APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55564

LUIS PINO, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

CARDONE CAPITAL, LLC; GRANT CARDONE;
CARDONE EQUITY FUND V, LLC;
CARDONE EQUITY FUND VI, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
No. 2:20-cv-08499-JFW-KS
John F. Walter, District Judge, Presiding

Argued and Submitted March 17, 2022
San Francisco, California

Filed December 21, 2022
DktEntry 51-1

FOR PUBLICATION

Before: Morgan Christen and Daniel A. Bress, Circuit Judges, and Barbara M. G. Lynn,[*] District Judge.

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[*] The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

Opinion by Judge Lynn

* * *

[Case Summary and counsel block omitted]

OPINION

LYNN, District Judge:

Plaintiff Luis Pino filed suit against Defendants Grant Cardone, Cardone Capital, LLC, Cardone Equity Fund V, LLC, and Cardone Equity Fund VI, LLC, alleging violations of the Securities Act of 1933 ("Securities Act") based on material misstatements or omissions in certain real estate investment offering materials. Specifically, Pino brought claims under § 12(a)(2) of the Securities Act against all Defendants, and a claim pursuant to § 15 of the Securities Act against Cardone and Cardone Capital, LLC. The district court dismissed all claims under Federal Rule of Civil Procedure 12(b)(6).

Pino appeals, arguing that the district court erred in holding that Cardone and Cardone Capital, LLC are not "sellers" under § 12(a)(2). In this opinion, we hold that Pino plausibly stated a claim that Cardone and Cardone Capital, LLC qualify as statutory sellers under the Securities Act. In a separate memorandum disposition filed concurrently with this opinion, we conclude that some of the Defendants' challenged statements are actionable under the Act. We therefore affirm in part and reverse in part the district court's dismissal of Pino's claims.

Background

Cardone founded Cardone Capital, LLC ("Cardone Capital") in 2017, and is its CEO and sole Manager. Cardone Capital is a real estate property management company that invests in property by pooling money from many other investors. ER 6–7. Cardone Capital manages Cardone Equity Fund V, LLC ("Fund V") and Cardone Equity Fund VI, LLC ("Fund VI"), which invest in real estate assets throughout the United States. Funds V and VI (the "Funds") are categorized as emerging growth companies under the 2015 U.S. JOBS Act, a law that reduces reporting and accounting requirements for emerging companies, and that enables the sale of securities using crowdfunding techniques. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012). Investments in Funds V and VI were subject to Regulation A, which exempts offerings from registration with the Securities and Exchange Commission ("SEC"), but are subject to certain requirements, including submission to the SEC of an "offering statement" disclosing information about the proposed offering on Form 1-A, which is subject to qualification by the SEC before the offering can proceed. 17 C.F.R. §§ 230.252, 230.255. Regulation A provides that the SEC "does not pass upon the merits of or give its approval to any securities offered or the terms of the offering, nor does it pass upon the accuracy or completeness of any offering circular or other solicitation materials." *Id.* § 230.253.

Fund V began receiving subscriptions on December 12, 2018, and raised $50,000,000 as of September 20, 2019. The First Amended Complaint

alleges that when Fund V closed, Cardone posted on the Cardone Capital Instagram account that Fund V is "the first Regulation A of its kind to raise $50 Million in crowdfunding using social media," and that "[b]y accessing social media, I am offering investment opportunities to the everyday investor, like you!" Appellant's Excerpts of the Record ("ER") ER-56 ("FAC") ¶ 38; *see also id.* ¶ 40 ("This is the largest Reg A+ crowdfunding ever done for real estate investments of this quality using social media. . . . By using no middleman & going directly to the public using social media we reduce our cost. This ensures more of your money goes directly into the assets, resulting in lower promotional cost. More importantly, investors gain access to real estate that has never been available before."). Fund VI began receiving subscriptions on October 16, 2019, and raised $50,000,000 as of June 25, 2020.

Plaintiff Luis Pino alleges he invested a total of $10,000 in Funds V and VI. Pino further alleges that he invested in Fund V two days after attending a marketing presentation hosted by Cardone in Anaheim, California, titled the "Breakthrough Wealth Summit." *Id.* ¶¶ 34–36.

In 2020, Pino filed this putative class action, asserting claims under § 12(a)(2) of the Securities Act against all Defendants, and a claim pursuant to § 15 of the Securities Act against Cardone and Cardone Capital. In the FAC, Pino alleges that in soliciting investments in Funds V and VI, Defendants made untrue statements of material fact or concealed or failed to disclose material facts in Instagram posts and

a YouTube video posted between February 5, 2019, and December 24, 2019.

For example, the FAC describes an April 22, 2019, YouTube video in which Cardone states, "it doesn't matter whether [the investor] [is] accredited [or] non-accredited . . . you're gonna walk away with a 15% annualized return. If I'm in that deal for 10 years, you're gonna earn 150%. You can tell the SEC that's what I said it would be. They call me Uncle G and some people call me Nostradamus, because I'm predicting the future, dude; this is what's gonna happen." *Id.* ¶¶ 1, 56. The FAC also quotes several Instagram posts, made on both Cardone's personal account and the Cardone Capital account, regarding certain internal rates of return ("IRR"), monthly distributions, and long-term appreciation. For example, the FAC describes a February 5, 2019, post in which Cardone asks potential investors on his personal Instagram account, "Want to double your money[?]" and states that an investor could receive $480,000 in cash flow after investing $1,000,000, achieve "north of 15% returns after fees," and obtain a "118% return amounting to 19.6% per year." *Id.* ¶ 67.

Pino alleges that these statements were materially misleading. Further, he alleges that none of the communications contained cautionary language either indicating that the promises were speculative, or identifying the risk associated with investing in Funds V and V, but instead contained only a generic legend required under SEC Rule 255. *E.g., id.* ¶ 62.

Defendants moved to dismiss the FAC for failure to state a claim under Rule 12(b)(6). The district court granted the motion, concluding in part that Cardone

and Cardone Capital did not qualify as statutory sellers, warranting dismissal of the § 12(a)(2) and § 15 claims against them. Pino appeals. We have jurisdiction under 28 U.S.C. § 1291.

Standard of Review

We review de novo a district court's dismissal on the pleadings. *Moore v. Trader Joe's Co.*, 4 F.4th 874, 880 (9th Cir. 2021). Dismissal under Rule 12(b)(6) is warranted when the complaint fails to state sufficient facts to establish a plausible claim to relief. *Id.* When reviewing a dismissal pursuant to Rule 12(b)(6), the Court accepts "as true all facts alleged in the complaint" and construes them "in the light most favorable to plaintiff." *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019) (internal quotations omitted). However, "[t]hreadbare recitals of the elements of a cause of action" do not suffice to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Discussion

Section 12(a)(2) of the Securities Act of 1933 imposes liability on "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact . . . to the person purchasing such security from him." 15 U.S.C. § 77l(a)(2). The only issue we decide here is whether Cardone and Cardone Capital count as persons who "offer[] or sell[]" securities under § 12(a) based on their social media communications to prospective investors.

The term "offer to sell" or "offer" means a "solicitation of an offer to buy . . . for value." *Id.* § 77b(b)(3). To state a claim under § 12(a)(2), a plaintiff must allege that: (1) the defendant qualifies as a statutory seller or offeror; (2) the sale was effected "by means of a prospectus or oral communication"; and (3) the communication contains an "'untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading.'" *In re Daou Sys., Inc.*, 411 F.3d 1006, 1028–29 (9th Cir. 2005) (quoting 15 U.S.C. § 77*l*(a)(2)). Section 15 of the Act imposes secondary liability on anyone who "controls" an entity that violates § 12. 15 U.S.C. § 77o(a). To state a claim under § 15, a plaintiff must show that: (1) there is a primary violation of the Securities Act; and (2) the defendant directly or indirectly controlled the person or entity liable for the primary violation. *See SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011).

The district court held that neither Cardone nor Cardone Capital qualified as a statutory seller under § 12(a)(2). Specifically, the district court noted that the alleged solicitation consisted solely of statements made on social media highlighting the benefits of investing in the Funds. ER-24. Because neither Cardone nor Cardone Capital directly and actively solicited Pino's investment, and Pino did not allege that he relied on any such solicitation when investing, the district court held neither could be held liable as a "seller" under § 12(a)(2). The district court further held that, in the absence of a primary § 12 violation of the Securities Act, Pino's control claims against Cardone and Cardone Capital under § 15 must be

dismissed. On appeal, Pino contends this was error, mandating reversal.

In *Pinter v. Dahl*, 486 U.S. 622, 643, 647–48 (1988), the Supreme Court held that a person may be liable as a "seller" under the predecessor version of § 12(a) if the person either: (1) passes title to the securities to the plaintiff; or (2) "engages in solicitation," *i.e.*, "solicits the purchase [of the securities], motivated at least in part by a desire to serve his own financial interests or those of the securities owner." The FAC does not allege that Cardone or Cardone Capital passed title to the securities in question, and accordingly, neither qualify as a "seller" under the first prong of *Pinter*.

As to the second prong, there is no question that Cardone and Cardone Capital had financial interests tied to the Funds. Cardone Capital received 35% of the Funds' profits, ER 143, 141, 260, 268, and Cardone personally controlled Cardone Capital. ER 148, 265. The question, then, is whether Cardone and Cardone Capital "engaged in solicitation."

Neither the Supreme Court nor this Court has opined on whether solicitation must be direct or targeted towards a particular purchaser to fall within § 12. Accordingly, we must decide whether the Securities Act requires that a seller must specifically target an individual purchaser's investment, or whether Defendants' indirect, mass communications to potential investors through social media posts and online videos counts as "engaging in solicitation" under *Pinter*, such that Cardone and Cardone Capital qualify as statutory sellers.

The Eleventh Circuit recently held that videos posted publicly on YouTube and similar websites can constitute solicitation under § 12, even if the offering's promoters did not directly target the particular purchasers. *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341 (11th Cir. 2022). Specifically, in *Wildes*, the Eleventh Circuit considered "whether a person can solicit a purchase, within the meaning of the Securities Act, by promoting a security in a mass communication." *Id.* at 1345. The Eleventh Circuit concluded that, to qualify as solicitation under § 12, a person must "urge or persuade" another to buy a particular security, but those efforts at persuasion need not be personal or individualized. *Id.* at 1346 (quoting *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.3d. 1521, 1531, 1534 (11th Cir. 1991)). In reaching its holding, the Eleventh Circuit observed that the Securities Act does not distinguish between individually targeted sales efforts and broadly disseminated pitches, and noted that in early cases applying the Securities Act of 1933, "people understood solicitation to include communications made through diffuse, publicly available means—at the time, newspaper and radio advertisements." *Id.* at 1346.

The Eleventh Circuit correctly recognized that nothing in § 12 expressly requires that solicitation must be direct or personal to a particular purchaser to trigger liability under the statute. *See id.* at 1345–46. Put differently, nothing in the Act indicates that mass communications, directed to multiple potential purchasers at once, fall outside the Act's protections.

On the contrary, the Act contains broad language authorizing the purchaser of a security to bring suit against "*[a]ny* person . . . who offers or sells a security . . . by means of a prospectus or oral communication" that misleads or omits material facts. 15 U.S.C. § 77*l*(a)(2) (emphasis added). The statute defines "offer to sell," "offer for sale," and "offer" as including "*every* attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." *Id.* § 77b(a)(3) (emphasis added). "Prospectus" means "*any* prospectus, notice, circular, advertisement, letter, or communication, *written or by radio or television*, which offers any security for sale or confirms the sale of any security." *Id.* § 77b(a)(10) (emphasis added). Although the Securities Act of 1933 predates the Internet, the inclusion of radio and television communications indicates Congress contemplated that broadly disseminated, mass communications with potentially large audiences would fall within the Act's scope. *See Wildes*, 25 F.4th at 1346.

Nor has the Supreme Court imposed a requirement that solicitation under § 12 requires that a seller "actively and directly" solicit a plaintiff's investment, as Defendants contend. In *Pinter*, the leading case on the meaning of a "statutory seller" under § 12, the Supreme Court recognized that imposing liability beyond those who merely pass title to securities, *i.e.*, to brokers and others who solicit offers to purchase securities, "furthers the purposes of the Securities Act—to promote full and fair disclosure of information to the public in the sales of securities." 486 U.S. at 646. In that vein, the Court held in *Pinter* that the Act's "seller" requirement extends liability "to

the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id.* at 647; *see In re Daou*, 411 F.3d at 1029 ("[A] plaintiff must allege that the defendants did more than simply urge another to purchase a security; rather, the plaintiff must show that the defendants solicited purchase of the securities for their own financial gain . . . .").

