UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--	X	01 CV 5852 (ARR)
IN RE KEYSPAN CORPORATION SECURITIES LITIGATION	:	OPINION AND ORDER
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ROSS, United States District Judge:

By opinion and order dated July 30, 2003, the court denied defendants' motion to dismiss the amended complaint. See In re KeySpan Corp. Sec. Litig., 01 Civ. 5852 (ARR), 2003 WL 21981806, at *18 (E.D.N.Y. July 30, 2003) ("KeySpan II"). By motion filed September 10, 2003, defendants have moved for reconsideration of this opinion pursuant to Local Civil Rule 6.3. For the reasons set forth below, the motion is granted.

BACKGROUND

For purposes of the instant opinion, the court assumes familiarity with its July 30 opinion and with the allegations of plaintiffs' amended class action complaint ("amended complaint," or "AC"). The court herein summarizes only those portions of the opinion and the amended complaint that are necessary to resolve defendants' motion.

The amended complaint alleges a class period dating from March 24, 2000, to July 17, 2001. Plaintiffs allege that throughout this period the individual defendants, four officers and directors of defendant KeySpan Corporation ("KeySpan," or "the Company"), made a series of false statements about KeySpan's performance and prospects. Specifically, the amended complaint alleges that the individual defendants knew of throughout the class period, yet deliberately concealed from the public, severe financial and operational problems at Roy Kay, Inc., a recently acquired subsidiary. The problems at Roy Kay allegedly belied defendants' positive reports and earnings forecasts, which misleadingly omitted the material threat Roy Kay posed to KeySpan's much-touted "growth strategy" in particular and to its financial health and reputation more generally.

In sustaining the complaint, the court rejected defendants' assertion that plaintiffs had merely pleaded "fraud by hindsight," that is, that plaintiffs had simply taken facts disclosed by defendants at the end of the class period and alleged, without sufficient factual particularity, that defendants had known these facts all along. See KeySpan II, 2003 WL 21981806, at *12. The court concluded, "Plaintiffs have pleaded specific facts demonstrating that as of January 2001, defendants possessed information about major problems at one its subsidiaries; that the existence of these problems contradicted the Company's rosy public representations; and that defendants waited six months before revealing these problems to the public." Id. at *15. Based on this conclusion, the court held that plaintiffs not only had overcome defendants' charge of fraud by hindsight but also had established defendants' scienter. Defendants' failure to disclose information contrary to their alleged false statements, the court held, constituted "strong circumstantial evidence of conscious misbehavior or recklessness." Id. (quoting Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001)).

Although the court denied defendants' motion to dismiss the entire complaint, the court granted defendants' motion, made in the alternative, to strike particular alleged false statements from the complaint. See id. at *17. The court struck two statements made in 2000 as inactionable general expressions of optimism, or "puffery." See id. (striking March 24, 2000 statement that defendants were "confident of increasing long-term value for our shareholders," and August 8, 2000 statement by defendant Catell that "I think we have a greater growth potential in our territory than any company in the industry"). The court rejected plaintiffs' assertion that these statements were premised on misrepresentations of existing facts, stating, "Although the amended complaint might permit an inference that defendants knew of the situation at Roy Kay at the very end of 2000, nothing in the complaint permits an inference of earlier knowledge." Id. For substantially the same reason, the court struck statements made in March 2000 as inactionable forward-looking statements within the statutory safe harbor of the Private Securities Litigation Reform Act ("PSLRA"). See id. at *18 ("The court agrees with defendants that ... plaintiffs have not alleged facts demonstrating [the statements'] falsity when made.").

In the instant motion, defendants argue that the foregoing findings – which limit the start date of defendants' alleged knowledge of the Roy Kay situation to January 2001 or, at the earliest, "the very end of 2000" – compel the conclusion that plaintiffs have failed to plead scienter for any statements made prior to this date. Defendants assert that the court "implicit[ly]" found that plaintiffs had failed to plead facts demonstrating that prior to January 2001 defendants knew of or recklessly disregarded the problems at Roy Kay. Def. Mem. at 2. Accordingly, defendants ask that the court make explicit this finding and strike from the amended complaint all alleged false statements made in the year 2000.[1]

Plaintiffs oppose the motion on three grounds. First, plaintiffs argue that it fails to satisfy the requirements of Local Civil Rule 6.3 insofar as it allegedly does not point out any factual matter or controlling decision that the court overlooked. Second, plaintiffs argue that the motion, which effectively seeks to shorten the class period, is premature, because "questions regarding the duration of a class period are to be resolved at the class certification stage of the proceedings and not before." Pl. Mem. at 3. Finally, plaintiffs argue that the court has already rejected defendants' arguments on the merits, inasmuch as the court's opinion allegedly supports the conclusion that defendants were aware of the problems at Roy Kay "many months" before January 2001. Id. at 4. Plaintiffs also point out, correctly, that the court, having found conscious misbehavior, expressly declined to rule on the

[1] The statements at issue were made from March 24, 2000, to October 31, 2000.

adequacy of plaintiffs' motive and opportunity allegations. See KeySpan II, 2003 WL 21981806, at *15 n.6. Defendants acknowledge as much, albeit in a footnote, but assert that the motive and opportunity allegations are deficient as well. Def. Mem. at 2 n.2.

