

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

IN RE: UNISYS CORPORATION : CIVIL ACTION
SECURITIES LITIGATION : :
 : :
 : NO. 00-1849

M E M O R A N D U M

This is a securities class action brought on behalf of all purchasers of the common stock of Unisys Corporation ("Unisys") between May 4, 1999 through October 14, 1999, who allegedly sustained damage as a result of those purchases.

Defendant Unisys, a provider of information technology to governmental and commercial customers, is a Delaware Corporation with its principal executive offices in Blue Bell, Pennsylvania. Defendant Larry Weinbach has been President, Chief Executive Officer and Chairman of Unisys since September 1997.

Defendant Jack McHale has been Vice President in charge of Investor Relations at Unisys since 1987 and has held similar positions since 1986. Among his duties, Mr. McHale interprets what drives value in the company for senior management and the Board of Directors, and how that can be communicated to the investment community to maximize shareholder value.

Finally, defendant Gerald Gagliardi was Executive Vice President of Global Customer Services of Unisys from 1996 until October 14, 1999 when Unisys announced that he was leaving the company at the time of corporate reorganization.

Plaintiffs allege that between May 4, 1999 and October 14, 1999, the defendants disseminated knowingly false and misleading statements about long term contracts with British Telecommunications ("BT") and the United States government in violation of section 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), rule 10(b)-5, 17 C.F.R. § 240.10b-5, and section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a). These statements were made in two separate press releases issued on May 4, 1999, at the Company's annual meeting with stock analysts held on the same day, and a July 15, 1999 press release.

The first May 4, 1999 press release announced a five year service management contract with BT, estimated to be worth over \$200 million. The second May 4, 1999 press release announced that Unisys was among a group of vendors selected for the U.S. General Services Administration (GSA) Federal Technology Service Millenia program. It claimed the GSA contract would be worth \$445 million to Unisys over a 10-year period.

On that same day, Mr. Weinbach spoke about the GSA contract to over 150 stock analysts at the Company's annual meeting with stock analysts, and stated "...we feel that we are being reasonably conservative by projecting about \$445 million in revenue over the ten year period."

Later on July 15, 1999, Unisys issued a press release

that announced a 58% increase in second quarter earnings per share and 9% revenue growth. In that press release, Mr. Weinbach attributed part of its success to an increased demand for its services, and pointed to the BT and GSA contracts, among others, to support this claim.

Plaintiff alleges that each of these statements were knowingly false and misleading because they failed to disclose that 1) Unisys' contracts with BT and GSA were not irrevocable commitments and were subject to contingencies; 2) the contracts with BT and the GSA were subject to regulatory approvals; 3) the Company was experiencing delays in securing regulatory approval with respect to these contracts; 4) the GSA contract did not commit the U.S. Government to buy anything from Unisys, but only permitted Unisys to list itself as one of 12 contractors that individual federal agencies could choose to perform work; and 5) Unisys was not competitive, and did not offer the GSA an attractive alternative to other bidders.

Plaintiff further alleges that the press releases and the meeting with the stock analysts on May 4, 1999 caused a material increase in the price of Unisys stock from \$31-7/8 at the close of May 3, to 34-5/8 by the close of May 5, 1999. During the period at issue in this case, Unisys stock traded between \$37 per share and \$50 per share.

However on October 14, 1999, defendants issued a press

release that showed Unisys' third quarter corporate revenue was substantially below market expectations. During a telephone conference with stock analysts that day, defendant Weinbach discussed the reasons for Unisys' disappointing third quarter. Weinbach explained that revenues were lower than expected because 1) work on the BT contract had been delayed due to the need for governmental approvals and would not produce substantial revenue until at least 2001; 2) United States Government contracts had been delayed in the quarter and would produce less revenue and less profits than had been represented by the Company; 3) in some sectors of its operations, Unisys had faced significant competitive pressures on contract bids, and could not compete with other bidders and remain profitable; and 4) Unisys was reorganizing its internal structure to eliminate competitive barriers and that defendant Gagliardi would be leaving Unisys to "pursue other interests."

