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

IN RE ADVANTA, CORP., SECURITIES LITIGATION.	:	CIVIL ACTION
	:	
	:	NO. 97-CV-4343

M E M O R A N D U M

BUCKWALTER, J. July 9, 1998

I. INTRODUCTION

After their stock lost approximately 20% of its value when Advanta Corporation ("Advanta") announced it expected to report a $20 million loss for the first quarter of 1997, plaintiffs, Advanta shareholders, filed this proposed securities class action suit against Advanta and seven of its present and former officers and directors.[1] Their three count amended complaint (the "Complaint") alleges violations of Section 10(b) (Count I); Section 20(a) (Count II) and Section 20(A) (Count III, against defendants Greenawalt and Marshall only) of the Securities and Exchange Act of 1934 (the "Exchange Act"). Presently, all defendants move to dismiss Counts I and

1. Individual defendants are as follows: Richard A. Greenawalt ("Greenawalt"), former President and Chief Operating Officer; Dennis T. Alter ("Alter"), Chairman of the Board; Robert A. Marshall ("Marshall"), former Executive Vice President and Group Executive, Advanta Personal Payment Services; William A. Rosoff ("Rosoff"), Director and Vice Chairman of the Board of Directors; Alex Hart ("Hart"), Chief Executive Officer and Director; Gene S. Schneyer ("Schneyer"), Vice President, Secretary and General Counsel; and John J. Calamari ("Calamari"), Vice President, Finance and Principal Accounting Officer.

II and defendants Greenawalt and Marshall seek dismissal of Count III.[2] For the reasons that follow, Advanta's Motion is granted and Greenawalt's Motion is granted.

II. BACKGROUND[3]

Advanta is a leading issuer of standard and gold MasterCard and VISA credit cards. Advanta cards typically carry no annual fee and a credit limit of approximately $6,000. Advanta is popularly known for its ability to attract customers by offering low "teaser" interest rates, about 7%, for a limited period. After the teaser period expires, Advanta raises the interest rate to a higher more competitive amount.

Historically, Advanta enjoyed strong credit quality and low charge-off rates.[4] Advanta's 1995 annual report informed shareholders that the company's total number of customer accounts increased by 27%, in 1995, to more than 5

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2. Defendants, Advanta, Atler, Rosoff, Hart, Schneyer and Calamari, filed a motion to dismiss Counts I and II ("Advanta's Motion"). Defendants, Greenawalt and Marshall, filed a motion to dismiss the entire Complaint ("Greenawalt's Motion") and joined Advanta's motion.

3. The facts are as alleged in the Complaint or taken from documents cited in Complaint, the full text of which are attached to either Advanta's or Greenawalt's motion to dismiss. See In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997); see also, San Leandro Emer. Med. Group Profit Sharing Plan v. Phillip Morris Co., 75 F.3d 801, 809 (2d Cir. 1996) (district court properly considered full text of documents partially quoted in complaint in granting motion to dismiss). Furthermore, plaintiffs have not objected to this Court's consideration of such documents.

4. A "charge-off" occurs when a credit card holder's unpaid balance becomes uncollectible, generally because a borrower is excessively delinquent, defaults, files for bankruptcy or an account is fraudulent. The unpaid balance is then "charged-off" against an established reserve.

million by the end of the year. The company boasted that its emphasis on acquiring gold card customers, generally better credit risks, helped maintain its “enviable credit quality profile.”

In a press release issued on July 18, 1996, Advanta announced that earnings for the three and six months ending June 30, 1996, represented an increase of 35% and 25%, respectively, compared to the same periods in 1995. Advanta also reported that “return on equity surpassed the 25% goal for the twenty-second consecutive quarter, attaining 27.7%.” This was an increase over both the previous quarters’ results and the results for the same quarter in 1995.

Plaintiffs maintain that in an effort to continue its previous growth, Advanta engaged in several practices that severely undermined the company’s future viability. Advanta began issuing credit cards with teaser rates and periods significantly lower and longer than industry standard. Advanta increased the number of high risk customers it extended credit to, contrary to representations made in its July 18, 1996 press release, and failed to increase personnel to monitor and enforce collection of such high risk accounts. Thus, by mid-1996 Advanta’s credit card charge-off rate had significantly increased.

Additionally, in the third quarter of 1996, Advanta changed its charge-off methodology for consumer credit card bankruptcies to provide the company additional time (from 30 to 90 days) to investigate a bankruptcy before charging-off an account. Plaintiffs allege that the change was simply a way for Advanta to delay reporting the earnings impact of rising charge-off rates from the third and fourth quarters of 1996 to the first quarter of 1997 and to allow individual defendants in the interim to unload shares of Advanta stock at artificially inflated prices.[5]

Plaintiffs also note that the change in the charge-off methodology was likely to have little effect in decreasing overall charge-offs. Advanta lacked adequate personnel to conduct additional investigation the extended charge-off period provided for. Moreover, more than three quarters of personal bankruptcies are filed under Chapter 7, freeing the borrower from all debt and rendering additional investigation by the creditor meaningless.

In a news release issued on March 17, 1997, Advanta announced that "[f]or the first quarter, the Company currently expects to report a loss in the area of $20 million, or

5. According to plaintiffs, during the months of November and December (in which the full negative impact of Advanta's weakened credit quality was masked) defendants Greenawalt, Alter, Marshall and Schneyer "dumped" more than one million shares of Advanta common stock for proceeds in excess of $44 million.

approximately $0.44 cents per share, compared with earnings of $41 million for the first quarter of 1996." Advanta attributed the loss to "continuing increases in consumer bankruptcies and charge-offs and lower receivable balances than originally anticipated in the credit card business."[6] Advanta simultaneously announced that its Board of Directors and senior management "have commenced a thorough and systematic review of its business strategy, growth prospects and operating environment aimed at maximizing the Company's value." In this regard, Advanta listed a number of steps it would take towards increasing revenue and stemming rising credit card losses. Advanta proposed to reprice credit card interest rates, improve collection procedures, shorten its teaser period, tighten underwriting and attract more high-quality credit card holders.

Immediately, the value of both classes of Advanta stock dropped. Advanta Class A stock dropped from $40.375 per share to $31.875 per share and Advanta Class B stock dropped from $39.6875 per share to $30.375 per share.

Against this background, plaintiffs allege that from August 13, 1996 until March 17, 1997 (the "Class Period"), defendants disseminated a series of materially false and

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6. Advanta's predictions came true. The company reported a first-quarter net loss of $19.8 million, or 43 cents a share, compared with net income of $41 million, or 91 cents a share in the year-earlier quarter. Additionally, credit card charge-offs were 6.6%, up from 3.2% in the first quarter of 1996.

misleading statements in violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder (Count I) and are liable as “control persons” under Section 20(a) of the Exchange Act (Count II). Additionally, Subclass plaintiff, Jerry Weinberg, seeks to hold defendants, Greenawalt and Marshall, liable as contemporaneous traders under Section 20(A) of the Exchange Act (Count III). Presently, defendants seek dismissal pursuant to Rule 12(b)6, for failure to state a claim, and Rule 9(b) and the Private Securities Litigation Reform Act (“PSLRA”), for insufficient pleading.

III. LEGAL STANDARDS

A. Rule 12(b)(6)

When considering a motion to dismiss a complaint under Rule 12(b)(6), a court must primarily consider the allegations contained in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The court must accept as true all allegations contained in the complaint and must give the plaintiff the benefit of every favorable inference that can be drawn from those allegations. See J/H Real Estate Inc. v. Abramson, 901 F. Supp. 952, 955 (E.D.Pa. 1995); Schrob v.

Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). A complaint is properly dismissed only if it appears certain that the plaintiff cannot prove any set of facts in support of its claim which would entitle it to relief. See Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Although the fact specific inquiries common to securities cases generally preclude dismissal, courts will nonetheless grant a defendant's 12(b)(6) motion if the alleged misrepresentations or omissions are immaterial or not pled in accordance with Rule 9(b) or the PSLRA. Dismissal is not appropriate, however, merely because a court disbelieves a complaint's factual allegations. See Neitzke v. Williams, 490 U.S. 319, 327 (1989).

B. Rule 9(b) and the PSLRA

Because 10b-5 claims by necessity involve allegations of fraudulent conduct, courts have long required that they be pled in accordance to Rule 9(b), which provides in pertinent part that in "all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiffs, through their pleadings,

> must inject precision and some measure of substantiation into their allegations of fraud. By way of example, allegations of who, what, when, where and how: the first paragraph of any newspaper story, would satisfy the particularity requirement of Rule 9(b).

Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984).

In 1995, in response to debate over the impact of securities fraud litigation, Congress enacted the PSLRA, which substantially modified, among other things the standard for pleading securities fraud claims. The PSLRA places additional burdens on plaintiffs attempting to plead fraud in securities cases. Under 15 U.S.C. § 78u-4(b), a plaintiff alleging that a defendant made a misleading statement must "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. § 78u-4(b)(1). A plaintiff must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Failure to meet these pleading requirements results in dismissal. 15 U.S.C. § 78u-4(b)(3).

IV. DISCUSSION

A. Count I

Plaintiffs assert claims under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Plaintiffs must therefore meet the three step test for Rule 10b-5 violations outlined by the Third Circuit Court of Appeals in In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1417 (3d Cir. 1997). First, the plaintiff must establish that the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading. Second, the plaintiff must establish that the defendant acted with scienter and that plaintiff's reliance on defendant's misstatement caused him or her injury. Finally, since the claim being asserted is a "fraud" claim, plaintiff must meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the PSLRA.[7]

The private right of action under Section 10(b) and Rule 10b-5 reaches beyond statements and omissions made in a registration statement or prospectus or in connection with an initial distribution of securities and creates liability for false or misleading statements or omissions of fact that effect trading on the secondary market. See In Re Burlington Coat Factory, 114 F.3d at 1417 (citations omitted).

7. For facts or information to be material for purposes of securities fraud litigation they must be of a type that "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Additionally, materiality is a mixed question of law and fact, and the delicate assessments of the inferences a reasonable shareholder would draw from a given set of facts are peculiar for the trier of fact. Shapiro v. UJB Financial Corp., 964 F.2d 272, 281 n.11 (3d Cir. 1992). Only if the alleged misrepresentations or omissions are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality is it appropriate for the district court to rule that the allegations are inactionable as a matter of law. Id.

First, plaintiffs allege that numerous statements from forms filed with the SEC, press releases and annual and quarterly reports were misleading when issued because they failed to reveal adverse business practices adopted by Advanta and negative facts and trends relating to the company's credit card business. Additionally, plaintiffs single out one statement made by Janet Point ("Point"), Vice President of Investor Relations, claiming Point knew her statement was false when issued.

Presently, defendants argue that all statements contained in the Complaint evidence full disclosure and are not misleading and that plaintiffs' allegations concerning such statements fail to meet the heightened pleading standards of Rule 9(b) and the PSLRA. First, I discuss the sufficiency of plaintiffs' general allegations of non-disclosure and then turn to their specific allegations regarding Point's statement.

i. Disclosure of Negative Facts and Trends

Plaintiffs contend that certain statements made during the Class Period are actionable because they fail to disclose negative facts and trends Advanta's officers and directors were aware of and thus left investors with false impressions as to the quality of Advanta's credit card portfolio. Specifically, plaintiffs claim Advanta failed to reveal that: 1) to perpetuate customer growth, the company had relaxed its underwriting standards; 2) in an attempt to retain customers, after the initial teaser period expired, Advanta was not repricing accounts to normal industry standard interest rates; 3) it lacked adequate credit collection capabilities and personnel to follow through on delinquent accounts; and 4) that the extended investigative period provided in the new charge-off methodology was irrelevant as most customers filed Chapter 7 bankruptcy, releasing them from all credit card debt.

Two general categories of statements are attributed with these deficiencies: 1) statements issued by Advanta regarding the 30 to 90 day charge-off change[8] and 2) what plaintiffs characterize as overly optimistic reports regarding the quality and future profitability of Advanta's credit card division. I review these groups individually in light of plaintiffs' allegations.

a. Charge-off Statements

Plaintiffs claim the following statements regarding the charge-off change were misleading because they failed to disclose the four adverse conditions listed above.

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8. Initially, plaintiffs argued that statements regarding the charge-off change were misleading because they did not explain the full negative impact of the change (that charge-off loss reports would be delayed). They abandoned this argument when faced with defendants' motion to dismiss highlighting the fact that, as plaintiffs admit in the Complaint, on at least four occasions Advanta not only disclosed the new method but provided detail as to the exact effect the change would have on reported earnings and losses.

