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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: WORLD ACCESS, INC. SECURITIES LITIGATION	CIVIL ACTION NO. 1:99-CV-43-ODE

ORDER

This civil action alleging violations of sections 11, 12 and 15 of the Securities Act of 1933 and sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder is currently before the Court on Defendants' Motion for Summary Judgment [# 145] and Plaintiffs' Motion for Leave to File Sur-Reply in Opposition to Defendants' Motion for Summary Judgment [# 172]. For the reasons set forth below, Defendants' Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Leave to File Sur-Reply is DENIED.

I. Facts and Procedural History

The following facts are undisputed unless otherwise noted. This case originated in 1999 when twenty-three class action complaints were filed on behalf of open market purchasers of the common stock of World Access, Inc. ("WAXS") during the period from April 29, 1997 through February 11, 1999, as well as those who received WAXS common stock in connection with acquisitions completed by the company in the Fall of 1998. After five years of litigation, only two Plaintiffs remain - William B. Tanner ("Tanner"), an open market purchaser from Memphis, Tennessee, who seeks to recover approximately $4.6 million in damages, and The Monetary Fund, Limited ("Monetary Fund"), a California-based hedge

fund that received shares as a result of the 1998 Telco merger transaction, which seeks to recover approximately $40,000 in damages. In 2001, WAXS filed for bankruptcy and an automatic stay was issued. The remaining Defendants are the following former officers and/or directors of WAXS: Steven A. Odom ("Odom"), Chairman of the Board of Directors and Chief Executive Officer ("CEO"); Mark A. Gergel ("Gergel"), Executive Vice President and Chief Financial Officer ("CFO"); Martin D. Kidder ("Kidder"), Controller and a Director; Hensley E. West ("West"), President, Chief Operating Officer ("COO"), and a Director; and Steven J. Clearman ("Clearman"), a Director.

WAXS was formed in the late 1980s or early 1990s as a repairer and refurbisher of used telephone equipment. In its early years, the company also acted as a contract manufacturer of telecom products developed and sold by third parties. By late 1994, the company's business strategy changed and it embarked upon a plan to become a full-scale manufacturer of its own products - referred to by an internal shorthand of being able to sell a "complete" or "turnkey" solution. The company planned to obtain its various products through the acquisition of other companies, internal development and the licensing of proprietary technology developed by others. To that end, the company targeted developing markets that were being opened up to competition through deregulation, particularly Latin America. Between 1995 and January of 1998, WAXS also acquired six companies and became able to license the rights to other products, including the right to sell those products under its own brand.

The fraud alleged in this case centers on one of those licensed products - a telephone switching product, the Compact Digital Exchange ("CDX") switch, marketed by WAXS between 1997 and early 1999. Plaintiffs' primary claim is that WAXS issued a series of false and misleading public statements concerning the CDX switch that artificially inflated the price of WAXS stock thus causing loss to Plaintiffs when WAXS's stock price fell. Essentially, Plaintiffs argue that WAXS represented the CDX switch as a "fully designed and operable product" when Defendants knew that the CDX switch was a "non-functional development stage prototype." [Amended Complaint ¶ 3].

In July of 1996, WAXS entered into a technology licensing agreement with Eagle Telephonics, Inc. ("Eagle") and International Communication Technologies, Inc. ("ICT") regarding a small, low-priced switch that Eagle had developed and sold under the name Eagle Digital Switching Central Office ("DSCO"). Under the terms of the agreement, Eagle retained ownership of the technology and controlled the engineering, but gave WAXS the exclusive right to manufacture, distribute, and sell the switch in certain countries, primarily in Latin America. WAXS also had the right to sell and market the DSCO switch under its own name and selected the CDX switch as its brand. A primary function of the CDX switch was to provide plain old telephone service ("POTS") to the end user, allowing for the processing of a call through the telephone network.[1] The CDX switch was much less expensive than the larger

[1] Plaintiffs argue that while POTS was a required function of the CDX switch, it was also intended to provide a variety of enhanced functions.

switches produced by other switch vendors. The CDX switch could be used as either a "Class 5" or a "Class 4" switch. A Class 4 switch provides a connection from one part of a network to another, whereas a Class 5 switch provides more features and connects the telephone of an end user to the telephone network. The Class 5 switch was an example of WAXS's strategy to provide customers with "turnkey" solutions.

By approximately 1997, Eagle and ICT had installed DSCO systems in China, India, Bangladesh and Russia, many of which are still in use and operational today. In early 1997, WAXS shipped its first CDX switch along with another product known as WLL-2000, a wireless local loop product that WAXS licensed from another company, to Hondouras for a field trial and test installation with Empresa Hondurena De Telecomunicaciones ("Hondutel"). Shortly thereafter, the installation was complete and the system was operational with calls being successfully placed through the system. WAXS shipped and installed another CDX switch in Honduras in 1998. These systems involved CDX Class 4 switches.