Creating liability for those who solicit a sale for financial gain, as opposed to limiting it to those who simply pass title, is consistent with the Securities Act's remedial goal of protecting purchasers from the harm caused by promoters' material misstatements and omissions, in part due to the promoter's superior access to information concerning the securities and their valuation. As the Court explained in *Pinter*:

> In order to effectuate Congress' intent that § 12(1) civil liability be *in terrorem*, the risk of its invocation should be felt by solicitors of purchases. The solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage of a traditional securities sale to involve the buyer, and it is directed at producing the sale. In addition, brokers and other solicitors are well positioned to control the flow of information to a potential purchaser, and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors. Thus, solicitation is the stage at which an investor is most likely to be injured,

> that is, by being persuaded to purchase securities without full and fair information. Given Congress' overriding goal of preventing this injury, we may infer that Congress intended solicitation to fall under the mantle of § 12(1).

486 U.S. at 646–47 (citations omitted).

Beyond the requirement that a seller must have his own, independent financial interest in the sale, *Pinter* contains no indication that Congress was concerned with regulating only a certain type of solicitations, let alone specifically targeted "active and direct solicitations," as urged by Defendants. Defendants contend that a plaintiff must allege a relationship "not unlike contractual privity" between purchaser and seller, which cannot be created by a broadly distributed communication. For support, Defendants argue that the language of § 12 cabins a "seller" to a person who makes an "offer" to the person "purchasing such security from him," pointing to a statement in *Pinter* that "the language of § 12(1) contemplates a buyer-seller relationship not unlike traditional contractual privity." 486 U.S. at 641–42.

We disagree. the "contractual privity" language in *Pinter* comes from the Court's recognition that, in considering who may be regarded as a statutory seller, "the language of § 12(1) contemplates a buyer-seller relationship." *Id.* at 642. However, as discussed above, the Supreme Court interpreted the meaning of "seller" under § 12 to include more than mere owners to encompass those who engage in solicitation. But *Pinter* did not answer what types of communications qualify as solicitation. *See Wildes*, 25 F.4th at 1346

(explaining that *Pinter* "says nothing about what solicitation entails" and "instead focuses on the result and intent necessary for section 12 liability: the solicitation must succeed, and it must be motivated by a desire to serve the solicitor's or the security owner's financial interests").

In fact, if anything, the advertisements at issue in this case—Instagram posts and YouTube videos—are the types of potentially injurious solicitations that are intended to command attention and persuade potential purchasers to invest in the Funds during the "most critical" first stage of a selling transaction, when the buyer becomes involved. *See Pinter*, 486 U.S. at 646–47. Pino fairly alleges that the nature of social media presents dangers that investors will be persuaded to purchase securities without full and fair information.

In this case, Defendants allegedly relied significantly on social media to source investors for the Funds at issue here. Cardone posted on social media that Fund V was funded through "crowdfunding using social media," and touted the use of social media as an intentional strategy to reduce promotional costs. FAC ¶¶ 38, 40. Accordingly, through their social media engagement, Cardone and Cardone Capital were significant participants in the selling transaction because they disseminated material information to would-be investors. To conclude that their social media communications fall outside the Act's protections would be at odds with Congress's remedial goals. As observed by the Eleventh Circuit in *Wildes*, under Defendants' interpretation of the Act, a seller liable "for recommending a security in a personal

letter could not be held accountable for making the exact same pitch in an internet video." 25 F.4th at 1346.

For the foregoing reasons, we conclude that § 12 contains no requirement that a solicitation be directed or targeted to a particular plaintiff, and accordingly, join the Eleventh Circuit in holding that a person can solicit a purchase, within the meaning of the Securities Act, by promoting the sale of a security in a mass communication. Here, the FAC sufficiently alleges that Cardone and Cardone Capital were engaged in solicitation of investments in Funds V and VI. The FAC contends that Cardone and Cardone Capital engaged in extensive solicitation efforts, including through the "Breakthrough Wealth Summit," a conference hosted by Cardone, and Defendants' extensive social media posts. Moreover, the FAC alleges that both Cardone and Cardone Capital had a financial interest in the sale of the securities; the Fund V and VI offering statements describe compensation tethered to contributed capital and distributions received by the Funds' manager, Cardone Capital, which is controlled by Cardone. FAC ¶ 84. To state a claim under § 12(a)(2), Pino need not have alleged that he specifically relied on any of the alleged misstatements identified in the FAC. *See Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 965 (9th Cir. 1990) ("[R]eliance is not an element of a section 12(2) claim."). Accordingly, Pino plausibly alleged that Cardone and Cardone Capital were both statutory sellers under § 12(a)(2). Because the district court erred in dismissing Pino's claim against Cardone and Cardone Capital under § 12(a)(2), it also erred in

dismissing Pino's § 15 claim for lack of a predicate primary violation of the Securities Act.

For the foregoing reasons and those set forth in our accompanying memorandum disposition, the district court's dismissal of Pino's claims under § 12(a)(2) and § 15 is

AFFIRMED IN PART, REVERSED IN PART.[1]

[1] The parties shall bear their own costs on appeal.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55564

LUIS PINO, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

CARDONE CAPITAL, LLC; GRANT CARDONE;
CARDONE EQUITY FUND V, LLC;
CARDONE EQUITY FUND VI, LLC,

Defendants-Appellees.

Appeal from the United States District Court
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John F. Walter, District Judge, Presiding

Argued and Submitted March 17, 2022
San Francisco, California

Filed December 21, 2022
DktEntry 52-1

NOT FOR PUBLICATION

MEMORANDUM*

Before: CHRISTEN and BRESS, Circuit Judges, and LYNN,** District Judge.

Plaintiff Luis Pino appeals the district court's ruling granting the Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), filed by Defendants Grant Cardone ("Cardone"), Cardone Capital, LLC ("Cardone Capital"), Cardone Equity Fund V, LLC ("Fund V"), and Cardone Equity Fund VI, LLC ("Fund VI").

Pino filed suit alleging violations of the Securities Act of 1933, based on material misstatements or omissions in connection with real estate investment offerings. Specifically, Pino brought claims under § 12(a)(2) of the Act against all Defendants, and a claim pursuant to § 15 of the Act against Cardone and Cardone Capital. In the First Amended Complaint ("FAC"), Pino alleged that when soliciting investments in Funds V and VI, Defendants made untrue statements of material fact or concealed or failed to disclose material facts in Instagram posts and a YouTube video, and in the Fund V and VI offering circulars, during the period between February 5, 2019, and December 24, 2019, and that none of Defendants' "test the waters" communications—*i.e.*, statements not contained within the offering circulars—contained sufficient cautionary language.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

Defendants moved to dismiss the FAC for failure to state a claim under Rule 12(b)(6), which the district court granted. Pino appeals. We have jurisdiction under 28 U.S.C. § 1291.

Pino's challenge to the district court's ruling that Cardone and Cardone Capital are not statutory sellers under the Securities Act is addressed in an opinion filed concurrently with this memorandum disposition. Because the FAC identifies actionable alleged misstatements regarding projected internal rates of return and distributions and debt obligations, which are not insulated by the bespeaks caution doctrine, we reverse the district court's dismissal of Pino's claims of violations of §§ 12(a)(2) and 15 of the Securities Act as to those alleged misstatements. We remand to the district court to allow Pino to replead consistent with our memorandum disposition and opinion. We affirm the district court's dismissal of Pino's Securities Act claims on the remainder of the alleged misstatements or omissions.

Standard of Review

We review de novo a district court's dismissal on the pleadings. *Moore v. Trader Joe's Co.*, 4 F.4th 874, 880 (9th Cir. 2021). Dismissal under Rule 12(b)(6) is warranted when the complaint fails to state sufficient facts to establish a plausible claim to relief. *Id.* When reviewing a dismissal pursuant to Rule 12(b)(6), the Court accepts "as true all facts alleged in the complaint" and construes them "in the light most favorable to plaintiff." *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019) (internal quotations omitted).

Discussion

Because the parties are familiar with the facts of the case, we do not recite them in detail here. Section 12(a)(2) of the Securities Act of 1933 ("Securities Act") imposes liability on "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact . . . to the person purchasing such security from him." 15 U.S.C. § 77l(a)(2). To state a claim under Section 12(a)(2), a plaintiff must allege that (1) the defendant is a statutory seller; (2) the sale was effected by means of a prospectus or oral communication; and (3) the communication contains an "'untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading.'" *In re Daou Sys., Inc.*, 411 F.3d 1006, 1028–29 (9th Cir. 2005) (quoting 15 U.S.C. § 77l(a)(2)).

The parties briefed the case with respect to our decision in *In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1113 (9th Cir. 1989), which provides that a projection or statement of belief may be actionable under the federal securities laws if (1) the speaker does not actually believe the statement, (2) there is no reasonable basis for the statement, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy. More recently, in *City of Dearborn Heights Act 345 Police & Fire Retirement System v. Align Technology, Inc.*, 856 F.3d 605, 616 (9th Cir. 2017), this Court held that claims premised on statements of opinion must satisfy the pleading standard articulated by the Supreme Court in *Omnicare, Inc. v. Laborers District*

Council Construction Industry Pension Fund, 575 U.S. 175 (2015). In *Omnicare*, the Supreme Court made clear that a statement of opinion cannot constitute an "untrue statement of fact" under the securities laws unless the speaker does not actually believe the statement. 575 U.S. at 184. The Supreme Court further stated: "an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion." *Id.* at 194. Accordingly, we held in *Dearborn* that to plead that a statement of opinion is false by omission, the plaintiff cannot simply allege there was "no reasonable basis" for the statement, but instead must allege "'facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.'" 856 F.3d at 616 (quoting *Omnicare*, 575 U.S. at 194).

The district court erred in holding that the FAC did not state an actionable claim based on alleged misstatements relating to internal rate of return

("IRR")[1] and distributions,[2] which are not protected by the bespeaks caution doctrine. The FAC includes

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[1] Specifically, the FAC identifies the following actionable alleged misstatements relating to IRR projections: an April 22, 2019, YouTube Video in which Cardone states: "[I]t doesn't matter whether [the investor] [is] accredited [or] non-accredited . . . you're gonna walk away with a 15% annualized return. If I'm in that deal for 10 years, you're gonna earn 150%. . . ." (FAC ¶¶ 1, 56); a May 5, 2019, Instagram post in which Cardone Capital's account refers to: "15% Targeted IRR," "monthly distributions," and "long term appreciation" (*id.* ¶ 57); a September 4, 2019, Instagram post in which Cardone Capital's account references "10X Living at Breakfast Point" in "Fund 4 & 5," and refers to "Target IRR 15%" (*id.* ¶ 61); and an October 16, 2019, Instagram post in which Cardone Capital's account refers to 10X Living at Panama Beach City, a property "in both Fund VI and Fund VIII," and recites a "Targeted Investor IRR" of "17.88%" and a "Targeted Equity Multiple" of "2.5–3X" (*id.* ¶ 59).

[2] Specifically, the FAC identifies the following actionable alleged misstatements relating to distributions: a February 5, 2019, Instagram post in which Cardone asks potential investors on his personal Instagram account, "Want to double your money[?]" and states that an investor could receive $480,000 in cash flow after investing $1,000,000, achieve "north of 15% returns after fees, and obtain a "118% return amounting to 19.6% per year" (FAC ¶ 67); a September 18, 2019, Instagram post on Cardone Capital's account which asks, "What does it take to receive $50,000 in yearly dividend income?" and responds "Invest $1,000,000 with Cardone Capital" (*id.* ¶ 70); a December 24, 2019, Instagram Post that posits, "Unlike Santa, I pay similar distributions every single month" (*id.* ¶ 76); a January 31 (no year) Instagram post stating, "Last year I sent out $20M in distributions. More importantly investors have their capital sitting next to mine, protected, waiting for appreciation. We [target] to sell properties when I can return to investors at least 2X-3X their investment" (*id.* ¶ 9); and a September 17, 2019, Instagram video in which Cardone advertised that investing

allegations that Cardone told investors they would realize a 15% IRR, while omitting that the SEC had previously requested that Defendants remove from the proposed Fund V offering circular references to their "strategy to pay a monthly distribution to investors that will result in a return of approximately 15% annualized return on investment," because the Fund had commenced only limited operations, had not paid any distributions to date, and did not appear to have a basis for such a projected return. FAC ¶ 55.

