IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,	§	
V.	§	CAUSE NO. A-15-CV-374-LY
DELL INC.; MICHAEL S. DELL; BRIAN T. GLADDEN; AND STEPHEN J. FELICE, DEFENDANTS.	§	

ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Before the court are Lead Plaintiff's Motion for Class Certification and Appointment of Class Representative and Class Counsel Pursuant to Fed. R. Civ. P. 23(a) and (b)(3) filed March 9, 2017 (Doc. #108); Defendants' Opposition to Lead Plaintiff's Motion for Class Certification and Appointment of Class Representative and Class Counsel filed May 30, 2017 (Doc. #114); Lead Plaintiff's Reply Memorandum of Law in Further Support of Motion for Class Certification filed July 13, 2017 (Doc. #119); and Defendants' Sur-Reply in Opposition to Lead Plaintiff's Motion for Class Certification filed July 28, 2017 (Doc. #125). Having considered the motion, response, reply, sur-reply, and the applicable law, the court will grant the motion for the reasons to follow.

I. Background

This is securities-fraud action brought on behalf of a purchasers of Dell Inc. securities[1] between February 22, 2012, and May 22, 2012 (the "Class Period"), against Defendants Dell Inc. ("Dell") and certain of its past and present officers[2] (collectively referred to as "Defendants") for violating Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78b, and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. 240.10b-5. Dell is a global information-technology company that designs, develops, manufactures, markets, sells, and supports mobility and desktop products, including notebooks, tablets, desktop personal computers, workstations, smartphones, servers, and networking products.

Plaintiffs allege that on February 21, 2012, Defendants issued a press release containing false and misleading statements and omissions regarding Dell's performance during its prior fiscal year,[3] including Dell's growth in the Asia-Pacific, Japanese, European, Middle Eastern, and African regions. Plaintiffs further allege that at that same time, Dell was experiencing weakened demand for and severe pricing pressure associated with its notebook and desktop product lines ("PCs"). Due to a significant shift in PC product demand and increasing competition from efficient low-cost PC manufacturers, the pricing pressure Dell was experiencing was so extreme that Dell decided not to pursue higher-margin premium PC sales in certain overseas markets.

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[1]The purchasers of Dell Inc. securities are represented by Lead Plaintiff City of Pontiac General Employees' Retirement System. For purposes of the motion, the court will refer to the purchasers their representative collectively as "Plaintiffs."

[2]Defendants Stephen J. Felice, Brian T. Gladden, and Michael S. Dell.

[3]Dell's fiscal year 2012 ended on February 3, 2012, and the first quarter of fiscal year 2013 began on February 4, 2012 and ended on May 4, 2012.

As a result, on May 22, 2012, Dell announced a half-billion-dollar shortfall in revenue relative to what Dell projected for the first quarter of 2013. Dell's operations cash flow dropped from $465 million in the first quarter of 2012 to negative $138 million in the first quarter of 2013, the first negative quarter since the first quarter of 2008. Dell attributed its revenue shortfall to its decision to forgo premium PC sales in its Asia-Pacific, Japanese, European, Middle Eastern, and African markets to avoid the negative impact on Dell's reported margins, weak demand for Dell's products, and poor sales-force productivity and execution. On May 23, 2012, one day after the revenue-shortfall announcement, the price of Dell stock declined more than 17%, the largest single day decline in Dell's stock price in over a decade on volume of more than 100 million shares. Before Dell's announcement and during the three-month-long Class Period, however, Plaintiffs allege that Dell's executives sold over 2.4 million shares of Dell stock worth approximately $41.3 million, which was nearly three-and-a-half times the amount of shares sold during all of 2011. Plaintiffs assert that these developments, which came to light over the course of the first quarter of fiscal year 2013 and had a negative impact on the final results for that quarter, were already known to Defendants and should have been disclosed as early as February 21, 2012.

This action is brought by City of Pontiac General Employees' Retirement System (the "Retirement System") on behalf of all who purchased Dell common stock during the Class Period —between February 22, 2012 and May 22, 2012. The Retirement System originally filed this action in the United States District Court for the Southern District of New York on May 21, 2014. The case was transferred to this court on April 30, 2015. The Retirement System filed an amended complaint on July 27, 2015 (Doc. #72). Defendants moved to dismiss the Retirement System's amended complaint under Federal Rule of Civil Procedure 12(b)(6) and the Private Securities Litigation

Reform Act, 15 U.S.C. §§ 78u-4, -5 (the "Reform Act") on September 8, 2015. The court denied the motion on September 16, 2016, concluding that the Retirement System sufficiently alleged Defendants' failure to reveal known, material adverse facts regarding Dell's PC market and PC-sales prospects in the future, adequately pleaded the *scienter* element of the applicable Section 10(b) and Rule 10b-5 analysis, and sufficiently alleged control-person liability against Gladden, Felice, and Michael Dell under Section 20(a) of the Exchange Act (Doc. #93). The court now addresses the Retirement System's motion for class certification.

