

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**In re: RESOURCE AMERICA
SECURITIES LITIGATION**

CIV. NO. 98-5446

MASTER FILE

CLASS ACTION

ORDER & MEMORANDUM

ORDER

AND NOW, to wit, this 26th day of July, 2000, upon consideration of (1) the Motion of the Resource America defendants¹ for Reconsideration of the Court's Order of September 3, 1999², or, in the Alternative, for Certification of that Order Pursuant to 28 U.S.C. § 1292(b) (Doc. 19, filed Sep. 16, 1999); (2) the Motion of defendant Grant Thornton for Reconsideration of the Court's Order of September 3, 1999 (Doc. 20, filed Sep. 17, 1999); (3) Plaintiff's Memorandum of Law in Opposition to Defendants' Motions (Doc. 22); (4) the Reply Brief in Support of defendant Grant Thornton's Motion for Reconsideration (Doc. 24); and the related submissions of the parties, **IT IS ORDERED** as follows:

1. Defendants' Motions for Reconsideration of the Court's Order docketed September 3, 1999 (Docs. 19 and 20) are **GRANTED**;
2. Upon reconsideration, defendants' original Motions to Dismiss the First Amended

¹The "Resource America defendants" are the corporate entity Resource America, Inc., and the following individually named defendants who were directors and/or officers of the company during the class period: Edward E. Cohen, Scott F. Schaeffer, Daniel G. Cohen, Michael L. Staines, Carlos C. Campbell, Andrew M. Lubin, Alan D. Schrieber, John S. White, Steven J. Kessler, and Nancy J. McGurk.

²The Court's Order is dated September 1, 1999; it was docketed on September 3, 1999.

Consolidated Complaint (Docs. 11 and 12), which were denied by the Court's Order docketed September 3, 1999, are **DENIED**;

3. The alternative relief sought by the Resource America defendants for certification of the Court's Order docketed September 3, 1999 pursuant to 28 U.S.C. § 1292(b) is **DENIED**; and

4. The request of the Resource America defendants for oral argument is **DENIED**.

IT IS FURTHER ORDERED that the Court will conduct a scheduling conference in due course.

MEMORANDUM

I. BACKGROUND

On February 22, 1999, plaintiffs filed their First Consolidated Amended Complaint (the "Amended Complaint") in this class action brought under § 10(b) of the Securities Exchange Act, see 15 U.S.C.A. § 78j(b), SEC Rule 10b-5 promulgated thereunder, see 17 C.F.R. § 240.10b-5, and § 20(a) of the Securities Exchange Act, see 15 U.S.C.A. § 78t-1. The putative class encompasses all persons who purchased stock of defendant, Resource America, Inc., from December 17, 1997 to February 22, 1999 (the "class period").

In the Amended Complaint, plaintiffs allege that the Resource America defendants, together with defendant Grant Thornton, LLP ("Grant Thornton"), engaged in a course of conduct that was designed to, and did materially, misstate the revenues and net income of Resource America, Inc. throughout the class period in direct violation of Generally Accepted Accounting Principles ("GAAP") by, inter alia,

(a) improperly recognizing gains from the sale of senior liens on its loan portfolio;

(b) improperly employing the accretion-of-discount method of recognizing revenue on distressed loans that Resource America, Inc. purchased at discounts;

(c) failing to properly discount cash flows on subordinated loan interests that Resource America, Inc. refinanced with other lenders; and

(d) engaging in concerted conduct to wrongfully increase Resource America, Inc.'s reported revenues. See Amended Complaint at ¶ 2.

According to the Amended Complaint, defendants employed a scheme involving purchasing of loans on income-producing properties, obtaining of artificially inflated appraisals on the properties securing the loans, and then selling certain senior loan interests to a related party or others and, relying on alleged artificially inflated appraisals, recognizing significant non-cash "gain on sale" and "accretion of discount" income, which was then used to materially overstate current and historical revenues, earnings and assets, on which members of the plaintiff class allegedly relied in purchasing stock. See Amended Complaint at ¶ 3.