DISCUSSION

I. Defendants' Motion Complies with Local Civil Rule 6.3

Local Civil Rule 6.3 requires a party moving for reconsideration to "set[] forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Local Civ. R. 6.3; see also EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 195 (E.D.N.Y. 2003) (to succeed, "the movant must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion") (citations omitted). "The standard for granting ... a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Boggs v. Die Fliedermaus, LLP, No. 99 Civ. 2451(RWS), 2003 WL 22299315, at *3 (S.D.N.Y. Oct. 7, 2003) (citing Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir.1995)). The movant may not use a motion for reconsideration to rehash "arguments on issues that have been considered fully by the Court," Boggs, 2003 WL 22299315, at *3 (citations and internal quotation marks omitted), nor may the movant "advance new facts, issues or arguments not previously presented to the Court." Dietrich v. Bauer, 198 F.R.D. 397, 399 (S.D.N.Y. 2001). In essence, "[m]otions for reconsideration allow the district court to correct its own mistake." Byrne v. Liquid Asphalt Sys., 250 F. Supp. 2d 84, 88 (E.D.N.Y. 2003); see also Boggs, 2003 WL 22299315, at *3 ("[A] motion for reconsideration may be granted to correct a clear error or prevent manifest injustice.") (citations and internal quotation marks omitted). The decision to grant or deny a motion for reconsideration lies within the sound discretion of the district court. See, e.g., Byrne, 250 F. Supp. 2d at 88; Dietrich, 198 F.R.D. at 399.

Plaintiffs' objections notwithstanding, defendants' motion fully complies with these requirements. Defendants neither raise new arguments nor fail to cite to matters previously raised that the court overlooked. On the contrary, defendants' motion points to issues that were clearly put before the court on the underlying motion but that the court erroneously failed to consider.

In their underlying motion, defendants argued that plaintiffs had not adequately pleaded scienter for any of the alleged misstatements in the amended complaint. Although defendants contended that scienter was lacking throughout the class period, defendants separately analyzed plaintiffs' scienter allegations in connection with the 2000 statements and the 2001 statements. Indeed, in the sections of their briefs concerning both "motive and opportunity" and "conscious misbehavior," defendants made separate point headings for each period. Def. Mem., 5/27/03, at 21 ("Plaintiffs Have Not Alleged ... Facts That Demonstrate Defendants Knew Or Recklessly Disregarded That KeySpan's 2000 Financial Statements Were False When Made"); id. at 23 ("Plaintiffs Do Not Allege With Particularity That Defendants Were Aware Of Or Recklessly Disregarded Facts Contradicting Their Public Statements in 2001"); id. at 16 ("The December 2000 Sales Were Not Suspicious Or Unusual"); ("The May 2001 Sales Were Not Suspicious Or Unusual"); see also Def. Reply, 6/17/03, at 7, 10, 18, 19 (similarly dividing discussion of scienter into respective 2000 and 2001 periods).

In their original motion, defendants thus squarely placed before the court the adequacy of plaintiffs' scienter allegations for each of two periods: 2000 and 2001. As mentioned, the court held that plaintiffs had adequately pleaded conscious misbehavior and therefore declined to reach the question of motive and opportunity. In reaching its conclusion, however, the court relied exclusively on facts indicating defendants' concealed knowledge "as of January 2001," KeySpan II, 2003 WL 21981806, at *15, or, by inference, "at the very end of 2000." Id. at *17. The court expressly found that the amended complaint did not plead any facts suggesting that defendants knew of the problems at Roy Kay any earlier. See id. Obviously, this finding is of critical importance to the issue of whether plaintiffs have adequately alleged conscious misbehavior for the year 2000. Nevertheless, as defendants point out, the court did not address the implications of this finding. Coupled with the court's failure to address whether plaintiffs had adequately pleaded motive and opportunity for the year 2000, the court's silence on defendants' year 2000 knowledge left the opinion devoid of any holding on the question of defendants' scienter during the year 2000. Because scienter must be pleaded with respect to each false statement alleged to be actionable, this silence was error. See Kalnit, 264 F.3d at 138 (quoting 15 U.S.C. § 78u-4(b)(2)) ("[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.") (emphasis added). Although tactfully framed as a request for "clarification," Def. Mem. at 1, defendants' motion, in keeping with the purpose of a motion to reconsider, calls the court's attention to this error and provides the opportunity for the court to fix it. Plaintiffs' procedural objections under Local Rule 6.3 are therefore not well taken.

II. Defendants' Motion Is Not Premature

Plaintiffs argue that defendants' motion, insofar as it raises "questions regarding the duration of the class period," is premature. Pl. Mem. at 3. This argument lacks merit.