The statements recited in the FAC relating to IRR and distributions are actionable. Pino plausibly alleges that by omitting mention of the SEC's communication to Cardone Capital that there was no basis to represent that investors would receive monthly distributions resulting in a 15% annualized return on their investments, the alleged misstatements relating to IRR and distributions were misleading to a reasonable person reading the statements fairly and in context. *See Omnicare*, 575 U.S. at 188–89 ("[I]f the issuer made the statement . . . with knowledge that the Federal Government was taking the opposite view, the investor again has cause to complain: He expects not just that the issuer believes the opinion . . . but that it fairly aligns with the information in the issuer's possession at the time."). Such facts likewise "call into question [Cardone's] basis for offering" his projections of a 15% IRR and promises of large monthly distributions or that investors would double or triple their

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$220,000 would allow investors to earn 'about $12,000-$15,000 a year' in distributions" (*id.* ¶¶ 12–14).

investments. *City of Dearborn Heights*, 856 F.3d at 616 (quoting *Omnicare*, 575 U.S. at 194).

The district court failed to interpret the FAC's allegations regarding debt obligations in the light most favorable to Pino, by disregarding defendants' statements about "who is responsible for the debt? The answer is, Grant!" and statements that the properties acquired by the Funds were assets, rather than liabilities. The FAC plausibly alleged that these statements were "untrue statements of fact," 15 U.S.C. § 77l(a)(2), because they suggest investors are not responsible for the "significant monthly debt service payments." FAC ¶ 82.[3]

In addition, the district court erred in holding that the bespeaks caution doctrine warranted dismissal of all alleged misstatements. The bespeaks caution doctrine allows a court to rule, as a matter of law, that a defendant's "forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994). A dismissal on the pleadings based on the bespeaks caution doctrine is justified only by a "stringent" showing that "'reasonable minds could not disagree that the challenged statements were not misleading.'" *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1409 (9th Cir. 1996)). Whether a statement in a public document with cautionary

[3] Judge Bress does not join this paragraph and would find the debt obligation statements not actionable.

language is misleading may only be determined as a matter of law when reasonable minds could not disagree that the "mix" of information in the document is not misleading. *Id.*

This Court has not directly addressed whether the bespeaks caution doctrine requires cautionary language to appear in the same communication as the statement it insulates. However, even if we assume, without deciding, that cautionary language need not necessarily appear in the same document as the alleged misstatement, the warnings in the offering circulars do not insulate misstatements made in Instagram posts and YouTube videos under the bespeaks caution doctrine. "[T]he bespeaks caution doctrine applies only to precise cautionary language which directly addresses itself to future projections, estimates or forecasts in a prospectus." *Worlds of Wonder*, 35 F.3d at 1414. Here, the offering circulars contain only generalized cautionary language that is too broad to immunize the otherwise actionable alleged misstatements about IRR and distributions, rendering the bespeaks caution doctrine inapplicable. In addition, the offering circulars for Funds V and VI were finalized and publicly filed in December 2018 and September 2019, respectively, while the alleged misstatements in the Instagram posts and YouTube video were primarily made later, from February through December 2019, and thus many of the misstatements are too attenuated from the release of the offering circulars to be insulated by the warnings contained therein.

In contrast, the district court did not err in holding that misrepresentations or omissions made in

the Fund V and VI offering circulars themselves are not actionable.[4] Pino did not sufficiently allege that the descriptions in the offering circulars of Defendants' strategy to purchase properties below market value was misleading. Instead, Pino only alleges that the Funds overpaid in the purchase of a single property, the Delray property, which does not bear on Defendants' intended strategy to purchase property at below-market prices.

In addition, any alleged omission regarding Cardone receiving an acquisition fee from sale of the Delray property in the Fund V offering is not actionable. The Fund V offering circular expressly disclosed the potential for conflicts of interest and related-party transactions between the Fund, Cardone Capital, and its affiliates, and that Defendants had sole discretion to decide what properties to purchase, so the allegation that Defendants engaged in undisclosed self-dealing is not actionable. For the same reason, the district court correctly dismissed Pino's claims that the Funds did

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[4] Specifically, the following alleged omissions and misstatements in the offering circulars are not actionable: (1) that the offering circulars represented the Funds' strategy was to acquire multi-family apartment communities at "below-market prices," when in fact Cardone and Cardone Capital purchased the "Delray" property at a high price to maximize their fee (FAC ¶¶ 86–87); (2) that the offering circulars represented that necessary financing would be secured before properties were obtained, when in fact Cardone purchased the properties from third parties before selling them to the Funds without informing investors (FAC ¶¶ 88–93); and (3) the Funds did not disclose that Cardone charged investors interest on money loaned to the Fund to acquire properties (FAC ¶¶ 96–100).

not disclose that Cardone Capital was extending commercially unnecessary, interest-bearing loans to the Funds; the offering circulars warn that Cardone and Cardone Capital may obtain lines of credit and long-term financing that may be secured by Fund assets, and have broad authority to incur debt and high debt levels.

For the foregoing reasons, we reverse the district court's dismissal of Pino's §§ 12(a)(2) and 15 claims as to Defendants' alleged statements regarding a 15% IRR and distributions, as well as the Funds' debt obligations. Because Pino did not plead these claims under the standard in *Omnicare*, the district court shall grant Pino leave to amend the FAC to replead these claims consistent with this memorandum disposition and opinion. We affirm the district court on Pino's Securities Act claims on the remainder of the alleged misstatements.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[5]

[5] The parties shall bear their own costs on appeal.

Appendix C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

No. 2:20-cv-08499-JFW (KSx)

LUIS PINO, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

CARDONE CAPITAL, LLC; GRANT CARDONE; CARDONE EQUITY FUND V, LLC; and CARDONE EQUITY FUND VI, LLC,

Defendants.

Judge: Hon. John F. Walter
Courtroom: 7A

Filed April 30, 2021
Document 96

FINAL JUDGMENT

Having granted Defendants Cardone Capital, LLC, Grant Cardone, Cardone Equity Fund V, LLC, and Cardone Equity Fund VI, LLC's ("Defendants") Motion to Dismiss Plaintiff's First Amended Complaint (ECF 94),

THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES that:

1. Judgment is hereby entered in favor of Defendants against Plaintiff Luis Pino ("Plaintiff") on all of Plaintiff's claims.

2. Plaintiff's First Amended Complaint in the above-captioned action is DISMISSED without leave to amend, and this action is DISMISSED with prejudice in its entirety.

3. Plaintiff shall recover nothing by his complaint.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: April 30, 2021 *s/[handwritten signature]*
John F. Walter
UNITED STATES
DISTRICT JUDGE

* * *

[Counsel block omitted]

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:20-cv-08499-JFW (KSx)

LUIS PINO, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

CARDONE CAPITAL, LLC; GRANT CARDONE; CARDONE EQUITY FUND V, LLC; and CARDONE EQUITY FUND VI, LLC,

Defendants.

Filed April 27, 2021
Document 94

CIVIL MINUTES - GENERAL

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly Courtroom Deputy	None Present Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS: None	ATTORNEYS PRESENT FOR DEFENDANTS: None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT
[filed 3/15/21; Docket No. 66]

On March 15, 2021, Defendants Cardone Capital, LLC, Grant Cardone, Cardone Equity Fund V, LLC, and Cardone Equity Fund VI, LLC (collectively, "Defendants") filed a Motion to Dismiss First Amended Complaint ("Motion"). On March 29, 2021, Plaintiff Luis Pino ("Plaintiff") filed his Opposition. On April 5, 2021, Defendants filed a Reply. On April 16, 2021, Plaintiff filed a Sur-Reply.[1] Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's April 19, 2021 hearing calendar and the parties were given advanced notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

[1] On April 16, 2021, Plaintiff filed an Ex Parte Application for Leave to File Motion for Leave to File a Sur-Reply ("Application") and a proposed Motion for Leave to File A Sur-Reply in Opposition to Defendants' Motion to Dismiss the First Amended Complaint ("Motion to File Sur-Reply"). *See* Docket Nos. 86 and 87. On April 19,2021, Defendants filed their Opposition. Although the Court finds Defendants' arguments persuasive, the Court nonetheless GRANTS Plaintiff's Application and Motion to File Sur-Reply and has considered Plaintiff's Sur-Reply (Docket No. 87-2).

I. Factual and Procedural Background[2]

A. The Parties

Plaintiff is an investor Cardone Equity Fund V, LLC ("Fund V") and Cardone Equity Fund VI, LLC ("Fund VI"), which were organized to "acquire various real estate assets throughout the United States." Plaintiff alleges that he invested $5,000 in Fund V and $5,000 in Fund VI (collectively, the "Funds") in reliance on misleading statements made by Defendants and misleading offering materials, specifically the Offering Circular for Fund V, dated

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[2] The Court grants Plaintiff's unopposed Request for Judicial Notice in Opposition to Defendants' Motion to Dismiss, filed March 29, 2021 (Docket No. 68). *See Metzler Inv. GMBH v. Corinthian Colls Inc.*, 540 F.3d 1049, 1064 n. 7 (9th Cir. 2008) (holding that the district court properly took judicial notice of SEC filings); *Henderson v. Wells Fargo Bank, N.A.*, 2016 WL 4597515, *1 (N.D. Tex. Aug. 15, 2016) (holding that "tax assessor records are matters of public record subject to judicial notice"); *Wynn v. Chanos*, 75 F.Supp. 3d 1228 (N.D. Cal. 2014) (taking judicial notice of video and corresponding transcript that was integral to the plaintiff's claim). In addition, the Court grants Defendants' request for judicial notice. *See* Notice of Motion (Docket No. 66), 1:8-12; Declaration of Lisa Bugni in Support of Defendants' Motion to Dismiss First Amended Complaint (Docket No. 66-1) ("Bugni Decl."), ¶¶ 2-11. Plaintiff does not object to the Court taking judicial notice of multiple SEC filings submitted by Defendants, but Plaintiff does object to the Court taking judicial notice of a screenshot of Plaintiff's investment portal. However, the Court may "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). In this case, the contents of the investment portal are alleged in the First Amended Complaint, and Plaintiff has not question the authenticity of the investment portal screenshot.

December 11, 2018 (the "Fund V Offering Circular"), and the Offering Circular for Fund VI, dated September 26, 2019 (the "Fund VI Offering Circular") (collectively, the Offering Circulars).

The Funds are managed by Cardone Capital, LLC ("Cardone Capital"). Grant Cardone ("Cardone") founded Cardone Capital in 2017 and he is its sole manager and Chief Executive Officer.[3] Cardone also founded Cardone Real Estate Acquisitions, LLC ("Cardone Acquisitions"), now Cardone Capital's acquisition arm, in 1995. Cardone has thirty years of experience investing in income-producing, multi-family real estate properties. Over the years, Cardone has purchased over forty properties across eight states – California, North Carolina, Georgia, Florida, Alabama, Arizona, Tennessee, and Texas – with a total purchase price of over $650,000,000. At the time the Funds were created, Cardone was managing a multi-family real estate portfolio consisting of over 4,500 units in twenty communities, valued in excess of $700 million. Several of these properties were acquired with the proceeds of three private offerings of securities made exclusively to accredited investors.[4]

Cardone Capital is a typical real estate syndicator and its business activities include identifying

[3] Cardone is described in the Offering Circulars as a real estate entrepreneur, sales trainer, author, and speaker who has worked with Fortune 100 companies such as Google, Wells Fargo, and Ford.

