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 MOTION TO DISMISS

Before the court are Defendants' Motion to Dismiss Plaintiffs' Amended Complaint filed September 8, 2015 (Doc. #74); Lead Plaintiff's Opposition to Defendants' Motion to Dismiss the Amended Complaint filed October 22, 2015 (Doc. #78); and Defendants' Reply Brief in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint filed November 23, 2015 (Doc. #83). A hearing was held before the court on the motion on December 4, 2015, after which Defendants filed a letter brief on regarding a recent decision on April 21, 2016 (Doc. #89), and Lead Plaintiff filed a Response to Defendants' Notice of Recent Decision on April 26, 2016 (Doc. #92). Having considered the motion, response, reply, arguments of counsel, supplemental letter briefs, along with the applicable law in this cause, the court is of the opinion that Defendants' motion to dismiss should be denied 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.

The following facts are adopted from Plaintiffs' amended complaint. 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

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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 to dismiss, 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.

experiencing was so extreme that Dell decided not to pursue higher-margin premium PC sales in certain overseas markets.

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 the amended

complaint on July 27, 2015 (Doc. #72). Defendants moved to dismiss the 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, arguing that the amended complaint fails to adequately plead the essential elements of false or misleading statements of material fact and *scienter*.

II. Analysis

A. Standard of Review

Motions to dismiss under Rule 12(b)(6) "are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs., Inc. v. Singh,* 428 F.3d 559, 570 (5th Cir. 2005). Faced with a Rule 12(b)(6) motion to dismiss a Section 10(b) action, this court must accept all factual allegations in the complaint as true. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007) (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993)). In addition, the court must also draw all reasonable inferences in the plaintiff's favor. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Lovick v. Ritemoney, Ltd.,* 378 F.3d 433, 437 (5th Cir. 2004)).

This court "must assess whether the complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Spitzberg v. Hous. Am. Energy Corp.*, 758 F.3d 676, 683 (5th Cir. 2014) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In determining whether a claimant has pleaded sufficient facts, only specific facts, not mere conclusory allegations or unwarranted deductions, are accepted as true and are considered. *See Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). The issue is not whether the plaintiff will ultimately prevail, but whether the

plaintiff is entitled to offer evidence to support its claims. *See Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401–02 (5th Cir. 1996). Thus, this court may dismiss for failure to state a claim only if the court can determine with certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

B. Section 10(b) Claim

Section 10(b) of the Exchange Act prohibits the use, in connection with the purchase or sale of a security, of "any device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . . ." 15 U.S.C. § 78j(b). SEC Rule 10b-5, in turn, makes it unlawful for any person, in connection with the purchase or sale of a security, to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. The elements of a private securities-fraud claim under Section 10(b) and Rule 10b-5 are (1) a material misrepresentation or omission; (2) *scienter*—a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation—"a causal connection between the material misrepresentation and the loss." *Owens v. Jastrow*, 789 F.3d 529, 535 (5th Cir. 2015) (quoting *Lormand*, 565 F.3d at 238–39)).

"Securities fraud claims brought by private litigants" are "also subject to the pleading requirements imposed by the [Reform Act]." *Owens*, 789 F.3d at 535. "At a minimum, the [Reform Act] pleading standard incorporates the 'who, what, when, where, and how' requirements" of Federal Rule of Civil Procedure 9(b). *Id.* (quoting *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 349–50 (5th Cir. 2002)). This means that "a plaintiff pleading a false or misleading statement or

omission as the basis for a section 10(b) and Rule 10b-5 securities-fraud claim must, to avoid dismissal pursuant to Rule 9(b) and [the Reform Act]," identify the allegedly misleading statement with particularity, explain why the statement was misleading, identify the speaker, state when and where the statement was made, and plead with particularity what the person making the misrepresentation obtained thereby. *Goldstein v. MCI WorldCom*, 340 F.3d 238, 245 (5th Cir. 2003). Additionally, to adequately plead the element of *scienter*, "the [Reform Act] requires a plaintiff to 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Owens*, 789 F.3d at 535 (quoting 15 U.S.C. § 78u-4(b)(2)). In the Fifth Circuit, "[t]he required state of mind [for *scienter*] is an intent to deceive, manipulate, or defraud or severe recklessness." *Lormand*, 565 F.3d at 251 (quoting *Ind. Elec. Workers' Pension Trust Fund IBEW v. Shaw Grp., Inc.*, 537 F.3d 527, 533 (5th Cir. 2008)).

Defendants argue that Plaintiffs have failed to adequately plead two essential elements of a Section 10(b) securities-fraud claim: (1) material misrepresentation or omission and (2) *scienter*. The court will address each element in turn.