On March 24, 1999 the Resource America defendants and defendant Grant Thornton filed separate Motions to Dismiss the Amended Complaint (the "Original Motions to Dismiss," Docs. 11 and 12) for failure to comply with the pleading requirements of Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act of 1995 (the "Reform Act"), see 15 U.S.C.A. § 78u-4 et. seq. On September 1, 1999 this Court issued an Order denying defendants' Motions to Dismiss without prejudice "to the right of the moving defendants to address the issues raised in the motions after completion of relevant discovery by motion for summary judgment and/or at trial." The order was docketed on September 3, 1999.

On September 16, 1999 the Resource America defendants moved the Court to reconsider its Order docketed September 3, 1999, or in the alternative, to certify the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In a separate motion filed on September 17, 1999, defendant Grant Thornton also asked the Court to reconsider its Order docketed September 3, 1999. It is these motions that are presently before the Court.

II. DISCUSSION

A. Motion to Reconsider Order Docketed September 3, 1999

Typically, a motion for reconsideration is filed pursuant to Federal Rule of Civil Procedure 59(e) or 60(b). See Scott v. EPA, No. 97-6529, 1999 WL 358918, at *1 (E.D. Pa. June 2, 1999) (noting that the “standards for granting a Motion for Reconsideration under [59(e) and 60(b)] are quite high”). However, neither Rule 59(e) nor 60(b) applies in this case because the order defendants seek to have reconsidered is not a final judgment or order but rather an interlocutory decision. See, e.g., Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994) (“Interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration. . . .”); Murr Plumbing, Inc. v. Scherer Bros. Fin. Svcs., 48 F.3d 1066, 1070 (8th Cir. 1995) (“The district court has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment. . . . An order denying a motion to dismiss a complaint under [Civil] Rule 9(b) is interlocutory in this sense.”).

A district court has the inherent power to reconsider interlocutory orders “when it is ‘consonant with justice to do so.’” Walker v. Pearl S. Buck Foundation, Inc., No. 94-1503, 1996 WL 706714, at *2 (E.D. Pa. Dec. 3, 1996) (quoting United States v. Jerry, 487 F.2d 600, 605 (3d

Cir. 1973)). Because of the interest in finality, however, courts should grant motions for reconsideration only sparingly. See Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1107 (E.D. Pa. 1992).

The Court has reviewed its Order docketed September 3, 1999 and agrees that under the circumstances reconsideration is appropriate, although not required, because the Court did not fully articulate in the Order the bases for its ruling. Accordingly, the Court will grant defendants' Motions for Reconsideration of that Order.

B. Reconsideration of Original Motions to Dismiss

1. The Resource America defendants' arguments

The Resource America defendants' original Motion to Dismiss the Amended Complaint raised two principal arguments³: (1) that Resource America, Inc.'s public SEC filings fully disclosed the facts plaintiffs allege were concealed from the market – a “truth on the market” defense; and (2) that the Amended Complaint's allegations of scienter are insufficient under the Reform Act.

The Resource America defendants' first argument – that dismissal is warranted because they disclosed the allegedly concealed facts in SEC filings – was not specifically addressed in the Court's Order docketed September 3, 1999. Upon reconsideration of that argument, the Court concludes that it does not warrant dismissal of the Amended Complaint.

Plaintiffs acknowledge that this is a “fraud on the market” case. See Amended Complaint,

³The Court notes that defendant Grant Thornton joined in these arguments in his original Motion to Dismiss the Amended Complaint. Additional arguments with respect to plaintiffs' allegations of scienter against Grant Thornton are addressed later in this Memorandum.

at ¶ 26. Accordingly, plaintiffs employ the presumption of reliance established by the fraud on the market doctrine; they allege that defendants made material misrepresentations or omissions which affected the market price of Resource America, Inc. common stock and that the plaintiffs, in purchasing the securities, relied on the integrity of the price established by the market.

In general, defendants may defend a fraud on the market case by “asserting that the information allegedly withheld from the market had in fact entered the market.” See In re Silicon Graphics, 970 F. Supp. 746, 753 (N.D. Cal. 1997) (quoting In re Apple Computer Sec. Lit., 886 F.2d 1109, 1113-14 (9th Cir. 1989)). This so-called “truth on the market” defense provides that “[i]f the allegedly withheld information has otherwise been supplied to the market and had its presumed effect on the market, then the alleged misrepresentation or omission in a particular public disclosure will not sustain a ‘fraud on the market’ claim.” Stepak v. Aetna Life & Casualty Co., No. 90-00886, 1994 WL 858045, at *8 (D. Conn. Aug. 29, 1994); see also Raab v. General Physics Corp., 4 F.3d 286, 289 (4th Cir. 1993).