The Retirement System's proposed class is as follows:

> All persons and entities who bought or acquired Dell common stock between February 22, 2012 and May 22, 2012, inclusive, and who were damaged thereby. Excluded from the Class are Defendants; the officers and directors of the Company at all relevant times; members of their immediate families and their legal representatives, heirs, successors or assigns; and any entity in which Defendants have or had a controlling interest.

II. Analysis

Federal Rule of Civil Procedure 23 sets forth the rules for establishing a certifiable class in federal court. Subsection (a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
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> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Subsection (b) directs that a class action may only be maintained if one of the following is satisfied:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b).

Accordingly, a class may be properly certified if it meets the requirements of Rule 23(a) and one or more of the provisions of Rule 23(b) are satisfied. The trial court "maintains substantial discretion in determining whether to certify a class action." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (citation omitted). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007) (quoting *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004)).

Defendants oppose class certification on a number of grounds. Specifically, Defendants argue: (1) the Retirement System is subject to unique defenses that destroy typicality under Rule 23(a)(3); (2) the Retirement System cannot adequately represent the class pursuant to Rule 23(a)(4); and (3) the class cannot be certified because individualized reliance issues predominate under Rule 23(b)(3).[4]

> The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700–701 (1979). To come within the exception, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Rule 23. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). The Rule "does not set forth a mere pleading standard." *Ibid.* Rather, a party must not only "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).

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[4] Defendants do not challenge the Rule 23(a) requirements of numerosity and commonality. Having reviewed the pleadings and all supporting evidence presented by the parties, the court concludes that the Retirement System has met the burden of establishing numerosity and commonality in this case.

Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013). The Fifth Circuit requires district courts to "look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.' " *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). *See also M.D. ex re. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012).

Federal Rule of Civil Procedure 23(a)

Typicality

Pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure, a class may be certified only if the "claims or defenses of the representative parties are typical of the claims or defenses of the class." The test "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1990) (quoting *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997)).

The Retirement System assert that all class members' claims arise from their investment in Dell stock during the Class Period and that they will allege that their purchase of Dell stock at artificially inflated prices was a result of Defendants' material misrepresentations. Defendants assert that the Retirement System is subject to defenses that destroy typicality of the claims of the class because the testimony of Gerald Seizert, an investment manager for the Retirement System, is contradictory to the claims alleged in the amended complaint.

Having reviewed the pleadings and all supporting evidence in this case, and looking beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law, the

court finds that the Retirement System has asserted typicality in this case. Assuming Seizert's testimony contradicts the allegations in the amended complaint, Defendants will be able to proffer that testimony at trial; but it does not show that the Retirement System is not typical to represent the class. Moreover, Defendants have not shown that statements of Seizert are binding on the Retirement System at this time.

Adequacy

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that "the representative parties will fairly and adequately protect the interests of the class." The rule "mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees." *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). The court must find that class counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *N. Am. Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 (5th Cir. 1979) (quoting *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969)). Additionally, "the class representatives [must] possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." *Feder v. Elec. Data Sys. Corp*, 429 F.3d 125, 129–30 (5th Cir. 2005) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482–83 (5th Cir. 2001)). Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625–26 (citing *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (considering whether named

plaintiffs have "an insufficient stake in the outcome or interests antagonistic to the unnamed members" in evaluating adequate representation requirement)).

The Retirement System asserts that as 70-year old pension fund providing retirement benefits to over 1,000 participants that purchased over 4,900 shares of Dell stock during the Class Period and was injured by the same wrongful conduct as the class, it is directly aligned with that of all class members. The Retirement System and the absent class members sustained losses in connection with their purchase of Dell stock as a result of the same alleged material misrepresentations; as the Retirement System proves its claims, it will also necessarily prove the claims of absent class members. Thus, the Retirement System contends, the class interests are not antagonistic for representation purposes because all class members are asserting the common right of achieving a maximum potential recovery for the class. *See Stott v. Capital Fin. Servs.*, 277 F.R.D. 316, 326 (N.D. Tex. 2011).

In addition, the Retirement System asserts that it has demonstrated a willingness and ability to serve as class representative by diligently prosecuting the case by maintaining regular contact with counsel regarding the status of this action and assisting in responding to discovery requests served on it by Defendants. Finally, the Retirement System contends that it has protected the interests of the class by retaining Robbins Geller Rudman & Dowd LLP as class counsel, arguing that counsel is among the most experienced securities class action law firms in the country. Defendants assert that the record reveals that the Retirement System "is merely a figurehead plaintiff willing to lend its name to a case about which it knows nothing." The court disagrees.

The court finds that the Retirement System has satisfied the adequacy requirement. The Retirement System's counsel have certified that they have been involved in other class-action cases,

that the Retirement System has been and continues to actively participate in the litigation matters in this case, and that the Retirement System has the ability to effectively protect the interests of class members. Furthermore, the Retirement System does not have any conflicts of interest with class members. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 568 U.S. 455, 466 (2013) (internal citations omitted). Having determined that the Retirement System has satisfied the typicality and adequacy requirements of Rule 23(a), the court will now address the requirements of Rule 23(b).