On that day, Unisys stock had opened at 35-1/2, but after Unisys' news conference, the price fell to below \$24, and by October 19, 1999, the stock closed at \$22 per share. The stock has not recovered to its level during the Class Period in this case.

To support its allegations of fraud and misrepresentation, plaintiff claims that motivational and circumstantial evidence of defendants' fraudulent intent exists.

First, plaintiff claims that when defendants made the misleading statements described above, Unisys was in the midst of trying to avoid paying a cash dividend to its Series A Preferred Stock Holders which it would have had to pay during the period at issue here. Pursuant to the contractual terms of the Series A Preferred Stock, holders of preferred stock could upon redemption, elect to receive either a) the stated redemption price of \$50 per share, plus \$.76 of accrued dividends, or b) approximately 1.67 shares of common stock for each share of preferred stock. Under these terms, as long as the price of Unisys stock traded at more than \$29.93 per share, preferred shareholders would receive greater value by exchanging their preferred stock for common stock than if they chose to receive stock. Thus, plaintiff claims that plaintiff had an incentive to inflate the price of Unisys stock as much as possible so that preferred stock holders would elect a stock for stock conversion, and the company would avoid paying 1 billion in cash to its preferred stock holders.

Second, plaintiff claims that on June 15, 1999 Unisys announced a transaction that was also tied to the price of Unisys' stock. On that day, Unisys announced that it had signed an agreement to purchase PulsePoint, a software developer, in a stock for stock merger. Under the agreement's terms, PulsePoint shareholders received \$6.60 worth of Unisys stock, as measured by

the average price of Unisys stock in the twenty trading days preceding a meeting of PricePoint shareholders to approve the merger. Thus, as plaintiff points out, the higher the price of Unisys' common stock, the less shares it would have to issue to complete the PulsePoint merger.

Finally, plaintiff asserts that inside selling by defendants Gagliardi and McHale demonstrate defendants' intent to defraud investors. Between August 11 and 13, 1999, defendant Gagliardi sold all of his Unisys common stock for between \$37.94, and \$40.21, and about twenty-five percent of all of his Unisys holdings, including options. Additionally, on July 25, 1999, defendant McHale sold 21,351 shares of his Unisys common stock for between \$41.25 and 41.30 per share, and on August 2, 1999, he sold 76,000 more shares of common stock at \$42 per share. With these transactions, McHale disposed of over 75% of his Unisys holdings; however, in the previous three years, McHale had never sold more than 10,000 shares per year.

DISCUSSION

Defendants have moved this Court to dismiss for plaintiffs' failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). Generally, under Rule 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved.

See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Because granting such a motion results in a determination on the merits at such an early stage of a plaintiffs' case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir.1985)).

While notice pleading is sufficient in most cases, the pleading requirements in securities fraud cases is more strict. In 1995, Congress passed the Private Securities Litigation Reform Act ("the PLSRA" or "Reform Act") to "establish ... more stringent pleading requirements to curtail the filing of meritless lawsuits" alleging securities fraud. H.R. Rep. No. 104-369, at 41 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 740. Today, to state a securities fraud claim under section 10(b) and rule 10b-5, a private plaintiff must plead the following elements: "(1) that the defendant made a misrepresentation or omission of (2) a material (3) fact; (4) that the defendant acted with knowledge or recklessness and (5) that the plaintiff reasonably relied on the misrepresentation or omission and (6)

consequently suffered damage." In re Advanta Corp. Sec. Litig., 180 F.3d 525, 537 (3d Cir. 1999) (quoting In re Westinghouse Sec. Litig., 90 F.3d 696, 710 (3d Cir.1996)).

Further, the Reform Act requires plaintiffs to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C.A. § 78u- 4(b)(1), (West Supp. 1999). The complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Id. § 78u-4(b)(2) (West Supp. 1999).