[4] These securities were offered through Reserve at St. Lucie LP 188, LLC (a/k/a Cardone Equity I), Reserve at Ormond Beach 27, LLC (a/k/a Cardone Equity II), and Cardone Equity Fund, LLC (a/k/a Cardone Equity III).

locations or potential properties, determining if properties are suitable for purchase, creating a marketing plan to attract investors, raising money from investors to acquire the properties, preparing the documents to be used in raising money from investors, negotiating the purchase and financing of the properties, managing the properties, making distributions to investors, and selling or refinancing the properties and distributing the profits to investors. Cardone Capital offers real estate investment opportunities to what it refers to as "the everyday investor" through the Funds. In order to offer these investment opportunities to everyday investors, the Funds were offered to both accredited and non-accredited investors. Investments in both Funds were made through offerings pursuant to Regulation A of the Securities Act.[5] In addition, both Funds were

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[5] According to the SEC:

> Regulation A is an exemption from registration for public offerings. Regulation A has two offering tiers: Tier 1, for offerings up to $20,000,000 in a twelve month period; and Tier 2, for offerings up to $75,000,000 in a twelve month period. For offerings of up to $20,000,000, companies can elect to proceed under the requirements of either Tier 1 or Tier 2.
>
> There are certain basic requirements applicable to both Tier 1 and Tier 2 offerings, including company eligibility requirements, bad actor disqualification provisions, disclosure, and other matters. Additional requirements apply to Tier 2 offerings, including limitations on the amount of money a non-accredited investor may invest in a Tier 2 offering, requirements for audited financial statements and the filing of ongoing reports. Issuers in Tier 2 offerings are not

categorized as emerging growth companies under the 2015 U.S. JOBS Act, a law that reduced reporting and accounting requirements for emerging companies and enabled the sale of securities using crowdfunding techniques. In fact, both Funds used social media crowdfunding to raise capital, and Fund V claims to have set a record because it was the first fund to raise $50,000,000 via Regulation A using social media crowdfunding. Fund V began receiving subscriptions on December 12, 2018, and completed raising $50,000,000 from over 2,200 individual investors on September 20, 2019. Fund VI began receiving subscriptions on October 16, 2019, and completed raising $50,000,000 on June 25, 2020.

B. The Offering Circulars

In order to comply with Regulation A, the Funds were required to file offering documents on Form 1-A with the SEC. On July 2, 2018, Cardone, as the Chief Executive Officer and President of Fund V, filed preliminary offering documents for Fund V with the SEC for review and comment. On July 30, 2018, the SEC sent a letter to Cardone with comments, including a request for additional information and suggestions for amendments, to the Fund V offering documents, and, on August 1, 2018, Cardone responded to the SEC's letter. The offering documents for Fund V were revised and finalized on December 11,

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required to register or qualify their offerings with state securities regulators.

See SEC.gov/smallbusiness/exemptofferings/rega.

2018. The offering documents for Fund VI were finalized on September 26, 2019.

The Offering Circulars, which were available to the public, contained detailed information concerning the Funds' business plans, financial projections, and the nature of the risks inherent in investing in the Funds. Specifically, the Offering Circulars disclosed to potential investors that Cardone Capital had very broad powers as the manager of the Funds. For example, although the Offering Circulars stated that the Funds' "primary focus is to invest in multifamily and commercial properties that will appreciate over a seven (7) to ten (10) year long holding period," the Offering Circulars clearly stated that the Funds would "[i]nvest in any opportunity our Manager sees fit within the confines of the market, marketplace and economy so long as those investments are real estate related and within the investment objectives of the" Funds. Fund V Offering Circular, pp. 5-6 (attached as Exh. 1 to the Bugni Decl.); Fund VI Offering Circular, pp. 5-6 (attached as Exh. 2 to the Bugni Decl.). In addition, the Offering Circulars disclosed that:

> Cardone Capital, LLC, our Manager, will make all decisions relating to the business, operations, and strategy, without input by the Members. Such decisions may include purchase and sale decisions regarding the assets, the appointment of other officers, managers, vendors and whether to enter into material transactions with related parties.

Fund V Offering Circular, p. 11; Fund VI Offering Circular, p. 11.

The Offering Circulars also stated that "[t]he timing and amount of distributions are the sole discretion of our Manager who will consider, among other factors, our financial performance, any debt service obligations, any debt covenants, and capital expenditure requirements. We cannot assure you that we will generate sufficient cash in order to pay distributions." Fund V Offering Circular, p. 17; Fund VI Offering Circular, p. 17.

The Offering Circulars also disclosed that investments in the Funds involved a certain amount of risk:

> Acquisition of properties entails risks that investments will fail to perform in accordance with expectations. In undertaking these acquisitions, we will incur certain risks, including the expenditure of funds on, and the devotion of management's time to, transactions that may not come to fruition. Additional risks inherent in acquisitions include risks that the properties will not achieve anticipated sales price, rents, or occupancy levels and that estimated operating expenses and costs of improvements to bring an acquired property up to standards established for the market position intended for the property may prove inaccurate.

Fund V Offering Circular, p. 11; Fund VI Offering Circular, p. 11. The Offering Circulars disclosed that there was a significant risk that investors would not realize "an attractive return" on their investment:

There is no assurance that our real estate investments will appreciate in value or will ever be sold at a profit. The marketability and value of the properties will depend upon many factors beyond the control of our management. There is no assurance that there will be a ready market for the properties . . . The real estate market is affected by many factors, such as general economic conditions, availability of financing, interest rates and other factors, including supply and demand, that are beyond our control. We cannot predict whether we will be able to sell any property for the price or on the terms set by it, or whether any price or other terms offered by a prospective purchaser would be acceptable to us. We also cannot predict the length of time needed to find a willing purchaser and to close the sale of a property. Moreover, we may be required to expend funds to correct defects or to make improvements before a property can be sold. We cannot assure any person that we will have funds available to correct those defects or to make those improvements. In acquiring a property, we may agree to lockout provisions that materially restrict us from selling that property for a period of time or impose other restrictions, such as a limitation on the amount of debt that can be placed or repaid on that property . . . These factors and any others that would impede our ability to respond to adverse changes in the performance of our properties could

> significantly harm our financial condition and operating results.

Fund V Offering Circular, p. 14; Fund VI Offering Circular, p. 14.

In addition, the Offering Circulars disclosed the existence of conflicts of interests. Specifically, the Offering Circulars disclosed that "*[t]here are conflicts of interest between us, our Manager and its affiliates*" because the Funds "expect that a third-party related to the Manager, Cardone Real Estate Acquisitions, LLC, will provide asset management and other services to our Manager and the" Funds. Fund V Offering Circular, p. 15; Fund VI Offering Circular, p. 15. The Offering Circulars also disclosed that "*[t]he interest of the Manager, our principals and their other affiliates may conflict with your interests.*" *Id.* Moreover, the Offering Circulars cautioned investors that any forward-looking statements made by or about the Funds were not guarantees of the Funds' future performance:

> With the exception of historical matters, the matters discussed herein are forward-looking statements that involve risks and uncertainties. Forward-looking statements include, but are not limited to, statements concerning anticipated trends in revenues and net income, projections concerning operations and available cash flow. Our actual results could differ materially from the results discussed in such forward-looking statements. The following discussion of our financial condition and results of operations should be read in conjunction with our

> financial statements and the related notes thereto appearing elsewhere herein.

Fund V Offering Circular, p. 26; Fund VI Offering Circular, p. 26.

Both Funds filed as exhibits to the Offering Circulars form Subscription Agreements used by investors to purchase Class A shares in the Funds. These Subscription Agreements contained additional detailed information and disclosures related to the Funds. Specifically, Section 1.18 of the Subscription Agreements provides:

> The Subscriber hereby represents that, except as expressly set forth in the Offering Documents, no representations or warranties have been made to the Subscriber by the Issuer or by any agent, sub-agent, officer, employee or affiliate of the Issuer and, in entering into this transaction, the Subscriber is not relying on any information other than that contained in the Offering Documents and the results of independent investigation by the Subscriber.

Subscription Agreement to Fund V Offering Circular, § 1.8 (attached as Exh. 4 to the Bugni Decl.); Subscription Agreement to Fund VI Offering Circular, § 1.8 (attached as Exh. 5 to the Bugni Decl.)

C. The Alleged Material Misrepresentations and Omissions

In his FAC, Plaintiff alleges three categories of material misstatements or omissions: (1) the projected

internal rate of return[6] ("IRR") of fifteen percent for the Funds; (2) the likelihood and amount of cash distributions to investors; and (3) the acquisition and financing of properties by the Funds.

With respect to IRR, Plaintiff alleges that Defendants promised a fifteen percent IRR to investors in the Funds. Specifically, Plaintiff alleges that in an April 22, 2019 YouTube video, Cardone said "it doesn't matter whether [the investor is] accredited [or] non-accredited . . . you're gonna walk away with a fifteen percent annualized return. If I'm in the deal for ten years, you're gonna earn one-hundred-fifty percent." Cardone then stated "you can tell the SEC that's what I said it would be. They call me Uncle G and some people call me Nostradamus, because I'm predicting the future dude, this is what's gonna happen." Plaintiff also alleges that in a May 5, 2019 advertisement on Cardone Capital's Instagram page, Cardone Capital promised "15% Targeted IRR," "Monthly Distributions," and "Long Term Appreciation" with respect to the Funds. Plaintiff also alleges that on September 4, 2019 and October 16, 2019 Cardone Capital advertised on its Instagram page a fifteen percent targeted IRR for Fund V and a 17.88 percent targeted IRR for Fund VI, respectively. Plaintiff alleges that these statements are misleading because none of Defendants' equity funds have ever realized an IRR of fifteen percent.

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[6] The IRR is a financial metric that measures the overall return on an investment, taking into account the amount invested and the amount and timing of any distributions to investors.

With respect to monthly distributions, Plaintiff alleges that Defendants overstated the amount of monthly distributions Fund investors could expect to receive. Specifically, Plaintiff alleges that on February 5, 2019, Cardone, on his personal Instagram page, asked "[w]ant to double your money" and indicated that an investor would receive $480,000 in cashflow over six years on an investment of $1,000,000 (along with $1,000,000 return of capital and $700,000 in appreciation), which would provide the investor with a targeted return of one-hundred-eighteen percent overall and a 19.6 percent return per year. Plaintiff also alleges that Cardone Capital's statement on its Instagram page that an investment of $1,000,000 would yield an investor $50,000 in "yearly dividend income" is misleading because the Funds have only made a 4.5 percent of return to date, or $45,000 in distributions on an investment of $1,000,000.

With respect to the acquisition and financing of properties, Plaintiff alleges that Cardone Capital stated on its Instagram page "[o]ne question you might want to ask is, who is responsible for the debt? The answer is Grant!" Plaintiff alleges that this statement is misleading because investor funds were used to pay the debt service on properties acquired by the Funds. Plaintiff also alleges that Cardone Capital's representation on its Instagram page that an investment in Cardone Capital was an "asset" rather than a "liability" was misleading because the interests in properties acquired by the Funds were leveraged with debt with a loan-to-value ration of sixty to eighty percent.

Plaintiff also alleges that statements made in the Offering Circulars regarding how properties would be acquired and financed were misleading. Plaintiff alleges that the statements that the Funds' strategy was to buy multi-family apartment communities at "below-market prices" is misleading because when the Funds purchased property, Cardone Capital, as manager of the Funds, received an acquisition fee equal to one percent of the purchase price and, thus, there was a strong incentive to purchase properties with a higher purchase price in order to maximize Cardone Capital's acquisition fee. In addition, Plaintiff alleges that Fund V acquired one property, 10X Living at Del Ray, for $93,875,000, which was $20,000,000 over market value according to the real property tax assessor records from 2019. Moreover, Plaintiff alleges that the following statement in the Offering Circulars is misleading:

> When the Company identifies a location or a potential property, it will secure the necessary financing, sign a contract and place an escrow deposit to be held with the designated escrow agent. The Company will take the time necessary to complete all its due diligence to the property including: site inspection, reviewing all leases, income and expenses, as well as securing a first mortgage on the property. After the due diligence process has been completed, the Company, will determine whether the property is suitable or not.

Plaintiff alleges that this statement is misleading because instead of obtaining loans to finance the

acquisitions from third parties, Cardone personally, through entities he owns and controls, purchased the properties from third parties before selling them to the Funds. According to Plaintiff, Cardone admitted in an April 21, 2020 interview his practice of buying properties personally and then selling them to investors: "I buy the deal. In the past at least, up until this moment, right now, our current fund, I buy the deal with my money before I offer it to the public." Finally, Plaintiff alleges that Defendants failed to disclose to investors that Cardone charged interest on the money he used to purchase the target properties until it was finally disclosed in Fund V's April 21, 2020 SEC Form 1-K and Fund VI's April 21, 2020 SEC Form 1-K. The April 21, 2020 SEC Form 1-Ks disclosed that for each loan made by Cardone, the Funds pay a "6% interest rate," and that each loan "is unsecured and is payable on demand." Plaintiff alleges that Defendants' failure to disclose that Cardone would charge investors interest on Cardone's loans to acquire properties was a material omission because investors were contributing the necessary capital to acquire the properties and, therefore, there was no apparent need for Cardone to loan money and charge interest to acquire the properties.

