

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE GLG LIFE TECH CORPORATION :
SECURITIES LITIGATION :
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This document relates to: ALL ACTIONS :
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11 Civ. 9150 (KBF)

MEMORANDUM
DECISION & ORDER

KATHERINE B. FORREST, District Judge:

On December 14, 2011, plaintiff Joseph Lardy, individually and on behalf of all others similarly situated, filed this action against GLG Life Tech Corporation (“GLG” or “the Company”), Luke Zhang (“Zhang”), and Brian Meadows (“Meadows”), alleging violations of Section 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 Section 20(a) of the Exchange Act. (See Compl., Dec. 14, 2011, ECF No. 1.)¹

On March 21, 2012, the matter was consolidated with Lattimore v. GLG Life Tech Corp. (12 Civ. 672). On February 28, 2013, the Court gave plaintiffs an opportunity to replead their allegations in light of defendants’ arguments and the relevant case law. (ECF No. 71.) On March 15, 2013, plaintiffs filed an Amended Consolidated Securities Class Action Complaint (ECF No. 73), which defendants have moved to dismiss.

¹ On May 10, 2012, a Consolidated Securities Class Action Complaint was filed. (ECF No. 27.) On June 25, 2012, defendants filed a motion to dismiss (ECF No. 31) and a request that the Court take judicial notice of certain documents (ECF No. 32). On October 17, 2012, the matter was reassigned from the Honorable Barbara S. Jones to the undersigned. (ECF No. 56.) On February 28, 2013, the Court issued an Order allowing plaintiffs leave to file an amended Complaint, if they so desired. (ECF No. 71.)

At its core, this case concerns whether defendants properly revealed the decline of the relationship between GLG and its largest customer, Cargill Incorporated (“Cargill”). According to plaintiffs, in early 2011, defendants became aware that GLG’s contractual agreement with Cargill was doomed – plaintiffs contend that defendants failed to timely notify the market of this fact. Providing a backdrop to these allegations, however, is the following: (1) GLG made it known to the market that Cargill was GLG’s largest and most important customer; (2) defendants told investors on March 31, 2011 that as of that date, Cargill had purchased all it was going to purchase from GLG for 2011; and (3) defendants filed a 40-F Form on March 31, 2011 with the SEC that stated GLG earned 90% of its revenues in 2009 from Cargill, 47% of its revenues in 2010 from Cargill, and that it expected revenues derived from Cargill to decrease even further in 2011.

With this backdrop in mind, the Court finds that plaintiffs have failed to sufficiently allege defendants misled the market with respect to the declining GLG-Cargill relationship. Accordingly, the Court hereby GRANTS defendants’ motion to dismiss.²

² The Court need not rule on defendants’ motion for judicial notice – it has taken into account those items that are relevant, relied on by plaintiffs, and incorporated by reference into the operative Complaint. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”) No additional information is necessary to resolution of this motion.

I. FACTUAL BACKGROUND

When deciding a Rule 12(b)(6) motion to dismiss, the Court must “accept all of plaintiff’s factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff.” Starr v. Georgeson Shareholder, Inc., 412 F.3d 103, 109 (2d Cir. 2005) (internal quotation marks and citation omitted); see also Tellabs, Inc., 551 U.S. at 323 (citation omitted).

GLG, which is headquartered in Vancouver, Canada and conducts its business in China, produces high-grade stevia extract – an all-natural sweetener derived from the stevia plant. (Am. Compl. ¶¶ 20-21, March 15, 2013, ECF No. 73.) GLG derives its income from two sources: (1) the sale of stevia extract; and (2) the sale of consumer products that contain stevia.³ (Id. ¶¶ 2, 3, 30.)