Likewise, Federal Rule of Civil Procedure 9(b) requires that a securities fraud claim be subject to heightened pleading requirements. Because section 10(b) and Rule 10b-5 are anti-fraud provisions, plaintiffs must plead them with the particularity required by Rule 9(b) and the Reform Act. See In re Burlington Coat Factory, Sec. Litig., 114 F.3d 1410, 1417 (3d Cir.1997).

While the Reform Act was intended to heighten pleading standards in securities fraud cases, it "was not intended to create an insurmountable pleading hurdle for plaintiffs in such cases." In re Resource America Securities Litigation, No. CIV.

98-5446, 2000 WL 1053861 *7 (E.D.Pa July 26, 2000).

Additionally, neither the Reform Act nor Rule 9(b) requires plaintiffs to plead all of the evidence and proof thereunder supporting their claim. See In re Cephalon Sec. Litig., CIV. A. No. 96-0633, 1997 WL 570918 *2 (E.D.Pa. Aug. 29, 1997).

Defendants first argue that plaintiff's complaint should be dismissed because it does not sufficiently allege any false or misleading statements. This Court finds no merit to this claim. Contrary to defendants' assertion, plaintiffs have identified the misrepresentations alleged to be false and misleading and have specified who made the statements, when and where the statements were made and precisely what information was omitted or misrepresented.

Specifically, plaintiffs' complaint alleges that each defendant caused Unisys to issue the two May 4, 1999 press releases that failed to disclose that the BT and GSA contracts were subject to contingencies and were not irrevocable commitments. Additionally, plaintiffs' complaint claims that defendant Weinbach spoke about the GSA contract to over 150 stock analysts on the same day and failed to make the same disclosures. Likewise, plaintiffs assert that defendants' July 15, 1999 press release attributed Unisys second quarter success, in part, to the BT and GSA contracts when it knew both of those deals were not irrevocable, were subject to contingencies and that price

competition on the GSA contract made that contract unlikely to provide substantial revenue.

In a footnote, defendants argue that their statements regarding Unisys' revenue projections are protected under the "safe harbor" provisions of the Reform Act. See 15 U.S.C. § 78u-5(c)(1)(B). Under the statutory safe harbor, defendants cannot be liable for forward looking statements that are identified as a forward-looking statement, accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or are immaterial; or if the plaintiff fails to prove that the forward looking statement, if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading. See id. The Court is not persuaded that defendants' statements were forward looking. Here, plaintiffs plead particularized factual allegations that defendants' knew that defendants' revenue estimates were false and misleading when made. Additionally, none of defendants' statements contained any language identifying the statements as forward looking.

With respect to the GSA contract, defendants argue that the purported omissions concerning the alleged contingent nature of that contract were publicly available information, and therefore not actionable. Defendant argues that the GSA contract

was available to the public on the Internet. It is well settled that there is no liability under the security laws because of an alleged failure to disclose information that is already available to the public. See, e.g., In re Tseng Labs, Inc. Sec. Litig., 954 F. Supp. 1024, 1029 (E.D.Pa. 1996). However, courts emphasize that a "truth on the market defense" is effective only where defendants can demonstrate that the information has "credibly" entered the market through "transmitt[al] to the public with the degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by the insiders' one-sided representations." In re Apple Computer Securities Litigation, 886 F.2d 1109, 1116 (9th Cir.1989), quoted in In re Newbridge Networks Sec. Litig., 962 F. Supp. 166, 178-79 (D.D.C. 1997). The GSA contract is not readily available on the GSA website, but rather an investor must pass through two other websites to see the contract. Even then, the contract merely says that "the Government currently envisions two methods for issuance of TO's" [and] "all contractors will be provided a fair opportunity to receive awards of each TO." Under these facts, it cannot be said that the contract was widely available or entered the market in such a way that could counterbalance the impressions left by Unisys' public statements. See Berry v. Valence Tech. Inc., 175 F.3d 699, 706 (9th Cir. 1999) (finding that a statement in a Forbes magazine article critical of a

company and its stock did not demonstrate that the market already knew of the company's fraud).

Next, defendant claims that the alleged misrepresentations were not material. "[A]n omitted fact is material if there is a 'substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.'" Shapiro v. UJB Financial Corp., 964 F.2d at 281 n. 11 (quoting T.S.C. Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). Thus, the real issue is whether there is a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having "significantly altered the 'total mix' of information" available to that investor. See id. (quoting Craftmatic Sec. Litig., 890 F.2d 628, 639 (3d Cir.1990)).

To demonstrate that the BT and GSA were not material, defendant argues that the BT contract represented less than .6% of Unisys' annual revenue, and similarly the GSA contract also represented less than .6% of Unisys' annual revenue.

To support its mathematical approach to materiality, defendant cites, among other cases, In re Westinghouse Sec. Litig., 90 F.3d 696, 714-15 (3d Cir. 1996), because in that case, the inadequate loan loss reserve that gave rise to the litigation only represented .54% of the company's net income. However, the In re Westinghouse Sec. Litig. Court only concluded that the loan

loss reserve was not material because plaintiff alleged no additional facts to demonstrate that this reserve inadequacy would be relevant to a reasonable investor. Moreover, the Court recognized that the question of materiality must be considered on a case-by-case basis, and "the single rule-of-thumb materiality criterion of 5%-10% of net income or loss should be used--if at all, and by itself--with extreme caution." 90 F.3d at 714 (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

In this case, the Court finds that it cannot conclude, as a matter of law, that defendants' misrepresentations were not material. Each contract was part of a separate announcement signifying their individual importance to the company. Further, Mr. Weinbach characterized the GSA contract as "a major award from the U.S. General Service Administration," at the analysts meeting on May 4, 1999. Similarly, the July 15, 1999 press release referred to both the BT contract and the GSA contract when discussing reasons for Unisys' economic strength. Had defendants disclosed that these contracts were not irrevocable and were still subject to contingencies, a reasonable investor would have thought twice about whether these contracts were as promising as they sounded. Consequently, the Court finds that plaintiffs adequately plead that these omissions were material.

Third, defendant argues that plaintiffs' allegations

fail to give rise to a strong inference of scienter as required by the Reform Act. See 15 U.S.C.A. § 78u- 4(b)(2), (West Supp. 1999). In this Circuit, even after enactment of the Reform Act,

“it remains sufficient for plaintiffs [to] plead scienter by alleging facts ‘establishing a motive and an opportunity to commit fraud, or by setting forth facts that constitute circumstantial evidence of either reckless or conscious behavior.’ Motive and opportunity,... must now be supported by facts stated ‘with particularity’ and must give rise to a ‘strong inference’ of scienter.

Advanta, 180 F.3d at 534-35 (citations omitted).

In this case, defendants opportunity to commit fraud is clear; each defendant was a senior corporate officer who controlled public dissemination of information about the company. Additionally, plaintiffs allege sufficient facts to establish defendants had a motive to commit fraud. The complaint pleads, in detail, three ways that Unisys would benefit from inflating its stock price.

With a lower stock price, Unisys would have had to issue more shares of stock to PulsePoint to complete a stock for stock merger. Moreover, there is evidence that Unisys was very concerned with minimizing the number of shares it would have to issue in the merger. In some circumstances, the artificial

inflation of stock price in the acquisition context may be sufficient for securities fraud scienter. See In re Time Warner Inc. Securities Litigation, 9 F.3d 259, 270 (2d Cir.1993). Here, the Court need not decide whether the PulsePoint deal alone is sufficient evidence of motive because other evidence of motive also exists to amplify the inference of motive. At the very least, the PulsePoint transaction is suspicious and is some evidence of motive.