D. Procedural History

On September 16, 2020, Plaintiff filed a Complaint against Cardone Capital and Cardone. On February 19, 2021, Plaintiff filed his First Amended Complaint ("FAC"), alleging claims against Cardone Capital and Cardone as well as the Funds. In his FAC, Plaintiff alleges claims for relief for: (1) violation of Section 12(a)(2) of the Securities Act against all of the

Defendants; and (2) violation of Section 15 of the Securities Act against Cardone Capital and Cardone. In their Motion, Defendants seek dismissal of the first and second claims for relief.

II. Legal Standard

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

In addition, Rule 9(b) provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The heightened pleading requirements of Rule 9(b) are designed "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything

wrong." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). In order to provide this required notice, "the complaint must specify such facts as the times, dates, places, and benefits received, and other details of the alleged fraudulent activity." *Id.* at 672. Further, "a pleader must identify the individual who made the alleged representation and the content of the alleged representation." *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1094 (C.D. Cal. 1999).

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.; Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

In their Motion, Defendants argue that Plaintiff's first claim for relief for violation of Section 12(a)(2) should be dismissed as to all the Defendants because Plaintiff has failed to adequately allege material misstatements or omissions actionable under Section 12(a)(2). Specifically, Defendants argue that statements alleged by Plaintiff in his FAC are: (1) not material misstatements; (2) protected by the bespeaks caution doctrine; and (3) in some cases, are mere puffery. Defendants also argue that Plaintiff's first claim for relief should be dismiss as to Cardone and Cardone Capital for the additional reason that Cardone and Cardone Capital do not qualify as statutory sellers under Section 12(a)(2). In addition, Defendants argue that Plaintiff has failed to adequately allege a predicate violation necessary to state its second claim for relief for violation of Section 15 against Cardone and Cardone Capital. In his

Opposition, Plaintiff argues that Defendants made numerous material misstatements and that those misstatements are not protected by the bespeaks caution doctrine and are not mere puffery. Plaintiff also disagrees that Cardone and Cardone Capital do not qualify as statutory sellers under Section 12(a)(2) and that he has failed to adequately allege a predicate violation necessary for his Section 15 claim.

A. Section 12(a)(2) Claim

Section 12(a)(2) provides a cause of action "where the securities at issue were sold using prospectuses or oral communications that contain material misstatements or omissions." *In re Morgan Stanley Info. Fund Sec. Info.*, 592 F.3d 347, 359 (2d Cir. 2010). To state a claim under Section 12(a)(2) of the Securities Act, a plaintiff must allege that the defendant is" (1) a statutory seller; (2) that the sale was effected by means of a prospectus or oral communication; and (3) that the communication contained a material misstatement or omission. *In re STEC Inc., Sec. Litig.*, 2011 WL 4442822, at *9 (C.D. Cal. Jan. 10, 2011). "Scienter, reliance, and loss causation are not prima facie elements of a Section 12(a)(2) claim." *In re XP Inc. Sec. Litig.*, __ F.Supp. 3d __, 2021 WL 861917, *2 (E.D.N.Y. Mar. 8, 2021) (*quoting Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 98 (2d Cir. 2017)).

1. Section 9(b)'s Heightened Pleading Requirement Does Not Apply to Plaintiff's FAC

In his Opposition, Plaintiff argues that Rule 9(b) does not apply to his Section 12(a)(2) claim. See Opposition, 26-28 ("The heightened pleading standards of the Private Securities Litigation Reform Act or Rule 9(b) do not apply here, and defendants do not contend otherwise"). Plaintiff argues that he has not alleged in his FAC that Defendants' conduct was fraudulent and, in fact, has "expressly disclaim[ed] and disavow[ed] at this time any allegation in this [FAC] that could be construed as alleging fraud." FAC, ¶ 111.

Although allegations of fraud are not required to state a claim under Section 12(a)(2), a complaint must meet the heightened pleading requirements under Rule 9(b) if the claim nevertheless "sounds in fraud." *See Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009). A claim "sounds in fraud" where a plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003). In addition, a plaintiff cannot evade the pleading requirements of Rule 9(b) simply by avoiding the use of the word fraud or alleging that the claims do not sound in fraud. *Id.* (holding that a plaintiff cannot avoid the pleading requirements of Rule 9(b) "simply by avoiding use of [the] magic word"); *see also Vignola v. FAT Brands, Inc.*, 2019 WL 6888051 (C.D. Cal. Dec. 17, 2019) (holding that the plaintiffs' Section 12(a)(2) claims had to satisfy the pleading requirements of Rule 9(b) and

that it was "immaterial" that the plaintiffs had "expressly disclaim any allegations or inference of fraud or intentional wrongdoing" in the second amended complaint). Instead, the court must examine the allegations of the complaint and apply the pleading standard of Rule 9(b) "where the gravamen of the complaint is plainly fraud." *In re Stac Electronics Sec. Litig.*, 89 F.3d 1399, 1405 n. 2 (9th Cir. 1996).

In this case, the FAC does not specifically allege fraud and avoids allegations inherently suggestive of fraud – e.g., there is no allegation that Defendants "knowingly" or "intentionally" concealed information or made misrepresentations. Although such allegations could be inferred, the allegations in the FAC can equally support the inference that Defendants made the alleged misrepresentations without the required scienter. In addition, Defendants have not argued that the allegations of the FAC sound in fraud. Accordingly, the Court concludes that Plaintiff's FAC does not necessarily sound in fraud. *See, e.g., In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 546 (N.D. Cal. 2009) (noting the paucity of Ninth Circuit published decisions finding that Rule 9(b) applies to a Section 11 claim where the underlying conduct was not also alleged to have constituted fraud).

2. Bespeaks Caution Doctrine

The bespeaks caution doctrine protects affirmative, forward-looking statements from becoming the basis for a securities fraud claim when they are accompanied by cautionary language or risk

disclosure.[7] *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994). In other words, "the 'bespeaks caution' doctrine reflects the unremarkable proposition that statements must be analyzed in context." *Rubinstein v. Collins*, 20 F.3d 160, 167 (5th Cir. 1994).

However, the "inclusion of some cautionary language is not enough to support a determination as a matter of law that defendants' statements were not misleading." *In re Stac Electronics*, 89 F.3d at 1408 (internal quotations omitted). The cautionary language cannot be "so generalized in nature that a reasonable jury could nonetheless find the prospectus misleading." *Gray v. First Winthrop Corp.*, as amended, 82 F.3d 877, 884 (9th Cir. 1996). Instead, "the language bespeaking caution [must] relate directly to that [as] to which plaintiffs claim to have been misled." *In re Worlds of Wonder*, 35 F.3d at 1415 (*quoting Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480, 489 (3d Cir. 1994)).

The bespeaks caution doctrine "has developed to address situations in which optimistic projections are

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[7] The parties agree that the Safe Harbor for forward-looking statements provided by the Private Securities Litigation Reform Act ("PSLRA") does not apply to securities offered by limited liability corporations. *See*, FAC, ¶ 66; *see also* 15 U.S.C. § 78u-5(b)(2)(D)-(E) (statutory safe harbor does not apply to forward-looking statements that are "made in connection with an initial public offering" or made by a limited liability company). However, the bespeaks caution doctrine is an entirely separate common law protection for forward-looking statements that contains no such exception. *See In re Infonet Services Corp. Sec. Litig.*, 310 F. Supp. 2d 1080, 1102 (C.D. Cal. 2003) (holding that bespeaks caution doctrine applies to Section 12(a)(2) claims).

coupled with cautionary language – in particular relevant specific facts or assumptions – affecting the reasonableness of reliance on and the materiality of those projections." *Rubinstein*, 20 F.3d at 167. It is meant "to minimize the chance that a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in the hopes of obtaining an increased settlement." *See In re Worlds of Wonder*, 35 F.3d at 1415. However, a court should not apply the doctrine too broadly because an overbroad application of the doctrine would encourage management to conceal deliberate misrepresentations beneath the mantle of broad cautionary language. *Id.*, at 858.

3. Plaintiff Has Failed to Allege Material Misstatements or Omissions By Defendants

In the FAC, Plaintiff alleges three categories of material misstatements or omissions: (1) the projected IRR of fifteen percent for the Funds; (2) the likelihood and amount of cash distributions for investors; and (3) the acquisition and financing of properties by the Funds. The Court concludes for the reasons discussed below that Plaintiff has failed to adequately allege the material misstatements or omissions with respect to any of the three categories.[8]

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[8] In his Opposition, Plaintiff argues that Defendants failed to address the following four purported misrepresentations in their Motion: (1) Cardone promised investors that their capital was "protected, waiting for appreciation" and that he could "return to investors at least 2X-3X their investment"; (2) Cardone claimed that investing $220,000 would allow investors to earn "about $12,000-$15,000 a year" and that he expected to sell the underlying property in five to seven years at which point the

a. Internal Rate of Return

In the FAC, Plaintiff alleges that Defendants repeatedly promised a fifteen percent IRR for investments in the Funds in a series of social media posts and online videos and that Defendants had no basis for predicting a fifteen percent IRR. Defendants argue that Defendants' statements about the projected IRR are forward-looking projections that cannot form the basis of a Section 12(a)(2) claim because: (1) the FAC is devoid of facts that the projection was not in good faith; (2) the bespeaks caution doctrine requires dismissal; and (3) the projection is immaterial puffery.

In the Ninth Circuit, in order for a projection to be actionable, a plaintiff must allege that: (1) the speaker does not genuinely believe the projection; (2) there is no reasonable basis for the speaker's belief; or (3) the

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investment would be worth $660,000 "Plus your cash flow"; (3) Cardone told investors they could "double" their money and that they could receive a "118% return" and "19.6% per year"; and (4) Cardone Capital represented to investors that their money would be "safe" in the Funds "because Cardone Capital is built on real assets which are already established and stable in nature." However, as Defendants point out, none of the four purported misrepresentations cited by Plaintiff are contained in the section of Plaintiff's FAC entitled "DEFENDANTS' MATERIAL MISSTATEMENTS AND OMISSIONS." In addition, Plaintiff has failed to allege that Cardone Capital's statement that the investments would be "safe" is false because Plaintiff's investment portal screenshot shows that his capital accounts reflects his full initial investment. With respect to the other three alleged misrepresentations, they are all forward-looking statements regarding projected returns and are protected by the bespeaks caution doctrine because of the cautionary language in the Offering Circulars.

speaker is aware of undisclosed facts that undermine the accuracy of the projection. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989). In this case, Plaintiff does not allege that Defendants did not believe the accuracy of the fifteen percent annualized IRR projection or that Defendants were aware of undisclosed facts undermining the projection.[9] In addition, the Court concludes that Plaintiff has failed to allege that Defendants had no reasonable basis for Defendants' statements regarding a projected fifteen percent IRR for investors in the Fund. Instead, Plaintiff simply alleges in conclusory fashion that "there is no basis for that statement." *See* FAC, ¶ 52. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; s*ee also Roberts v. Zuora, Inc.*, 2020 WL 2042244, at *10 (N.D. Cal. Apr. 28, 2020) (finding a projection actionable where the defendants were "aware of undisclosed facts such as the failed ZoZ and Keystone projects and customer integration issues"); *Trafton v. Deacon Barclays de Zoete Wedd Ltd.*, 1994 WL 746199, at *15 (N.D. Cal. Oct. 21, 1994) (holding a projection actionable where the defendants were "aware of facts, *i.e.*, no production of WCW and diminished production at PB, which seriously undermines the accuracy of the claim"). The FAC does not allege a single fact that would undermine Defendants' projected IRR or that

[9] If Plaintiff were to allege that Defendants did not believe the fifteen percent annualized IRR or that Defendants were aware of undisclosed facts undermining the projection, his FAC would sound in fraud and he would be required to satisfy the pleading requirements of Rule 9(b).

would otherwise make the projection unreasonable. The only fact alleged by Plaintiff is the SEC's comment in its letter regarding the preliminary Offering Circular for Fund V that the references to an annualized fifteen percent IRR should be removed because Fund V, at the time of the SEC's letter, had "commenced only limited operations, [had] not paid any distributions to date and [did] not appear to have a basis for such return." FAC, ¶ 55. However, although Fund V had only "limited operations" at the time of the SEC's letter, Cardone had over thirty years of experience investing in income-producing, multifamily real estate properties and syndicating real estate investments. Thus, notwithstanding Fund V's "limited operations," the Court concludes that Plaintiff has failed to adequately allege that Defendants did not have a reasonable basis to project a fifteen percent IRR annualized over ten years in light of Cardone's extensive prior experience investing in real estate and managing a multi-million dollar portfolio.[10]

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[10] The Court also concludes that Defendants' statements regarding a projected IRR are "inactionable puffery." *Pirani v. Slack Techs, Inc.*, 445 F. Supp. 3d 367, 389 (N.D. Cal. 2020) (dismissing Section 12(a)(2) claims premised on "inactionable puffery"). In *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993), the court held the statement that there was "an expected annual growth rate of 10% to 30% over the next several years" to be "immaterial puffery." Similarly, the statements made by Defendants in this case regarding the projected IRR are nothing more than "soft puffing statements." *Id.* (holding that statement in annual report that company was "poised to carry the growth and success of 1991 well into the future" to be immaterial "soft puffing statements").

