UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE APACHE CORP. SECURITIES LITIGATION	§ § § § §	CIVIL ACTION NO. 4:21-cv-00575

MEMORANDUM AND RECOMMENDATION

Pending before me is Defendants' Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint ("Motion to Dismiss"). *See* Dkt. 71. Having reviewed the motion, the response, the reply, the pleadings, and the applicable law, I recommend that the Motion to Dismiss be **DENIED**.

BACKGROUND

This is a securities class action lawsuit brought by Lead Plaintiffs Plymouth County Retirement Association and the Trustees of the Teamsters Union No. 142 Pension Fund (collectively, "Lead Plaintiffs"), individually and on behalf of those purchasers of the common stock of Apache Corporation ("Apache") during the period from September 7, 2016 through March 13, 2020 (the "Class Period"). The defendants are Apache, an exploration and production company headquartered in the Houston area, and three of its top executives: (1) John J. Christmann IV ("Christmann"), Apache's President and Chief Executive Officer; (2) Timothy J. Sullivan ("Sullivan"), Apache's former Executive Vice President – Operations Support; and (3) Stephen J. Riney ("Riney"), Apache's Executive Vice President and Chief Financial Officer. I will refer to Christmann, Sullivan, and Riney, collectively, as the "Individual Defendants." Lead Plaintiffs bring claims under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated thereunder by the Securities Exchange Commission.

Lead Plaintiffs' live pleading is the Consolidated Class Action Complaint for Violations of the Federal Securities Laws ("Consolidated Class Action Complaint"). *See* Dkt. 65. In this 148-page pleading, Plaintiffs allege a massive fraud centering

on an oil and gas field in the Texas panhandle. The origins of this fraud, according to Lead Plaintiffs, began in the early 2010s when Apache endured a prolonged financial slump. As its competitors in the exploration and production industry capitalized on advances in hydraulic fracturing, Apache allegedly did not make a single notable discovery during the fracking boom. As a direct result, the company's stock price languished. Plaintiffs cite a Houston Chronicle article, which observed that Apache "found itself on the outside looking in," and management "knew Apache had to get back its swagger if it was to reverse its fortunes. It had to return to the business of risk, and it had to make a headline-grabbing find." *Id.* at 18.

In an effort to make such a headline-grabbing find, Apache focused on a remote area of West Texas in Reeves County, dubbed "Alpine High." On September 7, 2016, the first day of the Class Period, Apache announced Alpine High as a major oil discovery in Texas. As alleged by Plaintiffs,

> For three years, Defendants touted Alpine High as a "transformational discovery" and "world class resource play" with immense production capabilities, including "conservative" estimates of over three billion barrels of oil and significant amounts of "really rich gas." Defendants supported their claims by highlighting examples of "strong well results" and "successful oil tests" that were purportedly representative of Alpine High's "2,000 to more than 3,000 future drilling locations," which would "deliver incredible value to Apache and its shareholders for many, many years to come." Analysts and industry media lauded this "massive shale discovery," emphasizing that Alpine High's "compelling economics" represented Apache's "largest catalyst opportunity" for the coming years and put Apache "back in the game" after a "rough time keeping up with competitors." Fueled by Defendants' assurances, Apache's stock price soared, reaching a Class Period high of $69.00 on December 12, 2016. The Individual Defendants took full advantage, reaping more than $75 million in Alpine High-linked compensation during the Class Period.
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> . . . Unbeknownst to investors, Defendants' statements were false. In reality, Apache's own production data and analyses of the Alpine High play never supported Defendants' public representations. As Apache was ultimately forced to admit, Alpine High was virtually barren.