While one effect of the court's granting defendants' motion would be to shorten the class period, defendants' arguments do not directly concern "the scope and duration of the class period." Id. at 3. Rather, defendants' arguments address the legal sufficiency of the complaint; as mentioned, defendants merely ask this court to decide, as indeed it must, whether each of the alleged false statements in the amended complaint is accompanied by adequate corresponding allegations of scienter. Such arguments are clearly the province of a motion to dismiss (or to reconsider an opinion on a motion to dismiss), and in fact cannot even be addressed at the class certification stage. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("[I]n determining the propriety of a class action, the question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (citation and internal quotation marks omitted); see also Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982) ("Class certification motions are not subject to the same standards as motions for dismissal for failure to state a claim or for summary judgment."); In re Health Mgmt., Inc., Sec. Litig., 184 F.R.D. 40, 44 (E.D.N.Y. 1999) ("This court will not inquire into the merits of this case [at the class certification stage] by determining which statements ... actually opened the door to litigation and which slammed the door shut.") (citation and internal quotation marks omitted).

Defendants' motion has nothing to do with whether plaintiffs have satisfied the requirements of Rule 23. Instead, defendants' arguments are limited to the question of whether the amended complaint satisfies the pleading requirements of the PSLRA and Rule 9(b). These arguments are properly before the court at this time, and the court rejects plaintiffs' unsupported assertion to the contrary.

III. Plaintiffs Have Failed to Plead Defendants' Scienter during the Year 2000

Plaintiffs also oppose defendants' motion on the merits, contending that the court "has already rejected defendants' arguments." Pl. Mem. at 4. Plaintiffs construe certain passages from the court's opinion as representing an affirmative finding of scienter with respect to all of the pre-2001 statements at issue, or at least as providing support for such a finding. As explained above, however, the court did not make any explicit ruling on defendants' scienter before January 2001 (or rather, before "the very end of 2000"). Moreover, as defendants recognize, the court's finding that nothing in the amended complaint supports an inference of knowledge before the end of 2000 weighs strongly against a finding of scienter, at least under the conscious misbehavior or recklessness prong. In any event, the relevant question is not whether the court's opinion supports a finding of scienter, but whether the amended complaint does.[2] As explained below, the court finds that it does not.

A. Conscious Misbehavior or Recklessness

As the Second Circuit has stated, "securities fraud claims have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statement. Under the circumstances, defendants knew, or more

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[2] Plaintiffs also assert that this court sustained the violations of ARB No. 45, which plaintiffs claim occurred "in significant part in fiscal year 2000." Pl. Mem. at 5. Although the court did sustain all of the alleged GAAP violations, see KeySpan II, 2003 WL 21981806, at *15 n.5, it did not explicitly address whether any of the alleged violations in the year 2000 were committed with scienter. Because GAAP violations, without corresponding intent to defraud, are inactionable under the securities laws, see Chill v. Gen. Elec. Co., 101 F.3d 263, 270 (2d Cir. 1996), the court's analysis and holding with respect to the pre-2001 false statements apply equally to the pre-2001 violations of GAAP.

importantly, should have known that they were misrepresenting material facts related to the corporation." Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000); see also Rothman v. Gregor, 220 F.3d 81, 90 (2d Cir. 2000) (conduct satisfies conscious misbehavior or recklessness prong where it "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") (citation and internal quotation marks omitted).

In this case, the amended complaint is devoid of allegations demonstrating, or even suggesting, that the problems at Roy Kay were either "known to the defendant[s] or so obvious that the defendant[s] must have been aware" of them throughout the year 2000. The earliest indication of any defendant's knowledge of the situation at Roy Kay is the January 25, 2001 meeting between defendant Feraudo and the principals of Roy Kay. As this court held in its July 30 opinion, Feraudo's comments at that meeting demonstrate an awareness not only of the gravity of Roy Kay's difficulties but of the threat these problems posed to KeySpan itself. See KeySpan II, 2003 WL 21981806, at **12-16. Although plaintiffs are correct that some of the problems Feraudo referred to had been ongoing for many months prior to the meeting, nothing Feraudo said at that meeting suggests that he, Catell, or any of the other defendants had contemporaneous knowledge of these problems.[3] As this court explained in its opinion dismissing the first consolidated class action complaint, plaintiffs cannot demonstrate scienter merely by cataloguing the mounting problems at Roy Kay and asserting, without particularized factual support, that defendants knew or were reckless in not knowing about these

[3] Moreover, pleading defendants' mere knowledge of isolated problems would not be enough. That is, even assuming arguendo that the facts alleged permitted an inference that defendants knew of one or more of the particular difficulties Roy Kay was having, the amended complaint would still have to show that defendants were aware that these problems presented a material threat to KeySpan. However, nothing in the amended complaint remotely suggests that during the year 2000 defendants knew enough about the situation at Roy Kay to make them aware that their publicly optimistic statements were misleading.

problems. See In re KeySpan Corp. Sec. Litig., No. 01 Civ. 5852 (ARR), 2003 WL 1702279, at *24 (E.D.N.Y. Mar. 21, 2003) ("KeySpan I") ("Although the complaint is long on details of the mounting difficulties at Roy Kay, it is short on facts suggesting that any of defendants had contemporaneous knowledge of these difficulties.").