1. Material Misrepresentation

Defendants contend that Plaintiffs' allegations arise from statements made by Dell in a February 21, 2012 earnings press release and related conference call that took place the same day led by Gladden, Felice, and Michael Dell. Defendants assert that none of the statements are actionable because Defendants were simply disclosing accurate historical data, which does not become misleading even if less favorable results might be predictable by the company in the future. "A statement or omitted fact is 'material' if there is a substantial likelihood that a reasonable investor would consider the information important in making a decision to invest." *R&W Tech. Services Ltd.*

v. Commodity Futures Trading Com'n, 205 F.3d 165, 169 (5th Cir. 2000) (citing *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Moreover, Defendants argue that Plaintiffs have not pleaded any facts to suggest that any forward-looking statement made on February 21, 2012 was false when made. *See Shushany v. Allwaste, Inc.*, 992 F.2d 517, 524 (5th Cir. 1993) ("Statements that are predictive in nature are actionable only if they were false when made.")

Expressions of corporate confidence, including "generalized, positive statements about [a] company's competitive strengths, experienced management, and future prospects," are immaterial and, thus, not actionable under the federal securities laws. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003). Plaintiffs assert, however, that Gladden's statement that Dell "expect[s] [its] first quarter revenue to be approximately in line with [its] adjusted historical decline," which he made on the February 21, 2012 conference call, was used by analysts to estimate Dell would earn approximately $14.9 billion in revenue for the first quarter of 2013, which Plaintiffs allege Defendants failed to correct throughout the entire quarter, reasonably induced investors to believe that Dell had a legitimate expectation of revenues based upon the information then-available to Defendants about Dell's business. *See Plotkin v. IP Axess Inc., Etc.*, 407 F.3d 690, 697 (5th Cir. 2005) (reversing, in part, dismissal of securities case, finding complaint "adequately pleads that material omissions from [press] releases rendered those releases misleading"). Plaintiffs further allege that Defendants lacked a reasonable basis to tell investors to expect in-line revenues because "growth was stagnant, shipments were stalling and inventories were stockpiling, all of which resulted in far too much product and not enough demand for the [Dell's] PCs." Thus, Plaintiffs' argue, by misleadingly informing investors to expect results in-line with prior quarters while in possession of contrary information, Defendants "'affirmatively create[d] an impression of a state of affairs that differs in a

material way from the one that actually exists.'" *Ind. Elec. Workers' Pension Trust Fund IBEW*, 537 F.3d at 541. In addition, Plaintiffs argue that because they have sufficiently alleged facts that show that Defendants were aware of undisclosed facts that would undermine the accuracy of their forward-looking statements, the PSLRA's safe-harbor provision does not apply. *See Lormand*, 565 F.3d at 244. The court agrees.

The court concludes that, in light of Dell's specific problems, Defendants' statements and omissions regarding these problems may not be disregarded, as Plaintiffs allege in sufficient detail Defendants' failure to reveal known, material adverse facts regarding Dell's PC market and PC-sales prospects in the future.

2. Scienter

Scienter may be established by demonstrating the intent to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Thus, a plaintiff may establish *scienter* by demonstrating either intent or severe recklessness. *See Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 408 (5th Cir. 2001) (defining severe recklessness as highly unreasonable omissions or misrepresentations demonstrating extreme departure from standards of ordinary care). Circumstantial evidence can support a *scienter* inference. *Id.*

Defendants argue that Plaintiffs' *scienter* allegations are based on Defendants' "beliefs" instead of personal knowledge, and that none of Plaintiffs' allegations against the Gladden, Felice, and Michael Dell are sufficient to be imputed to Dell Inc. The court's review of the amended complaint, however, reveals specific allegations as to the individual defendants regarding what they knew or recklessly disregarded, including the company's ballooning inventories and operations deficiencies within its sales divisions due in part to a significant decline in PC sales growth caused by

a shift in demand away from higher-margin premium PCs, resulting in stagnant growth, stalling shipments, and stockpiling inventories, all of which are contradictory to Gladden's February 21, 2012 statements regarding Dell's projected revenue for the first quarter of 2013. Having reviewed the facts and allegations in Plaintiffs' amended complaint *in toto*, *see Goldstein v. MCI WorldCom*, 340 F.3d 238, 247 (5th Cir. 2003), this court concludes that the omissions in Defendants' statements give rise to a strong inference of *scienter*. The court notes that the strong-inference pleading standard does not license the court to resolve disputed facts at this stage in the case. *Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249, 258 (5th Cir. 2005) (quoting *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 666 (8th Cir. 2001)). Defendants' arguments are fact-based and are insufficient to support a motion to dismiss. The court finds that Plaintiffs have adequately pleaded the *scienter* element of the applicable Section 10(b) and Rule 10b-5 analysis. Therefore, the court concludes that Defendants' motion to dismiss Plaintiffs' Section 10(b) claim should be denied.

C. Section 20(a) Claim

Plaintiffs also allege control-person liability against Gladden, Felice, and Michael Dell under Section 20(a) of the Exchange Act. *See* 15 U.S.C. § 78t. "Control person liability is secondary only and cannot exist in the absence of a primary violation." *Shaw Group*, 537 F.3d at 545 (alteration in original) (quoting *Southland*, 365 F.3d at 383). Having concluded that Plaintiffs have sufficiently alleged a Section 10(b) claim, the Section 20(a) claim likewise survives Defendants' motion to dismiss.

III. Conclusion

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint filed September 8, 2015 (Doc. #74) is **DENIED**.

SIGNED this 16th day of September, 2016.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE