UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22829-CIV-JORDAN

PETER H. KAMIN, et al.,)
Plaintiffs)
)
vs.)
)
KEVAN D. ACORD, et al.,)
Defendants)
______________________________)

ORDER GRANTING MOTIONS TO DISMISS

For the reasons which follow, the motions to dismiss and to adopt filed by Sebastian De La Maza, Alberto Perez, Jose Perez, and Thomas Borrell [D.E. 88, 94, 95, 97] are GRANTED.

I. FACTUAL ALLEGATIONS

On April 7, 2005, Neff Corporation announced that the private equity investment firm Odyssey was acquiring it at a premium above the existing price per share. This announcement took place after several weeks of negotiations and a due diligence process.

The plaintiffs are a group of private investors who sold Neff stock prior to the announcement of the acquisition. They claim that in March and early April of 2005, the defendants (none of whom are Neff directors or employees) learned that acquisition negotiations were taking place because of their close proximity to and relationships with Neff insiders. Specifically, the plaintiffs allege that the Perezes learned of the acquisition because Alberto shared office space and had unrelated business connections with Neff's CEO J.C. Mas, and then relayed the nonpublic information to his brother Jose. In addition, the plaintiffs allege that Sebastian De La Maza learned of the acquisition from his "constant contact" with his daughter Vivian Mas, who is married to J.C. Mas, and that Thomas Borrell found out about the acquisition when he vacationed with Jose Mas, a Neff director and the brother of J.C. Mas. The plaintiffs claim that after each defendant learned of the pending acquisition, they purchased Neff stock, which caused the stock price to rise. The plaintiffs also allege that this increase in stock price caused them to sell their Neff shares and – absent this increase in value – the plaintiffs would have held their stock until after the acquisition was publicly announced. So,

although they profited to some degree from the defendants' allegedly unlawful trading, the plaintiffs claim that their stock would have been priced even higher had they held on to it because the value of the stock increased 51 percent on the day the acquisition was publicly announced.

The plaintiffs allege that the defendants' actions violated § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, as well as § 20A of the Exchange Act, 15 U.S.C. § 78t-1. The plaintiffs also assert state law negligence claims. Dr. De La Maza, the Perezes, and Mr. Borell have moved to dismiss the Exchange Act claims under Rule 12(b)(6). I agree that dismissal of these claims is warranted.

II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), the plaintiffs must plead "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. For Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001). The court must limit its consideration to the complaint. *See GSW, Inc. v. Long County,* 999 F.2d 1508, 1510 (11th Cir. 1993). The factual allegations are accepted as true and all reasonable inferences from these allegations are drawn in the plaintiff's favor. *See Roberts v. Fla. Power & Light Co.,* 146 F.3d 1305, 1307 (11th Cir. 1998).

A plaintiff, however, must allege more than "labels and conclusions." *See Fin. Sec. Assur., Inc. v. Stephens, Inc.,* 500 F.3d 1276, 1282 (11th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 554-55 (2007)). The factual allegations in the complaint must "possess enough heft" to set forth "a plausible entitlement to relief." *Id.* In addition, a plaintiff's claim of fraud in a securities action must satisfy the requirements of Rule 9(b), which requires allegations of fraud to be stated with particularity (though "knowledge, and other conditions of a person's mind may be alleged generally"). "A sufficient level of factual support for a [§]10b claim may be found where the circumstances of the fraud are pled in detail. 'This means the who, what, when, where, and how: the first paragraph of any newspaper story.'" *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006) (citations omitted). Nevertheless, "a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directive of Rule 9(b) with the broader policy of notice pleading." *Friedlander v. Nims*, 755 F.2d 810, 813 n. 3 (11th Cir.1985)

Under the Private Securities Litigation Reform Act, in addition to satisfying the particularity requirement of Rule 9(b), "the complaint must allege facts supporting a strong inference of scienter for each defendant with respect to each violation." *Hubbard v. BankAtlantic Bancorp, Inc.*, 625 F. Supp. 2d 1267, 1278 (S.D. Fla. 2008) (citing *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008)). If this requirement is not met, the complaint must be dismissed. *See* § 78u-4(b)(3)(a); *Hubbard*, 625 F. Supp. 2d at 1278 (citation omitted).

III. ANALYSIS

The plaintiffs assert that the defendants' actions violated § 10(b) and § 20A of the Exchange Act. The Eleventh Circuit has held that a "plaintiff must first plead a violation of the Securities Exchange Act or its rules before pursuing [§] 20A insider trading claims." *See Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 797 (11th Cir. 2010). *See also In re AFC Enterprises, Inc. Securities Litig.*, 348 F. Supp. 2d 1363, 1375-76 (N.D. Ga. 2004) (plaintiff must sufficiently allege predicate violation of § 10(b) to establish actionable § 20A claim). Therefore, I address the plaintiffs § 10(b) claims first.[1]

To state a claim for securities fraud under § 10(b), private plaintiffs must allege: "(1) the existence of a material misrepresentation or omission, (2) made with scienter, (3) in connection with the purchase or sale of a security, (4) on which the plaintiff relied, and (5) which was causally connected to (6) the plaintiff's economic loss." *See Edward J. Goodman Life Income Trust*, 594 F.3d at 789, citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).[2] Because the plaintiffs

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[1]The plaintiffs assert that they need not show that the defendants owed a duty to them as required by a § 10(b) claim to assert a claim under § 20A. To support this proposition, they cite to *Johnson v. Aljian*, 490 F.3d 778 (9th Cir. 2007). In *Johnson*, the Ninth Circuit held that the express 5-year statute of limitations in § 20A controlled claims brought under this section, and allowed a plaintiff to bring a § 20A claim where the underlying § 10(b) violation was time-barred. *See id*. at 783. Contrary to the plaintiffs' argument, the Ninth Circuit did not find that the plaintiff need not establish all the elements of a § 10(b) private cause of action to bring a § 20A claim. Indeed, it reaffirmed that § 20A claims are derivative and a private plaintiff must first establish all six basic elements of a § 10(b) claim delineated by the Supreme Court. *See id*. at 782 n.13.

[2]A private plaintiff's burden in alleging a violation of § 10(b) is more rigorous than the S.E.C.'s burden because "the 'SEC does not need to prove investor reliance, loss causation or damages' in actions under 10(b)." *See S.E.C. v. K.W. Brown and Co.*, 555 F. Supp. 2d 1275, 1303 (S.D. Fla. 2007). Thus, my ruling that the S.E.C. stated a claim against the defendants under the

have not sufficiently alleged that they relied on the defendants' omissions, their § 10(b) and § 20A claims both fail.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008). The Supreme Court has held that "a rebuttable presumption of reliance" is present only in two circumstances. First, "under the fraud-on- the-market doctrine, reliance is presumed when the statements at issue become public" because the "public information is reflected in the market price." Second, "if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance." *See id*. (citations omitted). When neither presumption applies, a plaintiff "cannot show reliance upon any of [the defendants'] actions except in an indirect chain that [is] too remote for liability." *See id*. (finding that the plaintiffs could not demonstrate reliance on misrepresentations made by aiders or abettors who participated in § 10(b) violation because those defendants owed no duty to the plaintiffs).

The fraud-on-the-market doctrine is inapplicable because the plaintiffs do not allege that the defendants' misrepresentations became public during the period that the plaintiffs sold Neff stock. *See Basic Incorp. v. Levinson*, 485 U.S. 224, 247 (1988) ("[b]ecause most publicly available information is reflected in the market price" of a security, fraud-on-the-market theory creates a presumption "of an investor's reliance on any *public* material misrepresentations") (emphasis added).

The plaintiffs, moreover, have not sufficiently alleged that Dr. De La Maza, the Perezes, or Mr. Borrell had a duty to disclose their intent to trade (i.e., buy or sell) to them. The plaintiffs claim that the Perezes and Mr. Borrell owed them a duty because the Perezes and Mr. Borrell learned of the pending Neff acquisition through their relationships with J.C. Mas and Jose Mas, both Neff insiders.[3] The plaintiffs argue that the Perezes and Mr. Borrell were "tippees" of these insiders and therefore owed a derivative duty to them to disclose their intent to trade. But "tippee liability arises

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"misappropriation" theory of insider trading, *see* Order Denying Motions to Dismiss [D.E. 50 in Case No. 09-21977-Civ-Jordan], is not inconsistent with my holding here that these private plaintiffs have failed to do so.