In addition, the Court concludes that Defendants' statements regarding a projected fifteen percent IRR are not actionable because they are protected by the bespeaks caution doctrine. The performance of an investment over time is a classic example of a forward-looking statement. *See, e.g., Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1058 (9th Cir. 2014) (holding that forward-looking statements include: "(1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions underlying or related to any of these issues"). Moreover, the Offering Circulars – which were effective prior to the Funds' sale of any Class A shares to investors and which were incorporated by reference into the Subscription Agreements signed by every Fund investor – included a detailed section of risk warnings informing investors that the estimated returns may not be realized. For example, the Offering Circular for Fund V disclosed that:

> We are an emerging growth company organized in May 2018 and have not yet commenced operations, which makes an evaluation of us extremely difficult. At this stage of our business operations, even with our good faith efforts, we may never become profitable or generate any significant amount of revenues, thus potential investors have a possibility of losing their investments.

Fund V Offering Circular, p. 10. Thus, investors were warned that the IRR may not only be less than fifteen percent, but potentially zero. The Offering Circulars also warned of several risks that could negatively

impact the Funds' returns, including potential management changes, the nature of blind pool offerings, changes in the real estate market, lack of investment diversification, and competition from third-parties. Moreover, Plaintiff expressly agreed in his Subscription Agreement that "[t]he Subscriber acknowledges that any estimates or forward-looking statements or projections included in the Offering Circular were prepared by the management of the Issuer in good faith, but that the attainment of any such projections, estimates or forward-looking statements cannot be guaranteed by the Issuer, its management or its affiliates and should not be relied upon." Plaintiff also "acknowledge[d] receipt of the Offering Circular, all supplements to the Offering Circular, and all other documents furnished in connection with this transaction by the Issuer." Subscription Agreement to Fund V Offering Circular, § 1.3.

Despite the forward-looking nature of the IRR statements and the abundant meaningful cautionary language in the Offering Circulars, Plaintiff contends that the bespeaks caution doctrine does not apply because the cautionary language did not appear in the same document as the alleged misstatements. However, there is no such requirement. Indeed, courts have applied the bespeaks caution doctrine when the alleged misstatements were located outside the offering document and the cautionary language was located in the offering document. *See, e.g., Infonet*, 310 F. Supp. 2d at 1092-93 and 1102 (applying bespeaks caution doctrine when cautionary language was in offering documents and the alleged misstatements were made in roadshow presentations to convince

investors to participate in an initial public offering); see also *In re Splash Tech. Holdings, Inc. Sec. Litig.*, 2000 WL 1727377, *10 (N.D. Cal. Sept. 29, 2000) (holding that the bespeaks caution doctrine protects oral forward-looking statements when cautionary statements were in SEC filings and registration statement). For example, in *Infonet*, the court found the inclusion of the cautionary language in the Offering Circulars important "[b]ecause a registration statement and its amendments are formal documents of considerable legal weight, [and, thus] any misleading forward-looking statements made in less formal press releases and interviews which were all closely proximate in time to the registration statement may be fairly limited by cautionary statements contained in the registration statement." *Infonet*, 310 F. Supp. 2d at 1092-93 and 1102.

Plaintiff also argues that the bespeaks caution doctrine does not apply because the cautionary language contained in the Offering Circulars was "only boilerplate" and did not address Defendants' statements regarding the IRR. Although Plaintiff is correct that "[t]he cautionary statements must be 'precise' and 'directly address' the defendants' future projections" for the bespeaks caution doctrine to immunize projections from liability (*Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996)), the cautionary language contained in the Offering Circulars did, in fact, specifically address the IRR:

> *We are an emerging growth company organized in May 2018 and have not yet commenced operations, which makes an evaluation of us extremely difficult. At this*

> *stage of our business operations, even with our good faith efforts, we may never become profitable or generate any significant amount of revenues, thus potential investors have a possibility of losing their investments* . . . There is nothing at this time, other than the track record of our Manager, on which to base an assumption that our business operations will prove to be successful or that we will ever be able to operate profitably. However, past results do not guarantee future profitability. Our future operating results will depend on many factors including our ability to raise adequate working capital, availability of properties for purchase, the level of our competition and our ability to attract and maintain key management and employees . . .

Fund V Offering Circular, p. 10; Fund VI Offering Circular, p. 10; see also Fund V Offering Circular, p. 14 ("*The failure of our properties to generate positive cash flow or to sufficiently appreciate in value would most likely preclude our Members from realizing an attractive return on their Interest ownership*"); Fund VI Offering Circular, p. 14 ("*The failure of our properties to generate positive cash flow or to sufficiently appreciate in value would most likely preclude our Members from realizing an attractive return on their Interest ownership*").

Therefore, the Court concludes that Defendants' statements regarding the projected IRR are forward-looking and the Offering Circulars contain more than sufficient cautionary language under the law to invoke the protections of the bespeaks caution doctrine.

Accordingly, the Court concludes that to the extent Plaintiff's Section 12(a)(2) claim is based on Defendants' statements regarding a projected IRR of fifteen percent, that claim is dismissed.

b. Cash Distributions

In the FAC, Plaintiff alleges that investors were promised that they would receive significant, guaranteed monthly distributions. In their Motions, Defendants argue Plaintiff's allegations regarding distribution projections are insufficient because: (1) they are protected from liability by the bespeaks caution doctrine; and (2) the FAC fails to allege that Defendants had no reasonable basis for the distribution projections.

Plaintiff again argues that the bespeaks caution doctrine does not apply because the cautionary language in the Offering Circulars is "boilerplate" and its risk warnings are too "vague." However, the Court disagrees and concludes that the cautionary language in the Offering Circulars was not vague and specifically addressed distributions:

> Our ability to make distributions to our Members is subject to fluctuations in our financial performance, operating results and capital improvement requirements. Currently, our strategy includes paying a monthly distribution to investors under this Offering that would result in positive annualized return on investment, net of expenses, of which there is no guarantee . . . In the event of downturns in our operating results, unanticipated capital improvements

> to our properties, or other factors, we may be unable, or may decide not to pay distributions to our Members. The timing and amount of distributions are the sole discretion of our Manager who will consider, among other factors, our financial performance, any debt service obligations, any debt covenants, and capital expenditure requirements. We cannot assure you that we will generate sufficient cash in order to pay distributions.

Fund V Offering Circular, p. 17; Fund VI Offering Circular, p. 17.

In addition, the Offering Circulars contained specific and clear warnings related to the Funds' ability to make distributions:

> *We have broad authority to incur debt and high debt levels could hinder our ability to make distributions and decrease the value of our investors' investments* . . . Although we intend to borrow typically no more than 70% of a property's value, we may borrow as much as 80% of the value of our properties. We do not currently own any properties. High debt levels would cause us to incur higher interest charges and higher debt service payments and may also be accompanied by restrictive covenants. These factors could limit the amount of cash we have available to distribute and could result in a decline in the value of our investors' investments. We do not set aside funds in a sinking fund to pay distributions so you must rely on our revenues from operations and other sources of

> funding for distributions. These sources may not be sufficient to meet these obligations.

Fund V Offering Circular, p. 15; Fund VI Offering Circular, p. 15.

Therefore, the Court concludes that Defendants' statements regarding projected distributions are forward-looking statements that are protected by the bespeaks caution doctrine.[11] *See Infonet*, 310 F. Supp. 2d at 1088-89.

The Court also concludes that Plaintiff has failed to allege that Defendants lacked a reasonable basis for statements regarding a projected annual distribution of eight percent. The eight percent in projected annual distributions was reasonable in light of the 12.3 percent paid to investors in year two of Equity Fund I and the 11.4 percent paid to investors in year two of Equity Fund II.

Plaintiff also argues that Defendants' statements that the Funds would make monthly distributions was misleading because Defendants suspended distributions for two months (April and May 2020) "out of an abundance of caution" at the beginning of the COVID-19 pandemic. However, the Offering Circulars clearly disclosed that the "timing and amount of distributions are the sole discretion of our Manager." Fund V and Fund VI Offering Circulars,

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[11] In addition, the Supplement to the Offering Circular for Fund V, which was filed with the SEC prior to Plaintiff's investment, specifically disclosed that current distributions were being made to investors at an annual rate of 4.5 percent. Indeed, in 2020, Plaintiff received distributions of 4.9 percent – more than promised in the Supplement to the Offering Circular.

p. 17. Moreover, distributions were resumed in June 2020, and Plaintiff's June 2020 distribution was approximately three times the regular monthly distribution to compensate for the lack of distributions in April and May. Therefore, Plaintiff has failed to allege facts demonstrating that Defendants' statements that the Funds would make monthly distributions was misleading.

Accordingly, the Court concludes that to the extent Plaintiff's Section 12(a)(2) claim is based on Defendants' statements regarding projected distribution amounts, that claim is dismissed.

c. Acquisition and Financing of Properties

In the FAC, Plaintiff alleges that Defendants misrepresented or omitted to disclose four categories of information regarding the Funds' acquisition and financing of properties. Specifically, Plaintiff alleges that: (1) investors were not informed that they would be responsible for the debt payments on the properties; (2) Defendants misrepresented that the Funds' strategy was to acquire properties at below-market value, when in fact the properties were purchased at above-market prices because Cardone had a financial incentive to maximize the acquisition price; (3) Defendants failed to disclose that the 10X Living at Delray property had already been acquired by Cardone for inclusion in Fund V; and (4) Defendants did not disclose that Cardone was charging investors interest on money that he loaned to the Fund for the acquisition of properties. In their Motion, Defendants argue that all four categories of alleged misstatements are directly contradicted by the

plain language of the Offering Circulars and should be dismissed.

i. The Responsibility for Debt Payments

Plaintiff alleges that investors in the Funds were misled to believe that Cardone, not investors, would be responsible for making all debt payments on any acquired properties. In support of his argument, Plaintiff cites various social media posts, including a post by Cardone Capital allegedly stating that Cardone was "responsible for the debt." However, the surrounding context of the post makes it clear that it does not refer to debt service payments. Instead, the post's focus was on the fact that, in past investments, Cardone has invested a significant amount of his own money, making him "responsible for the debt" on those properties. In addition, the Offering Circulars for the Funds make clear that Cardone would be a joint owner of the Funds and, thus, would be jointly responsible for the debt – as stated in the post. Indeed, the post says nothing about Cardone paying all of the interest payments on investment properties.

Plaintiff also alleges that another post characterizing investments in real estate as "assets" is misleading. Plaintiff argues that because loans were used to acquire the properties, the properties should be considered liabilities, not assets. However, the post contains only a general definition of assets, a comparison picture of lavish lifestyle expenses and income-producing properties, and the exhortation to "surround yourselves by assets, not liabilities." It does not address the issue of the Funds' financing of properties.

In addition, Plaintiff alleges that a social media post comparing investments in stocks with investments in real estate misled Fund investors to believe that they would have no debt obligations. However, far from stating that investors will have no debt obligations, the infographic in the post actually highlights the potential benefits of investing in leveraged assets, such as that it increases the relative gains on assets if the market value increases. In addition, the leveraged nature of the Funds' business model and the investors' exposure to risks was clearly disclosed in the Funds' Offering Circulars. For example, the Offering Circular for Fund V warned that "[w]e will require additional financing, such as bank loans, outside of this offering in order for the operations to be successful." Fund V Offering Circular, p. 2. The Offering Circulars further specifically warned:

> *We have broad authority to incur debt and high debt levels could hinder our ability to make distributions and decrease the value of our investors' investments.*
>
> Our policies do not limit us from incurring debt until our total liabilities would be at 80% of the value of the assets of the Company. Although we intend to borrow typically no more than 70% of a property's value, we may borrow as much as 80% of the value of our properties. We do not currently own any properties. High debt levels would cause us to incur higher interest charges and higher debt service payments and may also be accompanied by restrictive covenants. These

> factors could limit the amount of cash we have available to distribute and could result in a decline in the value of our investors' investments.