On September 18, 1996, Advanta Credit Card Master Trust (the securitization vehicle for Advanta) in a Form 8K disclosed the change in the charge-off methodology along with the following explanatory language:

> As a result of this new methodology, charge-offs of receivables held by the Trust were lower in August 1996 than they would have been under the previous methodology and, conversely, delinquent Receivables were higher by a like amount.

On October 17, 1996, Advanta filed a Form 8K stating the following:

> In the third quarter, the Company adopted a new charge-off methodology relating to credit card bankruptcies which provides for an investigative period following notification of the bankruptcy petition of up to 90 days (rather than up to 30-days) prior to charge-off. The longer investigative period, which is consistent with others in the industry, had an approximate $24 million net positive impact for the quarter.

The change is next mentioned in Advanta's third quarter report filed on November 12, 1996:

> In the third quarter of 1996, the Company adopted a new charge-off methodology related to bankrupt credit card accounts, providing for a period of up to a 90-day (rather than a 30-day) investigative period following notification of the bankruptcy petition, prior to charge-off.

Credit statistics following the paragraph reflected this change in methodology.

Finally, on January 21, 1997 Advanta issued the following:

> As, previously disclosed, the Company adopted a new charge-off methodology relating to credit card bankruptcies in the third quarter of 1996. As anticipated that change had an impact in the fourth quarter 1996 similar to the amount in the third quarter.[9]

Defendants correctly note that each statement contains full and accurate disclosure as to the discrete topic of charge-offs and inclusion of such unrelated topics as underwriting, teaser rates, general trends in bankruptcy and collection practices was not necessary to clarify the accounting change. I agree.

When a corporation makes a disclosure, such as Advanta's report of the charge-off change, there is duty to make it complete and accurate. See U.S. v. Yeaman, 987 F.Supp. 373, 378 (E.D.Pa. 1997)(citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860-61 (2d Cir. 1968)). This, however, does not mean that by revealing one fact one must reveal all others that would be interesting or market-wise, but means only such others, if any, that are needed so that what was revealed would not be so incomplete as to mislead. Backman v. Polaroid Corp.,

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9. Plaintiffs also cite to Advanta's second quarter Form 10-Q filed on August 13, 1996, which they note makes no mention of the charge-off change implemented in the beginning of the third quarter. They claim disclosure in the second quarter report was necessary as, at the time it was filed, the third quarter, along with the new policy were "well underway." Corporations, however, are not required to disclose events from the quarter in progress in reports regarding the previous quarter. Zucker v. Quasha, 891 F.Supp. 1010, 1019 (D.N.J. 1995); see also, In re Burlington Coat Factory, 114 F.3d at 1432 (company not obligated to update public as to state of quarter in progress). Consequently, consideration of alleged omissions regarding charge-offs in Advanta's second quarter 1996 report is unnecessary.

910 F.2d 10, 16 (1st Cir. 1990)(interpreting SEC v. Texas Gulf Sulphur Co., 401 F.2d. at 860).

Advanta's coverage of the charge-off change, as cited by plaintiffs, was both complete and accurate. It describes the impact the change will have on both receivables and losses, the company's justifications for the change, and the assurance that the switch conforms with industry standards. There was no need for Advanta to interject into these comprehensive statements the extraneous information plaintiffs assert was lacking. Furthermore, additional explanation of the change is contained in the full text of documents cited in the Complaint. For example, a footnote to the financial highlights section of Advanta's October 17, 1996 Form 8K explains "[t]hird quarter 1996 figures reflect the adoption of a new charge-off methodology. Without this change, managed credit card charge-off and delinquency rates for the third quarter 1996 would have been 4.6% and 3.7% respectively."[10]

Therefore, I find Advanta's statements regarding implementation of the company's new charge-off policy neither materially false nor misleading and therefore not violative of

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10. In analyzing securities fraud claims, review of the full text of documents cited in plaintiffs' complaint is appropriate. It prevents plaintiffs from maintaining a claim of fraud by extracting an isolated statement from a document and placing it in a complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent. In re Burlington Coat Factory Securities Litigation, 114 F.3d at 1426 (citations omitted).