The Resource America defendants raise a truth on the market defense, arguing that, based on the allegations of the Amended Complaint, “it is beyond dispute in this case that the relevant facts were disclosed.” Motion of Resource America Defendants for Reconsideration (Doc. 19), at 4; Original Motion of Resource America Defendants to Dismiss the Complaint (Doc. 12), at 27. In connection with this defense, they point to the Eleventh Circuit’s decision in Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999), for the proposition that “when considering a motion to dismiss in a securities fraud case, [a court] may take judicial notice . . . of relevant public documents required to be filed with the SEC...” Id. at 1277. According to the Resource America

defendants, their SEC filings adequately “describe the Company’s methods for accounting for accretion of discount income and for the gain on sale of senior lien interests in its loans . . . set forth on an aggregate and loan-by-loan basis the amount of such income for each relevant period, and . . . list the cost of each loan and the value of the underlying real estate as established by independent appraisal.” Motion of Resource America Defendants for Reconsideration (Doc. 19), at 4.

Upon viewing the allegations in the light most favorable to the plaintiffs, the Court concludes that the disclosures by the Resource America defendants are insufficient to warrant dismissal of the Amended Complaint pursuant to a truth on the market defense at this stage of the litigation. The Court reaches this conclusion for several reasons.

First, plaintiffs have not alleged in the Amended Complaint that defendants disclosed all the relevant facts in their public filings, despite what the Resource America defendants contend. On the contrary, the Amended Complaint alleges that Resource America’s financial statements were materially misleading when made. See Amended Complaint, at ¶¶ 38-50, 105-21. Furthermore, plaintiffs allege that defendants’ disclosures were inadequate and fraudulent because they failed to disclose that Resource America, Inc. used artificial and contrived appraisals to report revenue when none existed. See Plaintiffs’ Memorandum in Opposition to the Resource America Defendants Original Motion to Dismiss (Doc. 13), at 14-18.

Second, consistent with Bryant, the Court has considered Resource America, Inc.’s various public disclosures through its SEC filings during the relevant time period. However, “before the truth on the market defense can be applied, the defendants must prove that the information that was

allegedly withheld or misrepresented was ‘transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by defendant’s statements.’” In re Bell Atlantic Corp. Sec. Litig., No. 91-0514, et. al., 1997 WL 205709, at *26 (E.D. Pa. April 17, 1997) (quoting Provenz v. Miller, 102 F.3d 1478 (9th Cir. 1996)), aff’d, 142 F.3d 427 (3d Cir. 1998). In other words, as the Fifth Circuit has explained, “the context in which a disclosure appears is an essential part of determining the disclosure’s adequacy. . . . The disclosure must be capable of being perceived as material and its significance – that is, its relationship to other aspects of the company’s condition – susceptible to common understanding.” Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 201(5th Cir. 1988) (applying to claims under § 10b of the Securities Exchange Act, see 15 U.S.C.A. § 78j(b)); see also Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097 (1991) (holding, in case relating to unlawful solicitation of proxies under § 78n(a), that if it would take a financial analyst to make sense of a defendant’s disclosures, then the disclosure cannot immunize them from liability).

Plaintiffs allege that Resource America, Inc.’s accounting scheme as a whole was misleading, and that as a consequence the significance of the raw information disclosed to the public was not susceptible to understanding even by the most sophisticated investors. See Amended Complaint, at ¶¶ 38-50, 105-21. Attached to the Amended Complaint are affidavits by two of plaintiffs’ financial experts who state that in their opinion Resource America, Inc’s public disclosures were “improper” and “subject to misinterpretation by shareholders.” See affidavits of Cogen Sklar LLP, Certified Public Accountants and Dr. Stephen Gale, attached as Exhibits A and B to Amended Complaint.