It is reasonable to infer that there might have been some lag time between defendants' full awareness of the problems at Roy Kay and the January 25, 2001 meeting with the Kays. The court therefore was and is willing to assume, on a motion to dismiss, that defendants might have perceived the seriousness of the Roy Kay situation "at the very end of 2000," KeySpan II, 2003 WL 21981806, at *17, that is, approximately a month before the January 25 meeting. Unfortunately for plaintiffs, the statements at issue occurred well before late December 2000; as mentioned, the alleged false statements were made between March 24, 2000, and October 31, 2000. It is not a reasonable inference from the facts alleged that defendants, when issuing the October earnings reports – much less when making public statements earlier in the year – knew that their accuracy was undermined by the situation at Roy Kay. Accordingly, the court finds that plaintiffs have failed to plead "strong circumstantial evidence of consciousness misbehavior or recklessness," Ganino v. Citizens Utilities Co., 228 F.3d 154, 168-69 (2d Cir. 2000) (citation omitted), and therefore have failed to plead scienter on this basis.

B. Motive and Opportunity

Even in the absence of consciousness misbehavior or recklessness, plaintiffs may establish scienter based on allegations that defendants had a motive and opportunity to commit fraud.[4] The parties do not dispute that defendants, by virtue of their positions in the Company, had such an opportunity. The question is whether plaintiffs have adequately pleaded motive.

"Motive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." Novak, 216 F.3d at 307 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994)). On the other hand, a plaintiff cannot base allegations of motive on generic incentives possessed by almost all corporate executives, such as "the desire to maintain a high corporate credit rating ... or otherwise to sustain the appearance of corporate profitability or of the success of an investment ..., and ... the desire to maintain a high stock price in order to increase executive compensation ... or prolong the benefits of holding corporate office." Id. (citations and internal quotation marks omitted).

Here, plaintiffs assert that defendants had two motives to commit fraud: the desire to profit from insider stock sales and the need to maintain a high credit rating in order to facilitate the acquisition of Eastern Enterprises. Considered alone or together, these alleged motives fail to create a strong inference of defendants' intent to deceive the public in making the statements at issue.

1. Insider Stock Sales

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[4] In their submissions in connection with the instant motion, both sides merely acknowledge the possibility of pleading scienter via motive without addressing the substance of plaintiffs' pleadings in this regard. Accordingly, the court's discussion of the parties' contentions about motive is based on their briefs submitted in connection with the underlying motion.

The amended complaint alleges that the "magnitude and timing" of defendants' class period stock sales demonstrate defendants' fraudulent intent. AC ¶ 152. Specifically, the amended complaint alleges that defendants sold their shares in two "tranches," in December 2000 and May 2001, AC ¶ 148-49; that the large volume of sales was unusual, inasmuch as none of the defendants, with one minor exception, had sold any shares or exercised any options in the year prior to December 2000; and that both sets of sales took place after the individual defendants became aware of the severity of problems at Roy Kay, and after the artificial inflation of KeySpan's stock price caused by defendants' concealment of these problems.

In the context of insider trading allegations, a plaintiff sufficiently pleads motive by alleging that defendants "misrepresented corporate performance to inflate stock prices while they sold their own shares." Kalnit, 264 F.3d at 138. However, "'[t]he mere fact that insider stock sales occurred does not suffice to establish scienter.'" Ressler v. Liz Claiborne, Inc., 75 F. Supp. 2d 43, 58 (E.D.N.Y.1999) (quoting Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1224 (1st Cir.1996)). For insider sales to raise an inference of improper motive, they must be "suspicious" or "unusual." See id. (collecting cases).

Much of the parties' briefing on the issue of motive focuses on the stock sales of Catell and, in particular, on the percentage of his total holdings that he sold during the class period. Plaintiffs allege that Catell sold 195,000 shares in December 2000, for proceeds approaching $7 million; unlike the other defendants, he did not sell any shares in May 2001. AC ¶¶ 57, 151. Although the amended complaint alleges that Catell's sales represent "almost 90% of the shares acquired from the exercise of options and almost 75% of all of the shares he owned, including the exercised options," AC ¶ 22, plaintiffs concede in their memorandum of law that Catell in fact sold only "25% of all combined shares (over which he had direct control) and options then exercisable." Pl. Mem., 6/10/03, at 45.

Defendants demonstrate that the actual percentage is even lower, given that public records filed with the SEC reveal that Catell sold fewer shares than plaintiffs claim he did. Def. Reply, 6/26/03, at 8 (first bullet point).