> Indeed, after three years of relentlessly touting Alpine High to investors, the "world class resource play" that was supposedly going to "transform" Apache produced less than 1% of the oil and gas that Defendants had represented to investors was recoverable. Alpine High was so devoid of oil and gas that Apache was forced to cease all drilling at the field in 2020, take a $3 billion write down, and slash its dividend by a staggering 90%. When the truth regarding Defendants' fraud emerged, analysts and the nation's leading financial publications excoriated Defendants, noting that the revelations "were in stark contrast to [Defendants'] past defense of Alpine High," and Apache's stock price was decimated, closing at a mere $4.46 on March 17, 2020—an astonishing decline of 93% from its high during the Class Period.

Id. at 8-9 (cleaned up).

This is not, Lead Plaintiffs insist, a situation in which a prospect turned out to be poor performing much to the surprise of those involved in the project. Instead, Lead Plaintiffs paint a sinister picture, claiming that Defendants touted the economic viability of Alpine High knowing full well that such statements were false. Based, in part, on statements from 24 confidential witnesses, the Consolidated Class Action Complaint asserts that Defendants lacked crucial data they needed to support impressive claims about Alpine High's production capabilities. Even worse, Lead Plaintiffs contend that the data behind the play actually indicated that Alpine High was not commercially viable. Lead Plaintiffs maintain that Defendants nonetheless went ahead and widely broadcast overwhelmingly positive statements about this high-profile project.

Defendants have moved to dismiss the Consolidated Class Action Complaint for failure to plead (i) an actionable false or misleading statement; or (ii) scienter with particularity as required by Federal Rule of Civil Procedure 9(b) and the Private Securities Reform Litigation Act ("PSLRA").

LEGAL FRAMEWORK

Rule 12(b)(6) authorizes dismissal of a complaint when the plaintiff has failed to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* At this initial pleading stage, I am required to accept as true all well-pleaded factual allegations in the Consolidated Class Action Complaint. *See Twombly*, 550 U.S. at 555–56.

Rule 9(b) requires parties claiming fraud to "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). The allegations must include "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (quotation omitted).

Section 10(b) of the Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). Rule 10b–5 implements § 10(b) by forbidding, among other things, the making of any "untrue statement of a material fact" or the omission of any material fact "necessary in order to make the statements made . . . not misleading." 17 C.F.R § 240.10b–5(b). "A § 10b–5 claim is subject to both Federal Rule of Civil Procedure 9(b)'s requirement that fraud be pled 'with particularity' and . . . the requirements of the [PSLRA]." *Abrams v. Baker Hughes Inc.*, 292 F.3d 424, 430 (5th Cir. 2002).

Enacted by Congress in 1995, the PSLRA has "twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). To accomplish this goal, the PSLRA contains "[e]xacting pleading

requirements." *Id.* at 313. Under the PSLRA's heightened pleading requirements, a plaintiff seeking to state a § 10(b) and Rule 10b–5 claim must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (quotation omitted).

The scienter, or state of mind element of a § 10(b) and Rule 10b–5 claim, is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). "Scienter is satisfied by a showing of severe recklessness, *i.e.*, an extreme departure from the standards of ordinary care." *Sec. & Exch. Comm'n v. World Tree Fin., L.L.C.*, 43 F.4th 448, 459 (5th Cir. 2022) (quotation omitted). To allege scienter under the PSLRA, "the 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." 15 U.S.C. § 78u–4(b)(2)(A).

Section 20(a) of the Exchange Act provides for joint and several liability for "controlling persons" who are found to have induced violations of the Exchange Act. 15 U.S.C. § 78t(a). "To impute liability to [the Individual Defendants]—the alleged 'control persons' of [Apache] under § 20(a) of the Securities Exchange Act—the investors ha[ve] to show a 'primary violation' under § 10(b): If the § 10(b) claim is inadequate, then so is the § 20(a) claim." *Mun. Emps.' Ret. Sys. of Mich. v. Pier 1 Imps., Inc.*, 935 F.3d 424, 429 (5th Cir. 2019).

ANALYSIS

A. Lead Plaintiffs Adequately Plead Actionable Misrepresentations

Defendants first argue that the Consolidated Class Action Complaint contains no well-pleaded allegations of an affirmative misrepresentation or omission. I disagree.

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