Moreover, the Offering Circulars included a comprehensive section entitled "Financing Strategy," which explains that financing between sixty and eighty percent of the Fund's real estate investments is part of its fundamental business strategy. Fund V Offering Circular, p. 41; Fund VI Offering Circular, p. 41. Potential investors were also informed about the nature and extent of debt service payments on earlier Cardone Equity Funds (*i.e.*, Funds I-III). Fund V Offering Circular, p. 61; Fund VI Offering Circular, p. 61. Therefore, the Court concludes that the nearly identical facts that Plaintiff alleges were misstated or omitted were, in reality, disclosed repeatedly and in great detail to investors. Furthermore, even if the social media posts were misleading, the Court concludes that Plaintiff's claim would still fail because the social media posts are immaterial in light of the robust disclosures in the Offering Circulars. *See, e.g., In re Velti PLC Sec. Litig.*, 2015 WL 5736589, at *22 (N.D. Cal. Oct. 1, 2015) (finding no material omission where "[e]ach of the [allegedly omitted] circumstances – and the risks they entailed – was disclosed in the registration statements"); *Primo v. Pacific Biosciences of California, Inc.*, 940 F.Supp. 2d 1105, 1116 (N.D. Cal. 2013) (finding alleged omission immaterial in light of other disclosures).

ii. The Acquisition of Properties at Below-Market Value

Plaintiff alleges that Defendants misrepresented that the Funds' business strategy was to obtain properties at below-market value because Cardone Capital had an incentive to maximize the purchase price because part of Cardone Capital's compensation was an acquisition fee of one percent of the purchase price of the properties. In support of this allegation, Plaintiff also alleges that none of the Funds' properties were acquired at below-market prices.

Despite Plaintiff's allegations in the FAC, Plaintiff admits that Cardone Capital's one percent acquisition fee was clearly disclosed in the Funds' Offering Circulars. In addition, Plaintiff admits that he is unaware of the prices paid for any of the Funds' properties except for 10X Living at Delray. This type of unsupported allegation fails the basic pleading requirements of Rule 8. *See Iqbal*, 556 U.S. at 678 (requiring that factual assertions must be facially plausible). A plaintiff cannot state a securities claim by quoting a statement in an offering followed by a conclusory allegation that the statement was false. *See Fodor v. Blakey*, 2012 WL 12893985, at *4-6 (C.D. Cal. February 21, 2012) (dismissing Securities Act claims because "conclusory allegations are insufficient" to meet pleading standard and plaintiff did not "state why the representations were false"). In this case, the only factual allegation in support of Plaintiff's claim that none of the Funds' properties were acquired at below-market prices is the fact that the 10X Living at Delray property was acquired for $93,875,000, which Plaintiff alleges was $20 million

more than the market value of the property. However, Plaintiff bases the market value of 10X Living at Delray on the tax assessor records from 2019. Plaintiff has failed to allege any facts indicating that the tax assessment value reflects of the actual fair market value of the property. Moreover, even if Plaintiff's allegation that Cardone Capital overpaid for the 10X Living at Delray property is correct, Plaintiff has failed to allege any facts demonstrating that Defendants' statements that the Funds' general business strategy was to purchase properties at below-market value are false or misleading – Defendants never promised investors that the Funds would acquire every single property at below-market value, only that this was their general strategy and intent. Therefore, the Court concludes that Plaintiff has failed to adequately allege that Defendants' statements regarding the Funds' acquisition strategy were false or misleading.

iii. The Prior Acquisition of the 10X Living at Delray Property

Plaintiff alleges that the Offering Circulars failed to disclose that 10X Living at Delray property would be acquired by Fund V, and that this property had been purchased by Cardone prior to the original filing date of the Fund V Offering Circular. However, based on Plaintiff's own timeline, the 10X Living at Delray property was not acquired by Fund V until after the original Offering Circular was filed. After the acquisition of the 10X Living at Delray property, and before Plaintiff's investment, Fund V filed Supplement No. 1, which was incorporated into the Offering Circulars and which specifically disclosed

that the 10X Living at Delray property would be acquired, along with other specified properties by Fund V. Thus, the Court concludes that Plaintiff's allegation that Defendants did not disclose that the 10X Living at Delray property would be an asset of Fund V is entirely contradicted by the Offering Circular. *See Turocy v. El Pollo Loco Holdings, Inc.*, 2016 WL 4056209, at *8-10 (C.D. Cal. July 25, 2016) (holding that statements were not misleading where "allegedly omitted facts rendering the statements false were actually disclosed").

Plaintiff also alleges that it was misleading for Fund V not to include the 10X Living at Delray property in its disclosures because Cardone had already purchased the property. However, Defendants specifically disclosed that management may pre-fund a property, and that funds from the offering might be used to replace the pre-funding. In addition, Defendants disclosed that the Funds were "blind pool offerings," *i.e.*, that investors would not be able to examine the economics of the investments made by the Funds. Moreover, Defendants disclosed that the Manager had sole discretion to make decisions regarding which properties would be acquired by each of the Funds, and that "[t]he interest of the Manager, our principals and their other affiliates may conflict with your interests." Therefore, the Court concludes that Plaintiff has failed to adequately allege that Defendants omitted material information regarding the acquisition of the 10X Living at Delray property.

iv. The Interest Paid to Mr. Cardone

Plaintiff alleges that Defendants did not disclose that Cardone charged interest on the loans he made to the Funds in order to acquire properties. However, Defendants did disclose to investors that the Funds could enter into related-party transactions with Cardone, that such transactions were not arms-length, and that this presented an inherent potential for conflicts of interest. Defendants also disclosed that the Funds would need to obtain various forms of financing from many potential sources. In addition, Defendants disclosed that the Funds "may engage the Manager or affiliates of the Manager to perform services at prevailing market rates." Plaintiff does not allege that the interest on loans from Cardone exceeded prevailing market rates or were otherwise improper. Therefore, the Court concludes that Plaintiff has failed to adequately allege that Defendants omitted material information regarding interest charged by Cardone on the loans he made to the Funds for the acquisition of properties.

Accordingly, Plaintiff's first claim for relief for violation of Section 12(a)(2) is dismissed.

4. Cardone Capital and Cardone Are Not "Sellers" Within the Meaning of Section 12(a)(2).

In their Motion, Defendants argue that Plaintiff cannot state a Section 12(a)(2) claim against Cardone and Cardone Capital for the additional reason that they are not "sellers" within the meaning of Section 12(a)(2). Section 12(a)(2) of the Securities Act

establishes liability for persons who offer or sell securities by means of communications that include untrue or misleading statements or omissions. *See* 15 U.S.C. § 77*l*(a)(2). In *Pinter v. Dahl*, 486 U.S. 622, 647–48 (1988), the Supreme Court held that a person may be liable under the predecessor of Section 12(a)(1) if the person either: (1) passes title to the securities to the plaintiff; or (2) solicits the purchase, motivated in part by his own financial interests.

In this case, Plaintiff does not allege in the FAC or argue in his Opposition that either Cardone or Cardone Capital passed title to the securities to Plaintiff. As a result, Cardone and Cardone Capital cannot be held liable under the first prong of *Pinter*. Under the second prong of *Pinter*, a defendant may qualify as a seller if the defendant solicited the purchase from the plaintiff and was motivated by financial gain. *Vignola v. FAT Brands, Inc.*, 2019 WL 6888051, at *4 (C.D. Cal. Dec. 17, 2019). To solicit a purchase, a defendant must do more than merely assist in a solicitation or publicly recommend a security. *Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 2001 WL 1111508, at *7 (S.D.N.Y. Sept. 20, 2001). Instead, a defendant must actively and directly solicit the plaintiff's investment. *Id.* (dismissing claims because "Plaintiff . . . has failed to allege that plaintiff in fact purchased the Certificates as a result of [defendant's] solicitation"). Thus, a defendant does not qualify as a seller under this prong when making a public presentation describing and recommending an investment. *Hudson v. Sherwood Sec. Corp.*, 1989 WL 108797, at *1 (N.D. Cal. July 27, 1989) (holding that allegations that defendant "made a presentation at a meeting of prospective investors" insufficient to

establish Section 12 liability), *aff'd*, 951 F.2d 360 (9th Cir. 1991).

In this case, Plaintiff alleges that Cardone and Cardone Capital made statements on social media highlighting the benefits of investment in the Funds. However, Plaintiff does not allege that Cardone or Cardone Capital was directly and actively involved in soliciting Plaintiff's investment, or that Plaintiff relied on such a solicitation when investing. *See Steed Fin. LDC*, 2001 WL 1111508, at *7. Therefore, neither Cardone nor Cardone Capital can be held liable as a "seller" under the second prong of *Pinter*. *See, e.g., Shain v. Duff & Phelps Credit Rating Co.*, 915 F. Supp. 575, 581 (S.D.N.Y. 1996) (holding that the defendants could not be statutory sellers for purposes of Section 12 "absent any allegations of direct contact of any kind between defendants and plaintiff-purchasers") (*quoting In re Newbridge Networks Sec. Litig.*, 767 F. Supp. 275, 281 (D.D.C. 1991).

Accordingly, Plaintiff's first claim for relief for violation of Section 12(a)(2) is dismissed as to Cardone and Cardone Capital on the alternative grounds that they are not sellers under Section 12(a)(2).

B. Plaintiff's Section 15 Claim Fails.

In his second claim for relief, Plaintiff alleges a claim for violation of Section 15 of the Securities Act against Cardone and Cardone Capital. To state a claim under Section 15 – the control person liability provision – of the Securities Act, a plaintiff must show that: (1) there is a primary violation of the Securities Act; and (2) the defendant directly or indirectly controlled the person or entity liable for the primary

violation. *See SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011).

In this case, because Plaintiff failed to allege a primary violation of the Securities Act, Plaintiff has failed to allege a control person liability claim against Cardone and Cardone Capital. Accordingly, Plaintiff's second claim for relief for violation of Section 15 of the Securities Act is dismissed.

IV. Conclusion

For all the foregoing reasons, Defendants' Motion is GRANTED. Plaintiff's FAC is DISMISSED without leave to amend, and this action is DISMISSED with prejudice.[12] Plaintiff and Defendants are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before April 30, 2021. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment, along with

[12] Although the Court recognizes that this Circuit has a liberal policy favoring amendments and that leave to amend should be freely granted, the Court is not required to grant leave to amend if the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile"). In this case, Plaintiff has had two opportunities to allege claims against Defendants. In addition, Plaintiff has failed to indicate in his Opposition what additional facts he could allege in order to state a viable claim against Defendants.

a declaration outlining their objections to the opposing party's version, no later than April 30, 2021.

IT IS SO ORDERED.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55564

LUIS PINO, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

CARDONE CAPITAL, LLC; GRANT CARDONE;
CARDONE EQUITY FUND V, LLC;
CARDONE EQUITY FUND VI, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California, Los Angeles
No. 2:20-cv-08499-JFW-KS

Filed February 22, 2023
DktEntry 56-1

NOT FOR PUBLICATION

ORDER

Before: CHRISTEN and BRESS, Circuit Judges, and LYNN,* District Judge.

The memorandum disposition filed on December 21, 2022, is amended as follows: On page 11, line 2,

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* The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

insert <On remand, Defendants may raise arguments to the district court regarding application of the *Omnicare* standard, but Defendants may not relitigate any of the issues resolved by this memorandum disposition.>.

With this amendment, the petition for panel rehearing filed on February 3, 2023, is DENIED. No further petitions for rehearing will be accepted.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55564

LUIS PINO, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

CARDONE CAPITAL, LLC; GRANT CARDONE;
CARDONE EQUITY FUND V, LLC;
CARDONE EQUITY FUND VI, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California, Los Angeles
No. 2:20-cv-08499-JFW-KS
John F. Walter, District Judge, Presiding

Argued and Submitted March 17, 2022
San Francisco, California

Filed February 22, 2023
DktEntry 56-1

NOT FOR PUBLICATION

AMENDED MEMORANDUM*

Before: CHRISTEN and BRESS, Circuit Judges, and LYNN,** District Judge.