Defendants, for their part, sidestep plaintiffs' allegations, which appear to be supported by the public record, that the other three individual defendants sold much larger percentages of their available holdings in December 2000. For instance, defendants apparently do not dispute that Feraudo exercised 100% of his available options in December 2000 and immediately sold all of the shares so acquired,[5] or that, given his relatively small amount of shares not held as options, this sale represented almost a complete divestment of his total holdings. AC ¶ 27; Pl. Mem., 6/10/03, at 42; Def. Ex. 11, 13. Defendant Matthews appears to have sold close to 50% of his total shares plus exercisable options in December 2000, Def. Ex. 9, 13, and defendant Luterman's December sales appear to represent an even greater percentage of his holdings. Def. Ex. 10, 13.

On the other hand, as defendants point out and as this court recognized in its first opinion, defendants' collective total holdings increased during the class period, a fact that undercuts the contention that defendants were motivated to unload their shares based on negative insider information. See KeySpan I, 2003 WL 1702279, at *21 (collecting cases). Nevertheless, the court accepts, for the purpose of analyzing defendants' motive, that the magnitude of defendants' December 2000 stock sales raises some suspicion.[6] That said, the lack of suspiciousness of the timing of the sales, and the absence of any logical connection between the sales, defendants' insider knowledge,

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[5] In addition, plaintiffs appear to be correct in their allegation that Feraudo exercised certain options prematurely. AC ¶ 27 n.1; Def. Ex. 11 (December 2000 Form 4).

[6] The May 2001 sales represented much smaller dollar amounts and percentages of defendants' total holdings at the time. In any event, given their temporal distance from the year 2000 statements at issue, these sales say nothing about defendants' state of mind in making those statements.

and the alleged misstatements – deficiencies identified by the court in the March 21 opinion, see id. at *23 – undermine any inference of scienter from these sales.

The last public statement at issue was the Company's third-quarter Form 10-Q, issued October 31, 2000. Defendants' December sales took place on December 12 and December 20, some six to seven weeks after this alleged false statement. As the court stated in its March 21 opinion, this lapse of time "tends to negate any inference that defendants 'sought to reap the immediate benefit a falsely positive statement had on the market.'" Id. (quoting Ressler,75 F. Supp. 2d at 60.)[7] As the court also recognized, the December sales post-dated the earlier alleged misstatements by an even greater amount of time. Id. Moreover, the December sales pre-date the July 17, 2001 disclosure of losses from Roy Kay by seven months.

Where the alleged insider trading occurs either well after any of the alleged false statements, or well before the public revelation of bad news – both of which are the case here – courts have consistently found the inference of scienter to be attenuated. See, e.g., In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1093 (9th Cir. 2002) (finding officers' sales of, inter alia, 49%, 55%, and 74% of their respective holdings not suspicious where timing of sales did not "appear to have been calculated to maximize the personal benefit from undisclosed inside information") (citation omitted); Ressler, 75 F. Supp. 2d at 60 (no inference of fraud where sales took place "well over two weeks after [the alleged fraudulent] comments were made," and over six months prior to the negative disclosure); In re Party City Sec. Litig., 147 F. Supp. 2d 282, 313 (D.N.J. 2001) ("Lauber's sales took place ... twelve, four, and three months, respectively, before Party City announced its inability to complete the year-end audit....A broad temporal distance between stock sales and a disclosure of bad news defeats

[7] In fact, the lapse of time discussed in the March 21 opinion was even shorter, because the complaint at issue there had alleged a fraudulent statement occurring on November 9, 2000. Id.

any inference of scienter."); Head v. NetManage, Inc., No. C 97-4385 (CRB), 1998 WL 917794, at **4-5 (N. D. Cal. Dec. 30, 1998) (sales by multiple insiders, including certain defendants' sales of 76%, 94%, and 100% of their holdings, did not support scienter where no sales were made in two months before negative disclosure); see also Ronconi v. Larkin, 253 F.3d 423, 435 (9th Cir. 2002) (no inference of scienter despite seven defendants' sales of over 69% of their holdings, and an eighth defendant's sale of 98% of her holdings, where, inter alia, sales were "suspicious in amount, but not in timing").

The court's finding that the December 2000 sales do not give rise to a strong inference of scienter is reinforced by the absence of allegations supporting defendants' knowledge of the problems at Roy Kay at the time of the false statements earlier in the year. Although plaintiffs may, of course, plead motive and opportunity without a showing of conscious misbehavior, the court cannot but be influenced by the lack of any allegations supporting defendants' contemporaneous knowledge of facts contradicting the accuracy of their year 2000 statements. As the Ninth Circuit has explained,

> stock sales are helpful only in demonstrating that certain statements were misleading and made with knowledge or deliberate recklessness when those sales are able to be related to the challenged statements. In this case, the class period alleged is so long, and the virtually identical allegations recycled throughout the complaint so many times, that it becomes difficult to see how particular stock sales would strengthen allegations that particular statements were uttered with deliberate recklessness at the times they were made. This fact operates to the detriment of the plaintiffs, because it is their burden under the PSLRA to provide a clear context from which we can find a strong inference of fraud.

Vantive, 283 F.3d at 1093.