Finally, the Amended Complaint alleges that beginning in August of 1998 an independent securities analyst issued a series of reports (the “Off Wall Street Reports”) on Resource America Inc.’s public disclosures in which for the first time the company’s use of accretion of discount accounting was detailed and criticized. See Amended Complaint at ¶¶ 87-93. At one point, the Off Wall Street Reports allegedly concluded that the company appeared to be a “seriously overvalued and little understood security.” Amended Complaint at ¶89. At about the same time as the publication of the Off Wall Street Reports the price of Resource America stock declined markedly. See Complaint at ¶¶ 85-93. Such a drop in price creates a reasonable inference that the information contained in those reports was material information that had not been previously available to the market. See Peregrine Options, Inc. v. Farley, Inc., No. 90-285, 1993 WL 489739, at *16 n.20 (N.D. Ill. Nov. 19, 1993).

When the allegations of the Amended Complaint are viewed in the light most favorable to the plaintiffs, the argument by the Resource America defendants that all relevant facts were disclosed in the company’s public SEC filings must be rejected. Taken together, the allegations of the Amended Complaint are sufficient to withstand a motion to dismiss – they state a claim upon which relief can be granted. To prevail on a “truth on the market” defense at this stage of the litigation the Resource America defendants must establish that defense as a matter of law on the basis of the allegations of the Amended Complaint, and they have not done so.

The Resource America defendants’ second argument – that the Amended Complaint’s allegations of scienter are insufficient under the Reform Act – was addressed in the Court’s Order docketed September 3, 1999. Upon reconsideration of that argument, the Court concludes that it

does not warrant dismissal of the Amended Complaint.

In In re: Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999), the Third Circuit explained the effect of the Reform Act on the pleading requirement governing securities fraud lawsuits. In this circuit plaintiffs in a securities fraud case must now plead scienter by “alleging facts establishing a motive and opportunity to commit fraud, or by setting forth facts that constitute circumstantial evidence of either reckless or conscious behavior.” Advanta, 180 F.3d at 534-35 (citations omitted). With respect to pleading scienter by means of motive and opportunity, the allegations “must be supported by facts stated with particularity and must give rise to a strong inference of scienter.” Id. at 535.

Plaintiffs pled scienter by means of motive and opportunity as to the Resource America defendants in paragraphs 19 and 20 of the Amended Complaint. The Resource America defendants contend that these allegations of scienter do not satisfy the heightened pleading requirements of the Reform Act. Specifically, they focus their challenge on the allegations of motive; they do not argue that the allegations of opportunity are insufficient under Advanta.⁴

The Amended Complaint alleges, inter alia, the following facts with respect to the Resource America defendants: (1) Resource America, Inc. is a company with expertise in the mortgage loan acquisition business; (2) all of the individuals defendant named among the Resource America defendants were executives of Resource America, Inc. and were aware of the company’s true financial condition; (3) during the class period, all of these individual defendants signed the 1997 Form 10-K

⁴With respect to opportunity, plaintiffs allege in the Amended Complaint that the individual Resource America defendants, as officers and directors of the company, had the opportunity to manipulate the accounting methods by which Resource America, Inc. recognized revenues on distressed loans that the company purchased at discounts.

and the 1998 Form 10-K on behalf of themselves and Resource America, Inc.; and (4) the 1997 Form 10-K and the 1998 Form 10-K contained fraudulent and misleading material statements concerning the company's accounting methods for recognizing revenues on distressed loans that the company had purchased at discounts. See Amended Complaint at ¶¶ 11-14,16,19-20,38-50,105-21. With respect to the motive to commit fraud plaintiffs allege: "Defendants were forced to artificially inflate the Company's stock price so that they could complete a public offering for 1.75 million shares of the Company's stock during the class period and receive approximately \$112 million in proceeds before underwriters' fees. . . . The individual Defendants, as officers and directors of the Company, would also benefit from the public and industry-wide perception of their successful leadership." Id. at ¶ 19.