According to plaintiffs, on May 1, 2008, GLG announced the signing of a Strategic Alliance and Supply Agreement (“SASA”) with Cargill, which was amended on May 5, 2009. (Id. ¶¶ 39-40.) The SASA included the following terms: (1) GLG would supply to Cargill and Cargill would purchase minimum annual quantities of stevia extract from GLG; (2) Cargill would purchase a minimum of 80% of its global stevia extract requirements from GLG for the first five years of the

³ With respect to GLG’s consumer products business segment, “the Company entered into a joint-venture agreement with China Agriculture and Health Foods Company Limited (‘CAHFC’) in December 2010 for the sale and marketing of an all-natural zero calorie food and beverage product line called AN0C, to be sold and distributed in China. Dr. Zhang’s All Natural and Zero Calorie Beverage & Foods Company (‘AN0C Co.’) manufactures the AN0C products.” (Am. Compl. ¶ 32.) While the amended Complaint makes a number of assertions about this branch of GLG’s business, plaintiffs abandoned these claims at the oral argument held before the undersigned on November 8, 2013. (See tr. at 22-23.)

agreement commencing October 1, 2008; and (3) GLG would serve as Cargill's exclusive Chinese supplier of stevia extract. (Id. ¶ 40.) The SASA was subject to renegotiation at various times throughout its term. (Id. ¶ 42.)

In February 2011, GLG conducted a Securities Offering ("the Offering").⁴ (Id. ¶¶ 3-4.) In an effort to attract investors, on February 1, 2011, GLG issued revenue guidance, "forecasting \$90 to \$100 million in revenue from the stevia extract business segment for FY 2011 . . . and \$70 to \$100 million in revenue from the ANOC consumer products business segment for FY 2011." (Id. ¶ 5.)⁵

On February 14, 2011, GLG stated in its Short Form Prospectus for the Offering:

We have derived, and we believe that we will continue to derive, a significant portion of our revenue from [Cargill], our largest customer We expect that a significant portion of our revenues over the next several years will continue to be derived from sales to Cargill pursuant to the SASA. Moreover, we cannot provide any assurances that a material proportion of our revenue will be derived from other customers in the future.

Under the SASA with Cargill, we will provide at least 80% of Cargill's global stevia extract requirements for the first five years of the agreement commencing October 1, 2008. These commitments are subject to renegotiation at certain times throughout the term of the SASA.

⁴ According to plaintiffs, the Offering was critical for GLG to fund "an expensive marketing and advertising-heavy product launch" of a series of all-natural zero calorie food and beverages to be sold in China by Dr. Zhang's All Natural and Zero Calorie Beverage and Foods. (Am. Compl. ¶ 3.)

⁵ Plaintiffs allege that these "unrealistic and unsupportable" projections "artificially inflated" GLG stock to a Class Period high of \$12.45 per share on February 1, 2011. (Am. Compl. ¶ 5.)

If Cargill were to terminate its relationship with us, there would be a material adverse effect on our business operations and financial condition.

(Id. ¶ 42.) On February 23, 2011, the Offering closed with total gross proceeds of \$58,190,000. (Id. ¶ 34.)

According to plaintiffs, “[b]y March 31, 2011, and perhaps earlier, GLG determined that [its agreement with Cargill] no longer materially affected its operating results,” but defendants “repeatedly misled investors by failing to disclose the true nature of the current status and future prospectus with Cargill” (Id. ¶¶ 7-8.)

Specifically, according to plaintiffs, defendants misled the market in its 40-F Form filed with the SEC on March 31, 2011 because GLG stated that it “derived the majority of its revenue from Cargill in the current period, its largest customer” (id. ¶ 73) and listed the SASA as a “material contract.” (Id. ¶ 44.) In the “Risk Factors” section, GLG stated:

We have derived a significant portion of our revenue from [Cargill] our largest customer. The economic dependence on this customer has been materially reduced from 90% of the Company’s revenues in 2009 to 47% of the revenues in 2010 and we further expect revenues from this customer to decrease in 2011 and beyond driven by the new distributor and customer relationships that the Company secured in 2010 as well as the expected development of revenues from its ANOC consumer business in China.

However, if Cargill were to terminate its relationship with us, this could adversely effect on [sic] our business operations and financial condition.

(Id. ¶ 71 (emphasis added).)⁶ Plaintiffs contend GLG’s language suggesting “if Cargill were to terminate its relationship . . . [it] could adversely effect [] our business” implied that the GLG-Cargill relationship was strong. (This statement, however, must of course be read in the context of the prior statements regarding the declining revenue percentages derived from Cargill in 2010 and 2011.)

Plaintiffs further contend that on a March 31, 2011 conference call with industry analysts, defendant Zhang, Chairman and CEO of GLG, stated that: “[B]oth party [sic] [GLG and Cargill] are happy now and we are in a good relationship now.” (Id. ¶ 74.) Defendant Meadows, CFO of GLG, stated that Cargill “told us, they’ve got sufficient inventories probably for the rest of this year. But their business continues to grow which is really the catalyst for more product from GLG.” (Id.) Plaintiffs argue that these statements misled investors to believe that GLG and Cargill still had a good working relationship.

Plaintiffs also rely on statements made by Meadows on an August 15, 2011 analyst conference call – when asked how much of GLG’s second quarter sales internationally outside of China were to Cargill, Meadows stated: “Majority of them were to Cargill We have stated not to expect anything [in the remainder of 2011], that we expect we’ll be working on a new order sometime in 2012.” (Id. ¶ 83.) Here again, plaintiffs argue that statements made on this call misled the market into believing the Cargill relationship was stronger than it actually was.

⁶ According to plaintiffs, the “Company Overview” portion of the report reiterated that GLG “will serve as Cargill’s exclusive Chinese supplier of stevia.” (Id. ¶ 72.)

On August 22, 2011, GLG submitted a letter to the SEC in response to the SEC's request that GLG file the SASA wherein it stated that it no longer derived "a substantial portion of its revenue from Cargill." (Am. Compl. ¶ 47.)

Thereafter, the Company issued two press releases that plaintiffs argue finally put the market on notice that GLG's relationship with Cargill was on the decline. Specifically, on October 6, 2011, GLG disclosed that its "existing distributors did not place any new substantial orders during the third quarter and as a result stevia revenues in the third quarter will be low compared to previous quarterly results in 2011." (Id. ¶ 86.) On November 14, 2011, GLG stated that it would no longer be serving Cargill in an exclusive capacity beyond September 30, 2011. (Id. ¶ 91.) Plaintiffs argue that these two press releases and the stock price declines that accompanied them illustrate that the information was both new and material. (Id. ¶¶ 87, 93.)

II. DISCUSSION

A. Legal Standard for Motion to Dismiss

To survive a Rule 12(b)(6) motion to dismiss, "the plaintiff must provide the grounds upon which [its] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The complaint must allege "enough facts to state a claim to relief that is plausible on its face." Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321

(quoting Twombly, 550 U.S. at 570); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (same).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678. In applying that standard, the court accepts as true all well-pled factual allegations, but does not credit “mere conclusory statements” or “threadbare recitals of the elements of a cause of action.” Id. If the court can infer no more than “the mere possibility of misconduct” from the factual averments, dismissal is appropriate. Starr, 592 F.3d at 321 (quoting Iqbal, 556 U.S. at 679).

To state a claim under Section 10(b) or Rule 10b-5, a plaintiff must plead the following six elements: “(1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance . . . ; (5) economic loss; and (6) loss causation[.]” Kleinman v. Elan Corp., plc, 706 F.3d 145, 152 (2d Cir. 2013) (alterations in original) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005)). Such a claim must meet the requirements of Federal Rule of Civil Procedure 9(b), as well as the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4(b).

To survive a motion to dismiss under Rule 9(b), the complaint must: “(1) specify the statements that the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent.” ATSI Commc’ns, Inc., 493 F.3d at 99; see also

Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004). “The PLSRA similarly requires that the complaint ‘specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading,’ and it adds the requirement that ‘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.’” In re Bank of Am. AIG Disclosure Secs. Litig., No. 11 Civ. 6678, 2013 WL 5878814, at *1 (S.D.N.Y. Nov. 1, 2013) (quoting 15 U.S.C. § 78u-4(b)(1) and citing ATSI Commc’ns, Inc., 493 F.3d at 99; City of Roseville Emps’ Ret. Sys. v. Energysolutions, Inc., 814 F. Supp. 2d 395, 401 (S.D.N.Y. 2011) (alteration in original)).

With respect to omissions, Rule 10b-5 does not impose a duty to disclose “all material, nonpublic information,” nor does it require corporations to disclose information “merely because a reasonable investor would very much like to know that fact.” Id. at *6 (internal quotation marks and citation omitted). There is no duty to disclose information “to one who reasonably should be aware of it.” Id. at *7 (quoting Seibert v. Sperry Rand Corp., 586 F.2d 949, 952 (2d Cir. 1978)). However, “once a party chooses to speak, it has a ‘duty to be both accurate and complete.’” Id. (quoting Caiola v. Citibank, N.A., N.Y., 295 F.3d 312, 331 (2d Cir. 2002)).

B. Analysis

As explained below, plaintiffs have failed to properly allege both scienter and that defendants made false or misleading statements (or omissions) regarding the relationship between the Company and Cargill. While defendants clearly had an optimistic view of GLG's future, plaintiffs have failed to state a claim that defendants misled investors in violation of Section 10(b).

a. Scienter

In determining whether a plaintiff has met the scienter requirement of a Section 10(b) claim, the Court must consider the Complaint as a whole, evaluating whether "all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." Tellabs, Inc., 551 U.S. at 323 (citations omitted). "[I]n determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." Id. A strong inference "need not be irrefutable," but it does require that "a reasonable person [would] deem the inference of scienter at least as strong as any opposing inference." Id. at 326.

The first way in which a plaintiff may prove scienter is by alleging facts "that show both motive and an opportunity to commit fraud." Chill v. General Elec. Co., 101 F.3d 263, 267 (2d Cir. 1996). "[M]otive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." Id. (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d

1124, 1128 (2d Cir. 1994); see also In re AOL Time Warner, Inc. Secs. & “ERISA” Litig., 381 F. Supp. 2d 192, 218 (S.D.N.Y. 2004).

Here, plaintiffs have failed to allege that defendants had a plausible motive to defraud investors. While plaintiffs initially alleged that defendants had a motive to mislead the market because they wanted a strong offering (Am. Compl. ¶¶ 35, 136), this contention is plainly contradicted by plaintiffs’ proffered timeline: defendants allegedly began misleading the market on March 31, 2011, but the Offering ended on February 23, 2011. (Id. ¶ 34.) Moreover, plaintiffs have failed to set forth any other possible motive on the part of defendants – they did not allege, for example, that defendants were attempting to engage in insider trading; in fact, defendant Zhang purchased a significant number of shares during the putative class period. (Defs.’ Reply at 13.) While plaintiffs do allege that defendant Zhang loaned over \$7 million to the Company (see Am. Compl. ¶¶ 152-54) – which might suggest that Zhang had a motive to artificially increase the value of GLG’s stock price – plaintiffs have failed to connect the dots in alleging that Zhang fraudulently misled the market because of the loans. Instead, plaintiffs’ allegations are generalized and thus insufficient to make out claim of scienter. See Kalnit v. Eichler, 264 F.3d 131, 142 (2d Cir. 2011) (“A plaintiff cannot base securities fraud claims on speculation and conclusory allegations.”) (citation omitted).⁷

⁷ Additionally, plaintiffs offer the violation of a legal duty to comply with Canadian regulations as a basis for a strong inference of scienter. (Am. Compl. ¶¶ 22-23, 76, 79, 82.) Defendants persuasively argue, however, that they did not violate Canadian regulations – they disclosed all that was required. (See infra; see also Defs.’ Reply at 11-13.)

The second way in which a plaintiff may plead scienter in a Section 10(b) claim is “by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” Chill, 101 F.3d at 268 (internal quotation marks and citation omitted). Indeed, “[w]here motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.” Kalnit, 264 F.3d at 142 (quoting Beck v. Mfrs. Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987) (citations omitted), overruled on other grounds by United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (en banc)).

To survive dismissal based on recklessness for purposes of alleging scienter, plaintiffs “must show that they alleged reckless conduct by the [defendants], which is at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.” Honeyman v. Hoyt (In re Carter-Wallace, Inc. Secs. Litig.), 220 F.3d 36, 39 (2d Cir. 2000). “To state a claim based on recklessness, plaintiffs must either specifically allege defendants’ knowledge of facts or access to information contradicting defendants’ public statements, or allege that defendants failed to check information they had a duty to monitor.” In re Gildan Activewear, Inc. Secs. Litig., 636 F. Supp. 2d 261, 272 (S.D.N.Y. 2009) (internal quotation marks and citation omitted).

Here, plaintiffs have failed to make out a claim that defendants knew or should have known that their alleged misrepresentations were false – plaintiffs did not sufficiently allege that defendants knew Cargill had terminated its relationship with GLG at any point during the proposed class period. While plaintiffs argue that in a letter to the SEC dated August 22, 2011, defendants reveal that the SASA was no longer material, plaintiffs misconstrue the plain language of the letter. In that letter, GLG wrote:

The Company no longer derives a substantial portion of its revenue from Cargill. For the quarter ended June 30, 2011, this customer accounted for approximately 21.7% of the Company's revenue, and for the year ending December 31, 2011[,] this customer is expected to account for less than 7% of the Company's revenue. . . . As a result, the Company does not believe the [SASA] constitutes information material to an investment decision that the Company has made or is required to make public . . . for the fiscal year ending December 31, 2011.

(Escobar Decl. at S-2 (emphasis added); see also Am. Compl. ¶ 47.) While plaintiffs argue that the “only plausible inference [from this letter] is that [d]efendants became aware that Cargill effectively eliminated the SASA no later than March 31, 2011, because after that date, [d]efendants determined they would no longer derive material revenues under the terms of the SASA” (Pls.’ Opp’n at 15), they ignore that this statement was made specifically for the 2011 fiscal year. (See tr. 17-19.) In fact, the letter made clear the same thing that the defendants had made clear on

the March 31, 2011 call: Cargill was not purchasing any additional stevia extract from GLG for 2011.⁸

Further, plaintiffs have failed to make out a sufficient allegation of recklessness on the part of defendants because plaintiffs' own pleadings make clear that there was substantial information in the market that suggested precisely that which plaintiffs allege defendants failed to disclose: that the GLG-Cargill relationship was deteriorating, to the detriment of GLG. Prior, extensive public disclosures weigh against an inference of scienter in this context. "Where allegedly undisclosed material information is in fact readily accessible in the public domain, . . . a defendant may not be held liable for failing to disclose this information." In re Bank of Am. AIG Disclosure Secs. Litig., 2013 WL 5878814, at *7 (internal quotation marks and citations omitted). As previously mentioned, the fact that Cargill was not going to be purchasing any additional stevia extract from GLG in

⁸ There also is a dispute between the parties regarding the minimum purchase requirements contained in the SASA. Plaintiffs contend that the Company's Annual Report on Form 40-F stated that the SASA, as amended on May 4, 2009, provided, inter alia, minimum annual quantities of stevia extract that GLG would supply and Cargill would purchase over the term of the agreement (Pls.' Opp'n at 2), but that defendants argue in their papers that the SASA did not require Cargill to make minimum annual purchases. (Id. at 7.) Defendants contend that GLG had previously revealed to the market that the SASA was revised in 2008 – the rolling three-year minimum commitment for annual purchase requirements was removed and replaced with a rolling 12-month commitment that would be renegotiated annually. (Def.' Reply at 2-3.) At oral argument, defendants stated that defendants do not believe any statement was made in 2010 that needed to be corrected, but if there was a statement that needed to be corrected, it certainly had been duly corrected by the March 31, 2011 call – "there is no way anybody came out of that March 31, 2011 call thinking anything about the Cargill GLG relationship other than this. No more orders for 2011. 2011 is going to be down 80 percent on a two year basis, 66 percent on a one year basis, and we still have hopes that something will come to pass in 2012." (Tr. 14.)

2011 was clearly disclosed on March 31, 2011, as was the fact of the 50% year over year decline in purchases by Cargill. These disclosures show that defendants did not behave so unreasonably so as to constitute “an extreme departure from ordinary standards of care.” See id. at *17 (explaining that even in a situation where reasonable minds would differ regarding whether a defendant acted recklessly, an inference of scienter premised on such fact would be precluded “because reckless conduct must be ‘highly unreasonable’ and constitute ‘an extreme departure from ordinary standards of care’”) (quoting Chill, 101 F.3d at 269) (emphasis omitted). Instead, based on plaintiffs’ allegations, they may have thought that they disclosed all that there was to disclose.

Moreover, while it may in fact be the case that defendants were overly-optimistic in expressing hope that Cargill would purchase stevia extract from GLG in 2012, this alone does not rise to the level of recklessness required. See Rothman v. Gregor, 220 F.3d 81, 90 (2d Cir. 2000) (“The fact that management’s optimism about a prosperous future turned out to be unwarranted is not circumstantial evidence of conscious fraudulent behavior or recklessness”) (citation omitted); see also Cosmas v. Hassett, 866 F.2d 8, 12 (2d Cir. 1989) (finding a sufficient claim of recklessness where defendants publicly made three false earnings predictions that they knew were false because they “were impossible to achieve because of import restrictions,” of which defendants would have known). Indeed, it just as easily could have been the case that defendants in fact thought Cargill would make purchases in 2012 as not. This fact, combined with the plain language in the SASA

that the agreement was subject to periodic renegotiation (i.e., the market was on notice from the outset that the SASA was subject to change), suggests that the market knew or should have known that regardless of what defendants hoped would happen in 2012, the purchases by Cargill for 2012 could not actually be secured until 2012.

In such circumstances, it is evident that plaintiffs have failed to make a sufficient showing of recklessness so as to create an inference of scienter. See Tellabs, Inc., 551 U.S. at 323.

b. Falsity

As a separate ground for dismissing plaintiffs' Complaint, plaintiffs have failed to sufficiently allege that defendants made false or misleading statements in connection with the GLG-Cargill relationship. Put simply, as of March 31, 2011, plaintiffs' own allegations show that defendants disclosed the nature of the deteriorating GLG-Cargill relationship so as to put the market on notice of such fact; after that point, plaintiffs make only cursory allegations that there was additional information to be revealed.

To the extent that plaintiffs argue defendants made material false and misleading statements, they focus on the following statements:

- March 31, 2011 conference call: Zhang stated that "both party [sic] are happy now and we are in a good relationship now," and Meadows stated that Cargill's "business continues to grow which is really the catalyst for more product from GLG;"

- August 15, 2011 conference call: Meadows stated that the “majority” of the stevia extract sales outside of China were to Cargill during the second quarter and that GLG “expect[s] [to] be working on a new order [with Cargill] sometime in 2012.”

(Pls.’ Opp’n at 14.) According to plaintiffs, it had already become clear to defendants by March 31, 2011 that GLG would no longer be able to rely on Cargill for any substantial portion of its revenue (see Am. Compl. ¶ 7) – yet they misled the market to believe otherwise. Notably, plaintiffs fail to cite any facts in support of this allegation; instead, they ask this Court to draw such an inference.

However, when asked whether GLG’s business from Cargill was “shrinking,” Meadows stated, “we have contract [sic] with them at this point which is probably the third of what we did with the last year.” (Declaration of Andrew R. Escobar in Support of Defendants’ Motion to Dismiss Plaintiffs’ Amended Consolidated Securities Class Action Complaint (“Escobar Decl.”) at K-15, Mar. 30, 2013, ECF No. 78.) Meadows then stated that Cargill had already obtained “sufficient inventories . . . probably for the rest of this year. But . . . their business continues to grow, which is . . . really the catalyst for more product from GLG.” (Id.)

When asked directly if Cargill would submit another purchase order for the year, an unnamed company representative responded, “we cannot say of any discussion. But . . . to be conservative, we haven’t assumed anything over and beyond what’s been committed . . . [which] we should fully deliver by the end of the second quarter. But . . . you never know, their business could tick up . . . we are in

periodic discussions with them” (Id. at K-18.) Not only that, when specifically asked whether investors should be concerned because the “Cargill business [is] perhaps falling off” and “growth in North America is not where we thought it was going to be at this stage,” Meadows responded: “Hey [], we made that conclusion probably a year ago,” to which the call participant responded, “Yeah.” (Id. at K-15.)

Moreover, as discussed above, GLG disclosed in the Management Discussion and Analysis (“MD&A”) section of their Form 40-F filed with the SEC that unfavorable changes in its relationship with Cargill could negatively impact the Company. (Id. at A-146.) Against this backdrop, the MD&A further stated in the section entitled “Factors Affecting the Company’s Results of Operations” under a subsection called “Relationship with Primary Customer” that the Company “derived the majority of its revenue from Cargill in the current period, its largest company. . . . For the [12] month period ended December 31, 2010, this customer accounted for 47% of the Company’s revenue. For the years end[ing] December 31, 2009 and 2008, this customer accounted for 90% and 77%, respectively, of the Company’s revenue.” (Id.)

Simply put, Meadows made it clear that Cargill had already bought all the product it would purchase from GLG for 2011 and that GLG’s financial projects did not assume additional purchases. These statements were on top of an almost 50% year over year decline in sales to Cargill. (See tr. at 11 (explaining that defendants disclosed to the market what amounted to an 83% drop in revenue from GLG’s

primary client over the course of a two year period).) The Cargill relationship had plainly materially changed for the worse based on these disclosed facts.