Plaintiff further alleges that if Unisys kept its stock price above \$29.93 per share, preferred shareholders would exchange their preferred stock for Unisys common stock instead of cash. Had the common stock price fell below \$29.93 per share, Unisys would have had to pay out \$1 billion to its preferred shareholders. Defendant's note that the price of Unisys stock was already above \$29.93 per share before May 4, 1999, however, it is undisputed that had Unisys disclosed the information at issue in this case, its stock may have declined below \$29.93. Indeed, after the October 14, 1999 announcement, Unisys stock fell to \$24 per share. The threat of a billion dollar cash payment strikes the Court as a significant motive to inflate the price of stock.

Third, plaintiff alleges that defendants Gagliardi and Mchale's stock sales give rise to an inference of their state of mind. It is true that courts in this circuit "will not infer

fraudulent intent from the mere fact that some officers sold stock." Advanta, 180 F.3d at 540 (citing Burlington Coat Factory, 114 F.3d at 1424). However, in Burlington Coat Factory, the Court found the officers' stock sales did not permit an inference of scienter because only three of the five defendants sold stock, plaintiffs provided information on the total stock holdings of only one defendant who had traded only 0.5 percent of his holdings, and plaintiffs failed to plead facts indicating whether such trades were "normal and routine" for the defendants and whether the trading profits were substantial in comparison to their overall compensation. See 114 F.3d at 1423. Here, the plaintiffs have alleged that both McHale and Gagliardi's stock sales represented significant portions of their Unisys holdings, and that such sales were neither normal nor routine.

The fact that defendant Weinbach was not alleged to have traded any stock during the Class period does not weigh against an inference of McHale and Gagliardi's fraudulent intent. See, e.g., In re APAC Teleservice, Inc. Sec. Litig., NO. CIV.9145, 1999 WL 1052004 *7 (S.D.N.Y., Nov 19, 1999). Moreover, given the other evidence of fraudulent intent already discussed, plaintiffs have sufficiently plead that defendants' had motive to commit fraud.

Moreover, plaintiffs have sufficiently alleged that when defendants made the public statements about the BT and GSA

contracts at issue in this case, they knew those contracts were not irrevocable and were subject to contingencies. Because the complaint must be construed with all inferences drawn in favor of the plaintiffs, defendants' Weinbach, McHale and Gagliardi's position in the company gives rise to an inference of their contemporaneous knowledge. See In re Aetna Inc. Securities Litigation, 34 F. Supp.2d at 953. Thus, plaintiffs have plead scienter because they have alleged that defendants' had several motives and the opportunity to commit fraud, or at the very least, have alleged circumstantial evidence of conscious behavior.

Finally, defendant argues that additional grounds exist for dismissing the claims against the individual defendants, Weinbach, McHale and Gagliardi. First, defendant claims that the Complaint fails to make particularized allegations against each individual defendant, but rather makes claims against the defendants as a group. Group pleading, which vaguely attributes the alleged fraudulent statements to "defendants" is not allowable under Rule 9(b). See Naporano Iron & Metal Co. v. American Crane Corp., 79 F. Supp.2d 494, 511(D.N.J. 1999). Upon reviewing the complaint, the Court is unpersuaded by defendants' underdeveloped arguments here, and finds that plaintiffs have made particularized allegations against each defendant.

Defendants conclude its memorandum in support of its

motion to dismiss with the allegation that plaintiffs have failed to state liability against the individual defendants. Defendants argue that plaintiffs did not make any particularized allegations regarding the conduct of defendants Gagliardi and McHale, and therefore plaintiffs claim in Count II of the complaint, that the individual defendants violated Section 20(a) of the Securities Exchange Act, should be dismissed. However, the Complaint makes clear that each individual defendant was responsible for the Unisys units that were the subject of each press release, and for the contents of each release. Accordingly, the Court will not dismiss Count II of the Complaint.

An appropriate Order will follow.

Clarence C. Newcomer, S.J.