Plaintiff Luis Pino appeals the district court's ruling granting the Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), filed by Defendants Grant Cardone ("Cardone"), Cardone Capital, LLC ("Cardone Capital"), Cardone Equity Fund V, LLC ("Fund V"), and Cardone Equity Fund VI, LLC ("Fund VI").

Pino filed suit alleging violations of the Securities Act of 1933, based on material misstatements or omissions in connection with real estate investment offerings. Specifically, Pino brought claims under § 12(a)(2) of the Act against all Defendants, and a claim pursuant to § 15 of the Act against Cardone and Cardone Capital. In the First Amended Complaint ("FAC"), Pino alleged that when soliciting investments in Funds V and VI, Defendants made untrue statements of material fact or concealed or failed to disclose material facts in Instagram posts and a YouTube video, and in the Fund V and VI offering circulars, during the period between February 5, 2019, and December 24, 2019, and that none of Defendants' "test the waters" communications—*i.e.*, statements not contained within the offering circulars—contained sufficient cautionary language.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

Defendants moved to dismiss the FAC for failure to state a claim under Rule 12(b)(6), which the district court granted. Pino appeals. We have jurisdiction under 28 U.S.C. § 1291.

Pino's challenge to the district court's ruling that Cardone and Cardone Capital are not statutory sellers under the Securities Act is addressed in an opinion filed concurrently with this memorandum disposition. Because the FAC identifies actionable alleged misstatements regarding projected internal rates of return and distributions and debt obligations, which are not insulated by the bespeaks caution doctrine, we reverse the district court's dismissal of Pino's claims of violations of §§ 12(a)(2) and 15 of the Securities Act as to those alleged misstatements. We remand to the district court to allow Pino to replead consistent with our memorandum disposition and opinion. We affirm the district court's dismissal of Pino's Securities Act claims on the remainder of the alleged misstatements or omissions.

Standard of Review

We review de novo a district court's dismissal on the pleadings. *Moore v. Trader Joe's Co.*, 4 F.4th 874, 880 (9th Cir. 2021). Dismissal under Rule 12(b)(6) is warranted when the complaint fails to state sufficient facts to establish a plausible claim to relief. *Id.* When reviewing a dismissal pursuant to Rule 12(b)(6), the Court accepts "as true all facts alleged in the complaint" and construes them "in the light most favorable to plaintiff." *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019) (internal quotations omitted).

Discussion

Because the parties are familiar with the facts of the case, we do not recite them in detail here. Section 12(a)(2) of the Securities Act of 1933 ("Securities Act") imposes liability on "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact . . . to the person purchasing such security from him." 15 U.S.C. § 77l(a)(2). To state a claim under Section 12(a)(2), a plaintiff must allege that (1) the defendant is a statutory seller; (2) the sale was effected by means of a prospectus or oral communication; and (3) the communication contains an "'untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading.'" *In re Daou Sys., Inc.*, 411 F.3d 1006, 1028–29 (9th Cir. 2005) (quoting 15 U.S.C. § 77l(a)(2)).

The parties briefed the case with respect to our decision in *In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1113 (9th Cir. 1989), which provides that a projection or statement of belief may be actionable under the federal securities laws if (1) the speaker does not actually believe the statement, (2) there is no reasonable basis for the statement, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy. More recently, in *City of Dearborn Heights Act 345 Police & Fire Retirement System v. Align Technology, Inc.*, 856 F.3d 605, 616 (9th Cir. 2017), this Court held that claims premised on statements of opinion must satisfy the pleading standard articulated by the Supreme Court in *Omnicare, Inc. v. Laborers District*

Council Construction Industry Pension Fund, 575 U.S. 175 (2015). In *Omnicare*, the Supreme Court made clear that a statement of opinion cannot constitute an "untrue statement of fact" under the securities laws unless the speaker does not actually believe the statement. 575 U.S. at 184. The Supreme Court further stated: "an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion." *Id.* at 194. Accordingly, we held in *Dearborn* that to plead that a statement of opinion is false by omission, the plaintiff cannot simply allege there was "no reasonable basis" for the statement, but instead must allege "'facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.'" 856 F.3d at 616 (quoting *Omnicare*, 575 U.S. at 194).

The district court erred in holding that the FAC did not state an actionable claim based on alleged misstatements relating to internal rate of return

("IRR")[1] and distributions,[2] which are not protected by the bespeaks caution doctrine. The FAC includes

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[1] Specifically, the FAC identifies the following actionable alleged misstatements relating to IRR projections: an April 22, 2019, YouTube Video in which Cardone states: "[I]t doesn't matter whether [the investor] [is] accredited [or] non-accredited . . . you're gonna walk away with a 15% annualized return. If I'm in that deal for 10 years, you're gonna earn 150%. . . ." (FAC ¶¶ 1, 56); a May 5, 2019, Instagram post in which Cardone Capital's account refers to: "15% Targeted IRR," "monthly distributions," and "long term appreciation" (*id.* ¶ 57); a September 4, 2019, Instagram post in which Cardone Capital's account references "10X Living at Breakfast Point" in "Fund 4 & 5," and refers to "Target IRR 15%" (*id.* ¶ 61); and an October 16, 2019, Instagram post in which Cardone Capital's account refers to 10X Living at Panama Beach City, a property "in both Fund VI and Fund VIII," and recites a "Targeted Investor IRR" of "17.88%" and a "Targeted Equity Multiple" of "2.5–3X" (*id.* ¶ 59).

[2] Specifically, the FAC identifies the following actionable alleged misstatements relating to distributions: a February 5, 2019, Instagram post in which Cardone asks potential investors on his personal Instagram account, "Want to double your money[?]" and states that an investor could receive $480,000 in cash flow after investing $1,000,000, achieve "north of 15% returns after fees, and obtain a "118% return amounting to 19.6% per year" (FAC ¶ 67); a September 18, 2019, Instagram post on Cardone Capital's account which asks, "What does it take to receive $50,000 in yearly dividend income?" and responds "Invest $1,000,000 with Cardone Capital" (*id.* ¶ 70); a December 24, 2019, Instagram Post that posits, "Unlike Santa, I pay similar distributions every single month" (*id.* ¶ 76); a January 31 (no year) Instagram post stating, "Last year I sent out $20M in distributions. More importantly investors have their capital sitting next to mine, protected, waiting for appreciation. We [target] to sell properties when I can return to investors at least 2X-3X their investment" (*id.* ¶ 9); and a September 17, 2019, Instagram video in which Cardone advertised that investing

allegations that Cardone told investors they would realize a 15% IRR, while omitting that the SEC had previously requested that Defendants remove from the proposed Fund V offering circular references to their "strategy to pay a monthly distribution to investors that will result in a return of approximately 15% annualized return on investment," because the Fund had commenced only limited operations, had not paid any distributions to date, and did not appear to have a basis for such a projected return. FAC ¶ 55.

The statements recited in the FAC relating to IRR and distributions are actionable. Pino plausibly alleges that by omitting mention of the SEC's communication to Cardone Capital that there was no basis to represent that investors would receive monthly distributions resulting in a 15% annualized return on their investments, the alleged misstatements relating to IRR and distributions were misleading to a reasonable person reading the statements fairly and in context. *See Omnicare*, 575 U.S. at 188–89 ("[I]f the issuer made the statement . . . with knowledge that the Federal Government was taking the opposite view, the investor again has cause to complain: He expects not just that the issuer believes the opinion . . . but that it fairly aligns with the information in the issuer's possession at the time."). Such facts likewise "call into question [Cardone's] basis for offering" his projections of a 15% IRR and promises of large monthly distributions or that investors would double or triple their

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$220,000 would allow investors to earn 'about $12,000-$15,000 a year' in distributions" (*id.* ¶¶ 12–14).

investments. *City of Dearborn Heights*, 856 F.3d at 616 (quoting *Omnicare*, 575 U.S. at 194).

The district court failed to interpret the FAC's allegations regarding debt obligations in the light most favorable to Pino, by disregarding defendants' statements about "who is responsible for the debt? The answer is, Grant!" and statements that the properties acquired by the Funds were assets, rather than liabilities. The FAC plausibly alleged that these statements were "untrue statements of fact," 15 U.S.C. § 77l(a)(2), because they suggest investors are not responsible for the "significant monthly debt service payments." FAC ¶ 82.[3]

In addition, the district court erred in holding that the bespeaks caution doctrine warranted dismissal of all alleged misstatements. The bespeaks caution doctrine allows a court to rule, as a matter of law, that a defendant's "forward- looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994). A dismissal on the pleadings based on the bespeaks caution doctrine is justified only by a "stringent" showing that "'reasonable minds could not disagree that the challenged statements were not misleading.'" *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1409 (9th Cir. 1996)). Whether a statement in a public document with cautionary

[3] Judge Bress does not join this paragraph and would find the debt obligation statements not actionable.

language is misleading may only be determined as a matter of law when reasonable minds could not disagree that the "mix" of information in the document is not misleading. *Id.*

This Court has not directly addressed whether the bespeaks caution doctrine requires cautionary language to appear in the same communication as the statement it insulates. However, even if we assume, without deciding, that cautionary language need not necessarily appear in the same document as the alleged misstatement, the warnings in the offering circulars do not insulate misstatements made in Instagram posts and YouTube videos under the bespeaks caution doctrine. "[T]he bespeaks caution doctrine applies only to precise cautionary language which directly addresses itself to future projections, estimates or forecasts in a prospectus." *Worlds of Wonder*, 35 F.3d at 1414. Here, the offering circulars contain only generalized cautionary language that is too broad to immunize the otherwise actionable alleged misstatements about IRR and distributions, rendering the bespeaks caution doctrine inapplicable. In addition, the offering circulars for Funds V and VI were finalized and publicly filed in December 2018 and September 2019, respectively, while the alleged misstatements in the Instagram posts and YouTube video were primarily made later, from February through December 2019, and thus many of the misstatements are too attenuated from the release of the offering circulars to be insulated by the warnings contained therein.

In contrast, the district court did not err in holding that misrepresentations or omissions made in

the Fund V and VI offering circulars themselves are not actionable.[4] Pino did not sufficiently allege that the descriptions in the offering circulars of Defendants' strategy to purchase properties below market value was misleading. Instead, Pino only alleges that the Funds overpaid in the purchase of a single property, the Delray property, which does not bear on Defendants' intended strategy to purchase property at below-market prices.

In addition, any alleged omission regarding Cardone receiving an acquisition fee from sale of the Delray property in the Fund V offering is not actionable. The Fund V offering circular expressly disclosed the potential for conflicts of interest and related-party transactions between the Fund, Cardone Capital, and its affiliates, and that Defendants had sole discretion to decide what properties to purchase, so the allegation that Defendants engaged in undisclosed self-dealing is not actionable. For the same reason, the district court correctly dismissed Pino's claims that the Funds did

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[4] Specifically, the following alleged omissions and misstatements in the offering circulars are not actionable: (1) that the offering circulars represented the Funds' strategy was to acquire multi-family apartment communities at "below-market prices," when in fact Cardone and Cardone Capital purchased the "Delray" property at a high price to maximize their fee (FAC ¶¶ 86–87); (2) that the offering circulars represented that necessary financing would be secured before properties were obtained, when in fact Cardone purchased the properties from third parties before selling them to the Funds without informing investors (FAC ¶¶ 88–93); and (3) the Funds did not disclose that Cardone charged investors interest on money loaned to the Fund to acquire properties (FAC ¶¶ 96–100).

not disclose that Cardone Capital was extending commercially unnecessary, interest-bearing loans to the Funds; the offering circulars warn that Cardone and Cardone Capital may obtain lines of credit and long-term financing that may be secured by Fund assets, and have broad authority to incur debt and high debt levels.

For the foregoing reasons, we reverse the district court's dismissal of Pino's §§ 12(a)(2) and 15 claims as to Defendants' alleged statements regarding a 15% IRR and distributions, as well as the Funds' debt obligations. Because Pino did not plead these claims under the standard in *Omnicare*, the district court shall grant Pino leave to amend the FAC to replead these claims consistent with this memorandum disposition and opinion. We affirm the district court on Pino's Securities Act claims on the remainder of the alleged misstatements. On remand, Defendants may raise arguments to the district court regarding application of the *Omnicare* standard, but Defendants may not relitigate any of the issues resolved by this memorandum disposition.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[5]

[5] The parties shall bear their own costs on appeal.

Appendix F

Relevant Statutes

15 U.S.C. § 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any

income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

15 U.S.C. § 77o. Liability of controlling persons

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.