In this context, whether plaintiffs' motive allegations as to the Resource America defendants are sufficient to survive a motion to dismiss is a close question. However, upon viewing the foregoing factual allegations in the light most favorable to plaintiffs, the Court finds that such allegations satisfy the pleading requirements of the Reform Act. Specifically, the Court concludes that the motive alleged – that is, the desire to raise capital by means of a secondary public offering – gives rise to a "strong inference" of scienter, as required under Advanta. See In re: Time Warner Inc. Sec. Litig., 9 F.3d 259, 268-70 (2d Cir. 1993) (although decided before enactment of Reform Act, Second Circuit applied Reform Act's "strong inference" scienter standard and held that desire to raise capital satisfied the motive prong); Advanta, 180 F.3d at 534 (holding that "Congress' use of the Second Circuit's language compels the conclusion that the Reform Act establishes a pleading standard approximately equal in stringency to that of the Second Circuit").

The Resource America defendants make several arguments in support of their position that plaintiffs' motive allegations are insufficient under Advanta. First, they cite In re: Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1422 n.12 (3d Cir. 1997), and other cases for the proposition that paragraphs 19 and 20 of the Amended Complaint can not satisfy the Reform Act's pleading standard for motive because they contain "boilerplate" allegations about officers and directors' greed that "could be made in any case." The Court disagrees. To the contrary, plaintiffs allege in paragraph 19 that the Resource America defendants artificially inflated the price of Resource America, Inc. stock so that the company could complete a \$112 million secondary public offering. That allegation – key to the Court's decision – negates the contention that the allegations of motive in the Amended Complaint are "boilerplate."

The Resource America defendants next argue that plaintiffs' allegations of motive are inadequate because there is no direct nexus between the alleged fraud – that is, the misstating of the revenue and net income of Resource America, Inc. throughout the class period – and the individual defendants named in the Amended Complaint. See, e.g., Advanta, 180 F.3d at 539 ("[G]eneralized imputations of knowledge do not suffice, regardless of the defendant's position within the company"). The Court rejects that argument. The Amended Complaint contains an allegation that each of the individuals among the Resource America defendants made various public disclosures, including those in the 1997 Form 10-K and the 1998 Form 10-K, on behalf of themselves and Resource America, Inc. Because these disclosures are alleged to have been fraudulent, see Amended Complaint at ¶¶ 38-50, 105-21, the Court concludes that plaintiffs have alleged a direct nexus between the fraud and those individual defendants.

The Reform Act was intended to heighten the pleading standard in securities fraud cases, and the Court has not taken this mandate lightly. See Advanta, 180 F.3d at 531 (“The purpose of the act was to restrict abuses in securities class-action litigation. . . .”). However, the Reform Act was not intended to create an insurmountable pleading hurdle for plaintiffs in such cases. If the plaintiffs fail to present evidence of a direct nexus between the Resource America defendants and the fraud alleged, the Court will address that issue after completion of relevant discovery in connection with a motion for summary judgment and/or at trial.

Finally, the Resource America defendants argue that their lack of insider trading refutes a finding that they had motive to commit securities fraud. In support of this position, they cite various decisions in which courts have held that the lack of insider trading by some individual defendants may refute an allegation that all company executives possessed the motive to commit insider trading. See, e.g., San Leandro Emergency Med. Plan v. Philip Morris Co., 75 F.3d 801, 813-14 (2d Cir. 1996) (“[W]e conclude that the sale of stock by one company executive does not give rise to a strong inference of the company’s fraudulent intent; the fact that other defendants did not sell their shares during the relevant class period sufficiently undermines plaintiff’s claim regarding motive.”); In re: Burlington, 114 F.3d at 1424 (“We will not infer fraudulent intent from the mere fact that some officers sold stock.”); Advanta, 180 F.3d at 540 (citing In re Burlington). The Court finds these cases inapposite.

In the cases cited by the Resource America defendants the plaintiffs alleged that at least some of the individual defendants were motivated to commit fraud in order to profit from insider trading. By contrast, in the instant case plaintiffs do not contend that the individual Resource America

defendants were motivated by the fact that they were engaged in insider trading. Rather, they allege that all of the Resource America defendants were motivated to commit fraud in order to complete a \$112 million public stock offering. In that context a lack of insider trading does not serve to negate the strong inference of scienter which the Court finds based on the allegations of the Amended Complaint.