[3]The plaintiffs do not allege that Dr. De La Maza was a "tippee" or owed any direct duty to the plaintiffs.

only when the tippee joins his tipper in a *co-venture* to exploit the confidential information." *See S.E.C. v. Yun*, 327 F.3d 1263, 1270 n. 15 (11th Cir. 2003) (emphasis added). To sustain a claim against a "tippee," a plaintiff must show that the insider "tipper" (here J.C. Mas and Jose Mas)"breached a fiduciary duty in disclosing to the tippee" and "gain[ed] some personal advantage" from disclosure. *See S.E.C. v. Adler* 137 F.3d 1325, 1333-34 (11th Cir. 1998), *citing Dirks v. S.E.C.*, 463 U.S. 646, 662 (1983). The plaintiffs' allegations do not support a claim of "tippee" liability. The complaint provides no facts -- let alone facts sufficient to meet the particularity requirements of Rule 9(b) and the PSLRA -- to show that J.C. Mas and Jose Mas intentionally disclosed nonpublic information to the defendants or breached any fiduciary duty to Neff shareholders. Rather, the plaintiffs allege only that Albero Perez learned of the pending acquisition through his "unrestricted access to Neff headquarters" and close relationship with J.C. Mas, who "routinely entrusted confidential information to Perez in connection with [real estate] projects and other business interests." Furthermore, the plaintiffs claim that Mr. Borrell learned the nonpublic information because he vacationed with Jose Mas during the height of the Odyssey acquisition negotiations. Absent any specific allegations that Jose Mas or J.C. Mas intentionally disclosed nonpublic information to the Perezes or Mr. Borrell in a breach of a fiduciary duty to plaintiffs and gained a benefit from this disclosure, the plaintiffs have not shown that the Perezes and Mr. Borrell owed a derivative duty to disclose their intent to trade to the *investor plaintiffs* under the "classical" insider trading theory.[4]

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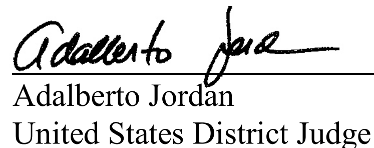
[4]I note that the plaintiffs also allege that Dr. De La Maza, the Perezes, and Mr. Borrell engaged in "misappropriation" insider trading when they breached a duty to the source of the nonpublic information that they intended to purchase Neff stock. *See Yun*, 327 F.3d at1269 (to show "misappropriation," the plaintiff must allege that an individual obtained confidential information "by reason of their relationship with the person possessing such information," and willfully "breached a duty of loyalty and confidentiality" by using that information to purchase or sell securities). The plaintiffs' claim of "misappropriation" insider trading is insufficient to state a private right of action under § 10(b) because the plaintiffs have not shown that they relied on the defendants' omissions. In "misappropriation" theory, the duty to disclose runs only to the source of the information with whom the trader shares a fiduciary relationship and not to the shareholders. *See United States v. O'Hagan*, 521 U.S. 642, 654 (1997) (no § 10(b) violation "if the fiduciary discloses to the source [and not to the public] that he plans to trade on the nonpublic information"). Moreover, the plaintiffs have cited no cases in which a plaintiff stated a private § 10(b) cause of action against a defendant based solely on "misappropriation" theory of insider trading. *O'Connor & Assoc. v. Dean Witter*

Thus, as in *Stoneridge Investment Partners*, where neither presumption of reliance was applicable because "[n]o member of the investing public had knowledge, either actual or presumed, of the [defendants'] deceptive acts during the relevant times," the plaintiffs here "cannot show reliance upon any of the defendants' actions except in an indirect chain that [ ] is too remote for liability." *See* 552 U.S. at 159.

IV. CONCLUSION

In sum, the motions to adopt [D.E. 94, 95] are GRANTED, and Dr. De La Maza's motion to dismiss (joined by the Perezes) and Mr. Borrell's motions to dismiss [D.E. 88, 97] are GRANTED. Counts I and II against Dr. De La Maza, Alberto Perez, Jose Perez, and Mr. Borrell are DISMISSED WITHOUT PREJUDICE. The plaintiffs may file an amended complaint by September 10, 2010. No further opportunities to amend will be granted.

DONE and ORDERED in chambers in Miami, Florida, this 27th day of August, 2010.



Adalberto Jordan
United States District Judge

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Reynolds, Inc., 529 F. Supp. 1179, 1187 (2nd Cir. 1981), is inapposite because the case involved a claim of "classical" insider trading.