Rule 10b-5. Accordingly, plaintiffs' 10b-5 claims based on such statements are dismissed pursuant to Rule 12(b)(6).[11]

b. Positive Portrayals

Next plaintiffs cite to four sources which they assert contain overly optimistic portrayals of the company and fail to disclose negative business practices and information.

First, in its 1996 third quarter report Advanta emphasized "our track record underscores our commitment to excel;" described itself as "a rapidly growing consumer financial services enterprise;" reassured shareholders that "despite a challenging industry environment, we are pleased to report that Advanta produced continued, consistent earnings growth in the third quarter" and noted that "for the fifth consecutive year, return on equity has met or exceeded the 25% level achieved this quarter."

Second, in its Form 10-Q filed on November 12, 1996, Advanta stated "The changes in the delinquency and charge-off rates from year-to year . . . reflect the trend in unsecured

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11. Additionally, plaintiffs' argue that the September 18, 1996 statement is misleading because it was issued by Advanta Credit Card Master Trust, rather than Advanta. Although they fail to allege as much, presumably the inference to be drawn is that the report was never made available to Advanta shareholders. Neither party has commented on this subject, yet, for purposes of Rule 12(b)(6), I will assume the report was unavailable. This consideration, however, does not alter my ultimate conclusion. It is evident from the remaining statements that Advanta's disclosure was sufficient.

consumer credit quality which is being experienced throughout the credit industry."

Third, on November 13, 1996 Advanta increased Class A and Class B dividends and commented "this dividend increase reflects management's confidence in the company's earnings momentum and Advanta's continuing commitment to enhancing shareholder value."

Finally, commenting on Advanta's fourth quarter results, announced on January 21, 1997, Alter stated "I am pleased to report that in 1996, Advanta maintained the growth of its current businesses and accelerated its expansion into new ventures."

Defendants maintain that plaintiffs allegations lack specificity regarding disclosure -- "the Complaint is silent as to the source, date, recipients, author or any other details about the undisclosed negative information."

Under the PSLRA, a plaintiff alleging that a defendant made a misleading statement must "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. § 78u-4(b)(1).

On the first page of the Complaint, plaintiffs state that the allegations contained within are based on information and belief, thus they must explain in some detail the basis for such belief. Towards this end plaintiffs claim that by virtue of their positions as officers/directors of Advanta, individual defendants were well aware of negative facts and trends within the company. “Because of Board membership and/or executive positions with Advanta, each of the Individual Defendants had access to the adverse undisclosed information about Advanta’s business prospects and financial condition and performance . . . and knew that these adverse facts rendered the positive representations made by and about Advanta and its business materially false and misleading.”

Additionally, plaintiffs’ characterize suggestions for future improvement made in Advanta’s March 17, 1997 press release and made by Advanta’s founder and Chairman of the Board, Dennis Alter in an article entitled “House of Cards” appearing in the June 1997 issue of Philadelphia Magazine as “admissions” that during the Class Period defendants were aware of Advanta’s potential downfalls. In reaction to first quarter losses, both identify a number of potential problem areas for the company and list corrective measures the company may take. The March 17, 1997 press release included the following suggestions: (1) aggressively repricing interests rates for high risk customers; (2) bringing Advanta's credit card fees "more in line with current industry norms;" (3) reducing the teaser period; (4) tightening underwriting; (5) "[m]ore quickly identifying and intervening on potentially troubled accounts;" (6) increasing the number of high quality cardholders; and (7) "[c]ontinuing to develop additional products that offer customers added value, rather than relying solely on low price." Additionally, Atler explained to Philadelphia Magazine "[w]hat happened is when the introductory period ended, we were probably not as aggressive as we could have been [repricing our rates] . . . ."

Taken together, and assuming for present purposes only that defendants had a duty to disclose, plaintiffs support for their belief that defendants were of aware of negative facts during the class period is insufficient. Plaintiffs first "fact", that their positions within the company rendered defendants knowledgeable, is merely an unsupported conclusion. A director, officer, or even the president of a corporation often has superior knowledge and information, but neither the knowledge nor the information invariably attaches to those positions, Rosenbloom v. Adams, Scott & Conway, Inc., 552 F.2d 1336, 1338-39 (9th Cir.1977) (citations omitted), and plaintiffs have not pointed to specific reports, circulated among defendants, which contained the adverse information defendants are charged with knowing. See San Leandro Emer. Med. Group Profit Sharing Plan v. Phillip Morris Co., 75 F.3d 801, 812-13 (2d Cir. 1996).