2. Defendant Grant Thornton's arguments

In its separate original Motion to Dismiss the plaintiffs' Amended Complaint, defendant Grant Thornton also challenges the adequacy of plaintiffs' allegations of scienter. The Court notes that paragraphs 19 and 20 of the Amended Complaint, which set forth plaintiffs' general allegations of scienter – allegations of motive and opportunity – do not refer to Grant Thornton. Plaintiffs' allegations of motive and opportunity as to Grant Thornton are contained in paragraph 123.

Paragraph 123 alleges that defendant Grant Thornton participated in the fraud alleged against the Resource America defendants. Plaintiffs claim that Grant Thornton was motivated by its desire to “maintain its competitive position as to other accounting firms by obtaining and retaining [Resource America, Inc.], and its related entities, including Jefferson Bank and Resource Asset Investment Trust (“RAIT”), as clients; and to protect and enhance the substantial fees which it obtained with knowledge of, or in reckless disregard to, the true facts regarding [Resource America, Inc.’s] financial condition and performance.” Amended Complaint, at ¶ 123.

Like the Resource America defendants, defendant Grant Thornton focuses its challenge on plaintiffs' allegations of motive on the ground that they are insufficient under Advanta. However, unlike the Resource America defendants, Grant Thornton further contends, albeit in summary

fashion, that plaintiffs' allegations of opportunity are inadequate under Advanta. See Brief in Support of Grant Thornton's Motion for Reconsideration, at 4 n.1.

The Amended Complaint alleges, inter alia, the following facts with respect to defendant Grant Thornton: (1) Grant Thornton served as the accounting firm responsible for auditing and certifying the financial records of Resource America, Inc. during the class period; (2) Grant Thornton also served as the accounting firm responsible for auditing and certifying the financial records of entities related to Resource America, Inc., including Jefferson Bank and RAIT; (3) beginning on or about August, 1998 reports published in financial circles (e.g., Off Wall Street Reports) described Resource America Inc.'s accounting practices as false and misleading; and (4) in the face of these reports, on or about September, 1998 Grant Thornton publicly denied that its accounting practices on behalf of Resource America, Inc. were false and misleading. See Amended Complaint at ¶¶ 18, 38-50, 87-93, 100-04, 123. With respect to the motive to commit fraud plaintiffs allege that defendant Grant Thornton had such a motive because, inter alia, it was fearful of losing three substantial and interrelated clients – namely, Resource America, Inc., Jefferson Bank, and RAIT. Id. at ¶ 123.

As with the Resource America defendants, whether plaintiffs' motive allegations as to defendant Grant Thornton are adequate to survive a motion to dismiss is a close question. Conclusory allegations that Grant Thornton knew of or recklessly disregarded violations of GAAP by Resource America, Inc., without more, would be insufficient to satisfy the requirements of Advanta. See Advanta, 180 F.3d at 539. However, upon viewing the foregoing factual allegations relating to Grant Thornton's motive to commit fraud in the light most favorable to plaintiffs, the

Court finds that the allegations are sufficient to withstand dismissal at this stage of the proceedings. Specifically, the Court concludes that the motive alleged – that is, the desire to maintain its competitive position as to other accounting firms by retaining three substantial and interrelated clients – gives rise to a strong inference of scienter. See Shields v. Cititrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994) (noting that motive entails “concrete benefits that could be realized by one or more of the false statements and wrongful disclosures alleged”).

Defendant Grant Thornton advances two arguments in support of its position that plaintiffs’ motive allegations are insufficient under Advanta. First, Grant Thornton cites Ikon Office Solutions, Inc. Sec. Litig., 66 F. Supp. 2d 622 (E.D. Pa. 1999), for the proposition that the Amended Complaint must be dismissed because plaintiffs failed to plead GAAP violations together with other “red flags” that would have put the auditors on notice of the inaccuracy of the company’s financial statements. Id. at 629. But the Court finds that the Amended Complaint does plead several “red flags” that should have revealed Resource America’s improper accounting practices to Grant Thornton. For example, plaintiffs have alleged that Off Wall Street Reports and other press reports which described Resource America, Inc.’s accounting practices as false and misleading were published during the class period. According to the Amended Complaint, Grant Thornton was not only aware of these reports, it publicly denounced them. Furthermore, plaintiffs allege inconsistencies in the established market values of the properties underlying Resource America, Inc.’s loan portfolio, as well as highly subjective appraisals to recognize materially false gains. Such errors should have been detected by a qualified accounting firm such as Grant Thornton. See Amended Complaint at ¶¶ 47-48, 59. When coupled with the allegations of motive discussed above,

these “red flags” establish a strong inference of scienter sufficient to withstand a motion to dismiss.