With respect to the defendants' statements during the year 2000, all of which are alleged to be false for failing to disclose the "crisis at Roy Kay" and most of which precede the December stock sales by many months, the court finds the reasoning of this passage persuasive. In the absence of any allegations supporting an inference that defendants knew of or recklessly disregarded the severity of the situation at Roy Kay throughout the year, it is difficult to see how defendants' December sales operate retroactively to create a motive to fraudulently conceal that situation. This logic finds support in opinions from within this Circuit. See Acito v. Imcera Group, Inc., 47 F.3d 47, 54 (2d Cir. 1995) (finding sales that occurred before the company insider himself became aware of negative information "fail to provide any inference of an intent to deceive the public"); Leventhal v. Tow, 48 F. Supp. 2d 104, 114-15 (D. Conn. 1999) (finding stock sales not suspicious where, inter alia, "over 65% of the alleged irregular sales occurred prior to the first allegedly negative report presented to [defendants]"); see also In re Health Mgmt. Sys. Sec. Litig., No. 97 Civ. 1865 (HB), 1998 WL 283286, at *6 (S.D.N.Y. June 1, 1998) (timing not suspicious where there "was no one particular event or events that triggered the substantial sales by the defendants").[8] In any event, even without considering defendants' lack of knowledge during the relevant period, the court concludes that the timing of the December 2000 sales is simply too arbitrary in relation to the false statements at issue and to the ultimate negative disclosure to support a strong inference of scienter.

2. Debt Issuance

Plaintiffs' allegations concerning the Fitch rating are also insufficient. The amended complaint alleges that on November 8, 2000, Fitch assigned an "A-" rating to KeySpan's $1.65 billion senior unsecured debt shelf registration. AC ¶ 101. Plaintiffs allege that the high Fitch rating depended on Fitch's ignorance of the problems at Roy Kay, as evidenced by Fitch's express reliance on the "reported plans of the Company to continue to expand its unregulated retail energy operations through

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[8] Here, the sales occurred just before defendants' likely knowledge of the situation at Roy Kay, that is, just before "the very end of 2000." However, even if the court were to assume arguendo that the sales were made after defendants became aware of the problems at Roy Kay, this assumption would not alter the fundamental point – namely, that in the absence of any particularized allegations of earlier knowledge, the December sales say nothing about defendants' state of mind from March to October.

acquisitions and internal growth." AC ¶ 102. The amended complaint alleges that this positive debt rating was "critical to KeySpan's financing of the Eastern acquisition and an additional motivating factor to conceal the operational and financial crises at the Roy Kay subsidiary that would have jeopardized the Fitch rating." AC ¶ 103.

Defendants argue that KeySpan's alleged motive to maintain a high credit rating constitutes the sort of generic motive that courts have rejected as a matter of law. In San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Co., 75 F.3d 801 (2d Cir. 1996) the Second Circuit rejected an attempt to plead scienter based on defendants' alleged desire to "maintain[] the company's bond or credit ratings at the highest possible level, so as to maximize the marketability of the $700 million of debt securities issued in January and minimize the interest rate on those securities." Id. at 813. The Court held that mere allegations of "a company's desire to maintain a high bond or credit rating" did not constitute a sufficient motive because "[i]f scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions." Id. (quoting Acito, 47 F.3d at 54).[9]

[9] Defendants also assert that the probative value of the high Fitch rating is eliminated by the fact that even after the Company announced that it would take losses due to Roy Kay, the Fitch rating remained the same. Plaintiffs take issue with the introduction of the post-class period Fitch rating, as it was neither filed with the SEC nor purportedly relied on by plaintiffs in bringing their complaint. The court agrees with plaintiffs that the propriety of considering the post-class period Fitch rating is dubious. See Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000) (on motion to dismiss, court may consider "public disclosure documents required by law to be, and that have been, filed with the SEC ..., and documents that plaintiffs either possessed or knew about and upon which they relied in bringing the suit."). More importantly, however, the court finds its probative value to be minimal. That the rating did not in fact drop upon KeySpan's disclosure of the losses from Roy Kay says nothing about defendants' state of mind before the disclosure. Theoretically, defendants could well have feared that the negative announcement would damage KeySpan's credit rating. Of course, whether the amended complaint pleads with sufficient particularity that defendants did in fact harbor such a fear, and were thereby motivated to commit fraud, is a separate matter, and one that is addressed below.

Plaintiffs contend that "it is well-established that the flotation of company debt can support an inference of scienter." Pl. Mem., 6/10/03, at 48 n.27.[10] Plaintiffs also argue that the court should disregard In re Emex Corp. Sec. Litig., No. 01 Civ. 4884 (SWK), 2002 WL 31093612 (S.D.N.Y. Sept. 18, 2002), which defendants cite and which purportedly established a bright-line rule that the desire to raise capital, by whatever means, can never support a finding of scienter. Though this court disagrees that Emex created such a rule,[11] the court agrees that no bright-line rule exists. As the Second Circuit recently clarified, the sufficiency of an alleged motive to raise capital depends on the circumstances of the particular case. See Rothman v. Gregor, 220 F.3d 81, 93 (2d Cir. 2000) ("This Court has ruled that, in some circumstances, the artificial inflation of stock price in the acquisition context may be sufficient for securities fraud scienter.") (citing, inter alia, In re Time Warner, Inc. Sec. Litig., 9 F.3d 259, 271 (2d Cir. 1993)).