Federal Rule of Civil Procedure 23(b)(3)

To certify a class under Federal Rule of Civil Procedure 23(b)(3), the court must determine that "questions of law or fact common to class members predominate over any questions affecting only individuals members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The purpose of Rule 23(b)(3) is to identify those actions in which certification of a class "would achieve economies of time, effort and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (citation omitted an internal quotation marks omitted). Defendants do not challenge the superiority of conducting the case as a class action. Therefore, the court will only address the issue of predominance.

The predominance inquiry requires courts "to consider how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir.

2003) (citation and internal quotation marks omitted). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623–24.

"Investors can recover damages in a private securities fraud action only if they prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405 (2014) ("*Halliburton II*"). In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the U.S. Supreme Court held that investors could satisfy the reliance requirement "by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements" so that "anyone who buys or sells the stock at the market price may be considered to have relied on those misstatements." *Id.* Thus, to invoke the *Basic* presumption of reliance, a plaintiff must show "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Id.* at 2408. *See also Greenberg v. Crossroads Sys.*, 364 F.3d 657, 661 (5th Cir. 2004).

The Retirement System asserts that it has demonstrated that the alleged misrepresentations were publicly known, that it purchased stock between the time the misrepresentations were made and the truth was revealed, and that Dell stock traded in an efficient market. The court agrees. Having satisfied the requirements for the *Basic* fraud-on-the-market presumption of reliance, Defendants must rebut the presumption by proving that the asserted misrepresentations had no effect on the market price of Dell stock. *Id.* at 2417.

Defendants assert that the alleged misrepresentations in this case did not have an impact on Dell's stock price (1) because either the purported corrective disclosure did not correct the alleged misstatement at issue or (2) because the substance of the alleged misrepresentation was already disclosed to the market and did not result in a statistically significant impact on Dell's stock price. Defendants also argue that the absence of price impact is further demonstrated by the fact that the price decline at the end of the Class Period can be attributed to other factors unrelated to the alleged misrepresentations, which likewise rebuts any presumed connection between that price decline and the prior alleged misstatements.

"Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248. However, Defendants may only introduce at the class certification stage evidence of lack of price impact that *Amgen* does not otherwise preclude–that "has ... to do with the issue of predominance at the class certification stage." *Halliburton II*, 134 S. Ct. at 2416. Evidence that relates to an issue that is "susceptible to common, classwide proof" and whose resolution in favor of the defendant will "necessarily defeat every plaintiff's claim on the merits," can only be considered at the merits phase. *Id.*; *Erica P. John Fund, Inc. v. Halliburton Co.*, WL 10714013, at *2 (5th Cir. Nov. 4, 2015). In this case, the issues Defendants seek to raise fall under the latter category.

Although the corrective nature of a disclosure and the prior disclosure of the substance of the alleged misrepresentation both bear on the issue of price impact, they do not affect the question of predominance at the class-certification stage. *See Halliburton II*, 134 S. Ct. at 2416. That is because both issues will apply to all plaintiffs' claims on the merits. "The class is entirely cohesive:

It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 460 (2013).

Finally, the court finds that Defendants' contention that other factors unrelated to the alleged misrepresentations contributed to the price decline at the end of the Class Period relates to the issue of loss causation and therefore cannot serve to rebut the *Basic* presumption of reliance at class certification. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) ("*Halliburton I*"). Consequently, the court finds that the Retirement System has satisfied the requirements of Rule 23(b)(3). Therefore, the court concludes that class certification is appropriate.

III. Conclusion

IT IS THEREFORE ORDERED that Lead Plaintiff's Motion for Class Certification and Appointment of Class Representative and Class Counsel Pursuant to Fed. R. Civ. P. 23(a) and (b)(3) filed March 9, 2017 (Doc. #108) is **GRANTED**. This action shall proceed as a certified class action under Rule 23(c) of the Federal Rules of Civil Procedure consisting of: All persons and entities who bought or acquired Dell common stock between February 22, 2012 and May 22, 2012, inclusive, and who were damaged thereby. Excluded from the Class are Defendants, the officers and directors of the Company at all relevant times; members of their immediate families and their legal representatives, heirs, successors or assigns; and any entity in which defendants have or had a controlling interest.

IT IS FURTHER ORDERED that Plaintiff City of Pontiac General Employees' Retirement System is appointed a Class Representative.

IT IS FURTHER ORDERED that Robbins Geller Rudman & Dowd LLP is appointed as class counsel for the above class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that a Conference after Class Certification is set in Courtroom No. 7, Seventh Floor of the United States Courthouse, 501 West 5th Street, Austin, Texas, on May 18, 2018, at 2:00 p.m.

SIGNED this 29th day of March, 2018.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE