b–5, its claim under Section 20(a) must also be dismissed. See Lipton,
20 284 F.3d at 1035 n.15.

21 **V. CONCLUSION AND ORDER**

22 For the foregoing reasons, the Court ORDERS as follows:

- 23 1) Defendants’ motion to dismiss is GRANTED WITH LEAVE TO AMEND
24 as to the Complaint in its entirety for failure to allege scienter;
- 25 2) Defendants’ motion to dismiss is GRANTED WITHOUT LEAVE TO
26 AMEND as to Audette’s statements that he “did see market levels and
27 asset levels recover nicely” and there was a “nice rebound”; Casady’s
28 statement that LPL had “good advisory asset growth overall”; and

1 Audette's statement that "I would just add that our debt plan and debt
2 structure and buyback plan was designed and built with having the
3 flexibility to be dynamic as we execute it over time";

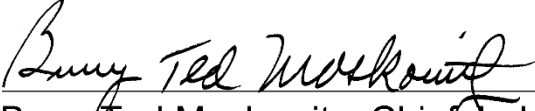
4 3) Defendants' motion to dismiss is GRANTED WITH LEAVE TO AMEND
5 as to Audette's statement "our 2015 core G&A guidance is 7.5% to 8.5%
6 and, in dollars, roughly \$700 million, that \$697 million to \$703 million.
7 **We're still on track**", and Audette's statement regarding a "likely" decline
8 in gross profits;

9 4) Defendants' motion to dismiss is otherwise DENIED.

10 Plaintiff shall have 45 days from the date this order is signed in which to file
11 an amended complaint.

12 IT IS SO ORDERED:

13 Dated: August 18, 2017

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15 Barry Ted Moskowitz, Chief Judge
16 United States District Court
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