In Rothman, plaintiffs alleged that the defendants "would concretely benefit from an artificially inflated [company] stock price, caused by their alleged material omissions, by using less [company] stock as consideration to acquire four companies." Id. The Court rejected defendants' assertion that San Leandro stood for the proposition that the desire to consummate a transaction could never constitute an adequate motive, stating, "Although virtually every company may have the desire to

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[10] As support for this proposition, plaintiffs cite solely to Ganino, in which the Second Circuit merely issued a remand to the district court to determine in the first instance whether facilitating a debt offering, among other asserted motives, amounted to a cognizable motive. Ganino, 228 F.3d at 170. It is thus an overstatement to say that the flotation of company debt is "well established" as a motive. In any event, as discussed below, this court agrees that, under certain circumstances, the flotation of company debt could constitute a motive to commit fraud.

[11] In Emex, the court held that allegations that defendants desired to increase the share price of Emex prior to two public offerings were insufficiently particularized to establish motive. Id. at *6. This court reads the holding in Emex as a mere application of the general principle that "a desire to raise much needed capital," without more, will not support an inference of scienter. See id. (quoting Glickman v. Alexander & Alexander Servs., Inc., No. 93 Civ. 7594(LAP), 1996 WL 88570, at *6 (S.D.N.Y. Feb. 29, 1996)).

maintain a high bond or credit rating, as *San Leandro* reasoned, not every company has the desire to use its stock to acquire another company." Id. After ruling that only one of the four acquisitions constituted a viable motive for fraud, the court nevertheless upheld a finding of scienter in light of the particular facts alleged about the remaining transaction. See id. at 93-94. The court found that defendants' alleged manipulation of the company's expenses to inflate its stock price in order to consummate the acquisition, more than half of which was paid for with stock, "in combination with the other allegations of the Complaint, reenforce[d] the adequacy of the complaint's allegation of scienter." Id. at 94 (emphasis added). Notably, the court had earlier held that plaintiffs had adequately pleaded recklessness. Id. at 92. The court reaffirmed that its holding regarding motive was highly dependent on context, stating, "Whether sufficient motive could be shown solely by an allegation of a high stock price artificially maintained in the context of one impending acquisition might well depend on the particular circumstances of the case, and, in any event, is not the issue before us." Id.; see also In re Interpublic Sec. Litig., No. 02 Civ. 6527(DLC), 2003 WL 21250682, at *11 (S.D.N.Y. May 29, 2003) ("While the simple purchase of one company by another may not ordinarily provide a sufficient allegation of a motive to commit fraud, a sustained and extensive plan to grow by acquisition, particularly through scores of acquisitions paid for with a company's stock, as alleged here, may."); In re Complete Mgmt., Inc. Sec. Litig., 153 F. Supp. 2d 314, 327-28 (S.D.N.Y. 2001) (inflation of stock price in acquisitions context "may at times be sufficiently specific support for an allegation of scienter"; noting that analysis is "highly fact-intensive" and "extremely contextual").

Accordingly, the question before the court is whether defendants' asserted desire to maintain a high Fitch rating in order to finance the Eastern acquisition, in light of the particular circumstances alleged in the complaint, constitutes a sufficiently concrete motive to commit fraud. Upon careful review of plaintiffs' allegations, the court concludes that it does not.

As an initial matter, the court finds significant that the amended complaint is almost devoid of allegations about the Eastern acquisition itself. The amended complaint, unlike the previous complaint, provides no factual context for the Eastern acquisition or its importance to the Company. Even assuming such importance, however, plaintiffs have failed to provide sufficient details of the financing of the acquisition for the court to conclude that a high Fitch rating was as "critical" as plaintiffs conclusorily assert it was. AC ¶ 103. Although the amended complaint asserts that the money raised by the long-term debt issuance would replace the short-term debt and commercial paper used to make the Eastern purchase, AC ¶ 101, it does not plead facts to show that the high Fitch rating was crucial to the acquisition itself or even to the Company's financial health more generally. See In re Baker Hughes Sec. Litig., 136 F. Supp. 2d 630, 643 (S. D. Tex. 2001) (in the absence of particularized facts, "plaintiff's simple reference to 'badly needed' or otherwise 'critical financing'" does not raise strong inference of scienter); Glickman, 1996 WL 88570, at *12 (motive to increase capital to consummate acquisitions insufficient where plaintiff pleaded no facts "to show that the underlying fraud was in any way necessary to [the] transaction[s]"); Portannese v. Donna Karan Int'l, Inc., No. 97 Civ. 2011(CBA), 1998 WL 637547, at *21 (E.D.N.Y. Aug. 14, 1998) (alleged motive to manipulate balance sheet to maintain credit facility was insufficiently concrete because "plaintiffs stop short of asserting that [the company] would have been in peril of losing this credit facility" absent the asserted manipulation). Indeed, the allegations of the amended complaint indicate that the Eastern acquisition was a fait accompli at the time of the Fitch rating and debt issuance, and that the money thus raised would simply "replace" money already otherwise raised. AC ¶¶ 101, 155. Other than the conclusory assertion that the financing was "desperately needed," AC ¶ 155, there is no suggestion that a lower Fitch rating would actually have threatened the deal, the Company, or the fortunes of any of the individual defendants. Without allegations detailing circumstances that made the need for the high rating a particularly keen one, no "strong" inference of fraud arises from the desire to obtain this rating.