Second, Grant Thornton contends that plaintiffs’ allegations of motive contain “catch-all” factors which can be found in every case where an accounting firm is a defendant. See, e.g., DiLeo v. Ernst & Young, 901 F.3d 624, 629 (7th Cir. 1990) (holding that retaining a client is an insufficient allegation of motive); Queen Uno Ltd. Ptrshp., 2 F. Supp. 2d 1345, 1360 (D. Colo. 1998) (holding that the receipt of ordinary fees is insufficient an allegation of motive). This argument, however, ignores the full extent of plaintiffs’ motive allegations. Far from relying on the so-called “catch-all” factors, plaintiffs’ allegations include facts that depict a fraudulent scheme involving Grant Thornton and Resource America, Inc., and which articulate a motive for Grant Thornton to participate in the fraud – Grant Thornton’s desire to retain three significant clients.

Finally, defendant Grant Thornton argues that plaintiffs’ allegations of opportunity are insufficient under Advanta because plaintiffs’ have simply alleged that as Resource America, Inc.’s accounting firm Grant Thornton had access to private and confidential information about the company. The Court disagrees. As stated above, plaintiffs’ allegations of motive giver rise to a strong inference of scienter. The allegations of opportunity further support that inference.

C. Motion for Certification of Interlocutory Appeal

The Resource America defendants have asked the Court to certify an adverse decision with respect to their motion to dismiss for interlocutory review by the Third Circuit pursuant to 28 U.S.C. § 1292(b). The Resource America defendants rationale for certification is that by deferring the examination of the merits of plaintiffs’ claims until after the completion of discovery, which is not unusual in other types of cases, the Court will contravene one of Congress’ main objectives in

enacting the Reform Act, that is, avoiding securities class action abuses by means of abusive discovery tactics. The Court disagrees that certification is appropriate.

The court may exercise its discretion to grant a § 1292(b) certificate only if its order: (1) involves a "controlling question of law," (2) offers "substantial ground for difference of opinion" as to its correctness, and (3) if appealed immediately "materially advance the ultimate termination of the litigation." Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir.). All of these conditions must be met before a court may certify an order for interlocutory appeal. See Aparicio v. Swan Lake, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981). Moreover, a court should certify decisions for interlocutory review only in limited circumstances. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978); Milbert v. Bison Labs., 260 F.2d 431, 433 (3d Cir. 1958).

The Resource America defendants have not satisfied the first of these stringent requirements for § 1292(b) certification. The Third Circuit has defined a "controlling question of law" to "encompass at the very least every order which, if erroneous, would be reversible error on final appeal." Katz, 496 F.2d at 755. The Court's Order in question, that is, the Order denying the Resource America defendant's Motion to Dismiss the Amended Complaint, does not involve a controlling question of law under the Third Circuit's definition because even if erroneous, it would not constitute a reversible error on appeal. See, e.g., Armenia v. Wyer, 210 F.2d 592, 593 (2d Cir. 1954) (citing Lavender v. Kurn, 327 U.S. 645, 653 (1946) ("Only where there is complete absence of probative facts to support [denial of motion to dismiss] does reversible error appear"). For that reason, the Court need not address the remaining requirements for § 1292(b) certification and will deny the request of the Resource America defendants for such certification.

III. CONCLUSION

Because the Court did not address in its Order docketed September 3, 1999, all of the issues raised by defendants in their original Motions to Dismiss the Amended Complaint, it decided to grant defendants' Motions for Reconsideration. Upon reconsideration, however, the Court concludes that the Amended Complaint alleges facts upon which relief can be granted against the Resource America defendants and defendant Grant Thornton under the securities laws. Accordingly, the Court will deny defendants' original Motions to Dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). Finally, the Court concludes that certification of this decision pursuant to 28 U.S.C. § 1292(b) is not warranted.

BY THE COURT:

JAN E. DUBOIS, J.