Additionally, Advanta's after the fact statements recognizing the causes of its first quarter losses do not constitute a basis for charging defendants with prior knowledge. Courts have uniformly rejected such attempts to plead fraud by hindsight, acknowledging that a plaintiff does not state a claim for securities fraud merely because a company discloses, after the fact, that its performance failed to meet expectations. See Wallace v. Systems and Computer Technology Corporation, 1997 WL 602808 * 5 (E.D.Pa. Sept. 23, 1997); In re Goodyear Tire & Rubber Co. Sec. Lit., 1993 WL 130381 at *2 (E.D.Pa. Apr. 22, 1993); Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir. 1991); DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990). During 1995 and 1996 Advanta reassured investors that it was capable of maintaining its earnings momentum. During the Class Period, Advanta continued issuing encouraging messages. Later the company had to report significant losses in its credit card division. Yet, simple comparison of these descriptions does not create underlying factual support for plaintiffs' claims. Plaintiffs' must point to specific facts suggesting that the difference is attributable to fraud. See In re Donald J. Trump Casino

Securities Litigation, 793 F.Supp. 543, 556-57 (D.N.J. 1992); DiLeo v. Ernst & Young, 901 F.2d at 627. In the instant case plaintiffs have not brought such facts to the Court's attention.[12] Therefore, because they have not alleged circumstances indicating that any of the "positive portrayals" identified in the Complaint were false or misleading, plaintiffs have failed to adequately plead fraud.[13] Accordingly, plaintiffs' claims based on these statements are dismissed pursuant to Rule 9(b) and the PSLRA.

Additionally, I note that review of the full text of documents cited in plaintiffs' complaint demonstrates an effort by Advanta to address plaintiffs' concerns.[14] In its third quarter report Advanta notes "[t]he provision for credit card losses for the third quarter of 1996 was $24.2 million compared to $10.6 million for the comparable period of 1995. This increase was primarily . . . In response to higher charge-off, impaired asset and delinquency levels." Also, in their 1995 annual report Advanta stated:

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12. Furthermore, I note that the uncanny resemblance between plaintiffs' list of undisclosed adverse business conditions and the list of proposed corrective measures contained in Advanta's March 17, 1997 press release only bolsters my conclusion.

13. Because I dismiss plaintiffs claim under 15 U.S.C. § 78u-4(b) for failure to adequately plead facts underlying their fraud claim, I do not address the issue of whether or not plaintiffs have adequately plead scienter as required by 15 U.S.C. § 78u-4(b)(2).

14. In re Burlington Coat Factory, supra note 10.

> Throughout the industry, credit card issuers and other lending institutions experienced deteriorations in credit quality as delinquencies and charge-offs rose. Advanta has enjoyed historically low delinquency and charge-off rates over the past few years. Given the changes in the recent credit cycle, coupled with the sheer size and seasoning of our portfolio, we expect to see delinquencies and charge-offs move upward to more normalized levels.

ii. Janet Point's Statement

Plaintiffs claim that a statement issued by on September 12, 1996 by Janet Point, Vice President for Investor Relations was false and misleading. Point informed the Dow Jones New Service that Advanta expected large revenue increases from repricing more than $5 billion of credit card receivables with current teaser rates of about 7% to what she described as Advanta's normal interest rate of 17%. Yet, in the June 1997 Philadelphia Magazine article, Alter is quoted as saying, "[w]hat happened is when the introductory period ended, we were probably not as aggressive as could have been [repricing our rates]. . . Instead of repricing to 18 percent-we repriced closer to 13 or 14 percent in order to retain our image and the luster of being a low-cost provider." Comparison of these two statements, plaintiffs' allege, leads to the inference that Point's statement was false and misleading.

Defendants contend that Point's statement is not actionable because it falls within a statutory safe harbor that protects forward-looking statements when the plaintiff fails to prove defendant made them with actual knowledge that they were false. Under the safe harbor that defendants refer to, 15 U.S.C. § 78u-5(c), “a person shall not be liable with respect to any forward-looking statement ... to the extent that ... the plaintiff fails to prove that the forward-looking statement ... was made with actual knowledge by that person that the statement was false or misleading. . . ."