Moreover, nothing in the amended complaint alleges that defendants even considered the Eastern acquisition or the Fitch rating when making the false statements at issue. Although plaintiffs allege that Fitch relied on the alleged misrepresentations when issuing its rating, they do not allege, and nothing in the complaint permits the inference, that defendants believed this rating to be critical to the acquisition of Eastern and were therefore motivated to make the misrepresentations. See Glickman, 1996 WL 88570, at *11 ("After all, the complaint never alleges that these transactions actually motivated defendants to engage in fraudulent conduct."); Emex, 2002 WL 31093612, at *6 ("Moreover, the Complaint is devoid of any allegations that defendants considered either stock offering [the benefits of which allegedly provided a motive] when issuing the April 9 press release [which was alleged to contain false statements]."). Indeed, to accept the Eastern transaction as an adequate basis for scienter, the court would have to conclude that beginning in March 2000, defendants embarked on a coordinated seven-month campaign of public disinformation, culminating with the falsified third-quarter earnings reports in October 2000, in order to secure a high credit rating that would "clinch" the financing for this transaction – which, in turn, would "support[] the rise of KeySpan's stock prices to levels of historic all-time highs, at which time defendants [would sell] their stock." Pl. Mem., 6/10/03, at 48. This speculative theory not only is unsupported by any specific factual allegations, but also leaves unexplained the fact that defendants allegedly continued to make false statements for a full seven months after the supposed scheme was consummated in December. Although the amended complaint alleges another debt issuance and high Fitch rating in May 2001, it is vague as to the purpose of this issuance and lacks any details to suggest that it was necessary for the realization of a particular concrete benefit. See AC ¶ 121.

In the absence of more specific allegations connecting, logically and temporally, the alleged false statements to defendants' alleged motive, plaintiffs' scienter allegations are simply too vague and speculative to pass muster. See Glickman, 1996 WL 88570, at *11 (motive insufficient where plaintiffs failed to "point to a discrete and specific series of events flowing directly from a particular motive"); Fant v. Perelman, No. 97 Civ. 8435 (LAP), 1999 WL 199078, at *12 (S.D.N.Y. Apr. 9, 1999) (no motive where "[t]here is a factual vacuum in the complaint" between the alleged motive and the alleged fraudulent scheme) (citation omitted). As the Glickman court recognized, cases in which courts have sustained allegations of motive founded on a desire to raise capital "show a much closer relationship between the allegation of fraud and the transactions said to be the goal or purpose of the fraud." Glickman, 1996 WL 88570, at *10; see, e.g., Time Warner, 9 F.3d at 267-68 (finding sufficient motive both to fraudulently conceal company's active consideration of rights offering needed to pay down debt from merger, and to "hype" alternative, more attractive means of raising capital, where announcement of rights offering would lower stock price and thereby decrease its efficacy); Interpublic, 2003 WL 21250682, at **11-12 (finding sufficient motive in "sustained multi-year program of acquisition and misstatements of financial results," where "many of these acquisitions relied on [the company's] issuing its own shares and stock-for-stock transactions"); Complete Mgmt., 153 F. Supp. 2d at 320, 327-28 (finding sufficient motive in detailed allegations that defendants sought to record "phony" receivables to inflate stock price in order to use stock to make acquisitions that, in turn, would reduce company's dependence on the phony receivables).

In sum, the court concludes that the desire to maintain a high credit rating to finance debt incurred by the Eastern acquisition, while not wholly generic, is not alleged with sufficient particularity to raise a strong inference of scienter. Even when defendants' stock sales a month after the first Fitch rating are also considered, the facts as alleged in the complaint fail to present a clear context from which it can be inferred that defendants were motivated to make false statements from March to October of 2000. For these reasons, plaintiffs have failed to satisfy the scienter requirement with respect to any of the alleged false statements made during this period.[12]

[12] As indicated above, this holding also applies to the alleged violations of GAAP during the year 2000.

CONCLUSION

For the foregoing reasons, defendants' motion is granted, and the alleged false statements from the year 2000 are hereby stricken from the amended complaint.

SO ORDERED.

Allyne R. Ross
United States District Judge

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Brooklyn, New York

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