Taking together these various statements, it appears that defendants' statements were neither false nor misleading. See ECA, Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 197 (2d Cir. 2009) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)); Rombach, 355 F.3d at 173 (2d Cir. 2004) (explaining that the Court must look to "the total mix of information" to decide whether the statements would have "mislead a reasonable investor"). Instead, a shareholder would have walked away from the call with Meadows and Zhang believing that things with Cargill were already in serious decline, would not get better in 2011, and in general, were not going well.

Moreover, puffery, or expressions of corporate optimism, do not provide grounds for liability in federal securities actions: "People in charge of an enterprise are not required to take a gloomy, fearful[,] or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business that they manage." Rombach, 355 F.3d at 174 (explaining that to succeed on their claim, "plaintiffs must do more than say that the statements in the press releases were false and misleading; they must demonstrate with specificity why and how that is so") (internal quotation marks and citation omitted); see also Lau v. Mezei, No. 10 Civ. 4838, 2012 WL 3553092, at *7 (S.D.N.Y. Aug. 16, 2012) (explaining that puffery includes "general promises,"

but not statements that relate “to the nature and degree of the risk associated with particular investments”) (citations omitted).

Here, when Zhang spoke about the parties “being happy” and “in a good relationship with Cargill,” he was plainly speaking in vague generalities. Similarly, when Meadows discussed the possibilities of working with Cargill in the future, he merely expressed optimism about the future of the relationship – against concrete disclosures of a 50% year over year decline in Cargill purchasing and numerous disclosures that Cargill was not contributing any additional revenue for 2011. Taken as a whole, the statements made by defendants on the March 31, 2011 conference call fail to rise to the level required to make out claim of false or misleading representations to the market.

As for the August 15, 2011 call, during which Meadows stated the “majority” of stevia extract sales outside of China were to Cargill during the second quarter and that GLG expected to “be working on a new order [with Cargill] sometime in 2012,” these statements too are insufficient to support a claim of falsity.

Under the PSLRA safe harbor provision, a defendant is not liable for a forward-looking statement “if the forward-looking statement is identified and accompanied by meaningful cautionary language or is immaterial or the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading.” Slayton v. American Express Co., 604 F.3d 758, 766 (2d Cir. 2010) (citing Southland Secs. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 371-72 (5th Cir. 2004)). Forward-looking statements do not need to be “contained in a

separate section or specifically identified,” as “the facts and circumstances of the language used in a particular report will determine whether a statement is adequately identified as forward-looking.” Id. at 769.

First, Meadows did not state that as of August 15, 2011, GLG was aware of a 2012 order from Cargill; rather, he expressed his expectation, as a hopeful executive, that GLG would be working with Cargill in 2012. Second, the pleadings themselves make clear that there was cautionary language throughout the SASA and various discussions of that document; based on the totality of information provided to investors, it should have been clear that the SASA was subject to renegotiation at various times during its term, and that it was on increasingly shaky ground. Third, as aforementioned, plaintiffs have failed to sufficiently allege that defendants knew their statements were in fact false. Fourth, the August 15, 2011 call did not reveal anything more than what essentially had already been revealed back in March of 2011 – that the GLG-Cargill was on the decline and that while there was perhaps hope for 2012, GLG could expect no additional revenue from Cargill for 2011.

For these reasons, plaintiffs have failed to sufficiently allege falsity and thus, their Section 10(b) claim must fail.

C. Section 20(a) Allegations

Plaintiffs also bring claims under Section 20(a) of the Securities Exchange Act, which holds defendants jointly and severally liable where they directly or indirectly controlled “any person liable under any provision of this chapter or any

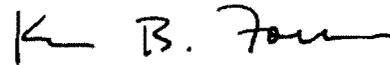
rule or regulation thereunder.” 15 U.S.C. §78t(a). Since plaintiffs fail to sufficiently allege a primary violation of Section 10(b), their Section 20(a) claims are dismissed.

III. CONCLUSION

For the reasons stated above, defendants’ motion to dismiss is GRANTED. The Clerk of the Court is directed to close the motion at ECF No. 75 and to terminate this action.

SO ORDERED.

Dated: New York, New York
January 31, 2014



KATHERINE B. FORREST
United States District Judge