It is apparent that Point’s statement meets the definition of a forward-looking statement -- “a statement of plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer,” so I must determine whether it is worthy of statutory protection. In paragraph 33 of their complaint, plaintiffs allege generally that all statements by Advanta, or its representatives referred to in the complaint do not qualify for safe harbor protection because “at the time each of those forward-looking statements was made the particular speaker knew that the particular forward-looking statement was false, and/or the forward-looking statement was authorized and/or approved by an executive officer and/or director of Advanta who knew that those statements were false when made.” Presumably, additional support for plaintiffs’ allegations comes from Alter’s later “inconsistent” comments to Philadelphia Magazine.

Defendants characterize these allegations as conclusory and assert that they fail to allege the required state of mind, that the speaker had actual knowledge that the statement was false or misleading when made. I agree. Plaintiffs' catch-all allegation that all speakers knew that their statements were false when made is too broad and Alter's comments indicate nothing more than Advanta's failure to follow through exactly as planned on its proposed interest increase, rather than purposeful intent to fool the investing public. Therefore, mindful of the pleading requirements of Rule 9(b) and the PSLRA, I find plaintiffs' allegations as to Point's state of mind insufficient. Accordingly, Plaintiffs' claims of fraud based on such statement are dismissed pursuant to Rule 9(b) and the PSLRA.

B. Counts II and III

Counts II and III are derivative of Count I and therefore are also dismissed. In Count II, the Complaint alleges that individual defendants are liable as "control persons" under Section 20(a) of the Exchange Act. Because, plaintiffs have failed to state and/or to adequately plead a primary violation of the Exchange Act, their "control persons" claims must also be dismissed. See Shapiro v. UJB Fin. Corp., 964 F.2d at 279. Likewise, under Section 20A, an insider who trades shares of stock while in possession of material, nonpublic information is liable to any person who traded contemporaneously with the insider. Generally, to state a claim under Section 20A a plaintiff must establish: (1) trading by a corporate insider; (2) a plaintiff who traded contemporaneously with the insider; and, (3) that the insider traded while in possession of material nonpublic information, and thus is liable for an independent violation of the Exchange Act. See e.g., Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 703-04 (2d Cir. 1994); In re VeriFone Sec. Litig., 11 F.3d 865, 871-72 (9th Cir. 1993). Accordingly, because plaintiffs have failed to state and/or plead a claim under the Exchange Act their Section 20A claim is also dismissed.

An appropriate Order follows.

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

IN RE ADVANTA, CORP., SECURITIES LITIGATION.	:	CIVIL ACTION
	:	NO. 97-CV-4343

O R D E R

AND NOW, this 9th day of July 1998, upon consideration of a motion to dismiss Counts I and II of the complaint submitted by defendants, Advanta Corp., Dennis Alter, William A. Rossoff, Alex W. Hart, Gene S. Schneyer, and John J. Calamari (collectively "Advanta" and "Advanta's Motion") and joined by defendants, Richard A. Greenawalt ("Greenawalt") and Robert A. Marshall ("Marshall") (Docket No. 16); a motion to dismiss the entire complaint submitted by Greenawalt and Marshall ("Greenawalt's Motion") (Docket No. 15); Plaintiffs' combined response (Docket No. 20); a reply submitted by Greenawalt and Marshall (Docket No. 26) and a reply submitted by Advanta (Docket No. 27), it is hereby ORDERED that Advanta's Motion is **GRANTED** and Greenawalt's Motion is **GRANTED**.

As to Count I, claims based on statements regarding change in Advanta's charge-off policy are **DISMISSED**, with prejudice, pursuant to Rule 12(b)(6); claims based on Janet Point's statement regarding changes in interest rates are **DISMISSED**, without prejudice, pursuant to Rule 9(b) and the

PSLRA; and claims based on remaining general statements regarding Advanta's credit card division are **DISMISSED**, without prejudice, pursuant to Rule 9(b) and the PSLRA. As they derive from Count I, Counts II and III are also **DISMISSED**, without prejudice. Any amended complaint plaintiffs seek to file pursuant to this Memorandum and Order must be filed within thirty (30) days of this order, unless that time limitation is specifically extended by order of this court.

BY THE COURT:

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RONALD L. BUCKWALTER, J.