In August of 1997, GCA Telecom ("GCA") in El Salvador placed purchase orders for several CDX switches, along with certain design, installation and training services to be provided by WAXS. Interoperability testing to ensure compatibility between the CDX switch and the national telephone network in El Salvador ("ANTEL") was completed in December 1997. In March of 1998, GCA and WAXS entered into a second contract which provided that WAXS would construct the GCA networks in La Gloria, Santa Ana and San Miguel and supply and install all of the telecommunications equipment for these networks. These systems involved CDX Class 5 switches in

turnkey projects and thus were more complex and contained more features than previous installations.

Defendants state that the GCA networks were fully functional and complete in December of 1998. Plaintiffs dispute this and state that by the second quarter of 1998, problems with the functionality of the CDX switch became apparent and GCA was seriously unhappy with WAXS's performance. While Defendants point to the affidavit of one of the founders of GCA, Jose Belarmino Jamie ("Jamie"), in which he states that "[o]n behalf of GCA, I accepted the networks in La Gloria, Santa Ana and San Miguel as being complete in December 1998," Plaintiffs argue that no written documentation exists to confirm this statement. [See Jamie Affidavit, ¶ 43; Pls.' Resp. to Defs.' Statement of Material Facts, ¶ 121]. Plaintiffs point to email and letter correspondence between GCA and WAXS officials discussing problems with the networks in which GCA officials threatened to withhold payment if the problems were not corrected. [Pls.' Resp. to Defs.' Statement of Material Facts, ¶¶ 101-119]. Plaintiffs assert that there was a rift within GCA between Jamie, some of the other founders of GCA and the Sanchez family, who had provided financial support to GCA. [Id. ¶ 122]. Plaintiffs claim that Jamie's certification of the networks as complete had little to do with their state of completion or performance but was, instead, directly related to a power struggle occurring within GCA for which Jamie desired WAXS's support. [Id.]. Defendants dispute this and acknowledge that while a number of performance problems occurred as the networks were "turned up" after the first calls were placed in July of 1998, that the networks were complete and

functional by December of 1998.[2] [Defs.' Mot. for Summ. J. at 18]. Thus the events surrounding the completion and functionality of the GCA projects are disputed.

In 1998, WAXS also installed CDX switches in Ghana, Mexico and the Congo and the switches, Class 4 in nature, operated as intended. In 1999, WAXS completed additional CDX switch installations in Argentina, Guatemala and El Salvador.[3] Eagle currently continues to sell, market, and support the product under the DSCO brand name and by 2002 there were approximately 400-500 CDX switches installed and operational in twenty-eight countries.

Between 1994 and 1998, WAXS grew rapidly with revenues of $15.3 million in 1994, $30.1 million in 1995, $51 million in 1996, $93 million in 1997 and $211 million in 1998. In 1997 and 1998, WAXS's CDX switch installations, combined, accounted for a small percentage of the company's total revenue. CDX switches accounted for approximately 5% of the company's 1997 revenues of $93

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[2] In addition to the affidavit of Jamie attesting to the completeness of the network, Defendants point to a letter of recommendation that GCA provided WAXS in December of 1999 indicating that the CDX switch had proven to be low maintenance and easy to use as well as the additional purchases and continued use of the CDX switch by GCA in 2001 and 2003.

[3] Plaintiffs do not dispute that these additional installations were made but point out problems associated with the installation of CDX Class 5 switches in Italy in November of 1998 under an agreement with Aexis Telecom ("Aexis"). [Pls.' Resp. to Defs.' Mot. for Summ. J. at 36-41]. Defendants respond that this installation cannot be relevant to Plaintiffs' claims given the timing of the Aexis installation relative to Plaintiffs' purchases and to the disclosure of the alleged fraud. [Defs.' Reply at 7]. They contend that the problems associated with the Aexis project were a result of a problem with obtaining an appropriate carriers' license, not a result of problems with the functionality of the CDX switch. [Id.].

million. It accounted for approximately 4% of the company's 1998 revenues of $211 million.

In late 1998, WAXS completed mergers with three companies, NACT Telecommunications, Inc. ("NACT") and Telco Systems, Inc. ("Telco"), which were publicly held telecommunications equipment manufacturers who had their own products, and Cherry Communications Incorporated (d/b/a Resurgens Communications Group) ("Resurgens"), a facilities-based provider of international network access. These mergers had a significant impact on WAXS's size, revenue, product line, and service offerings. In November of 1998, analysts were projecting 1999 revenues for WAXS of roughly $900 million of which approximately 78% was related to these acquisitions. Analysts were also projecting that WAXS's "switching products," including products acquired from NACT and other refurbished equipment, would account for 14% of 1999 revenues, and projecting that the CDX switch would account for 2-3% of 1999 revenues. Plaintiffs do not dispute the projected CDX switch revenue for 1999 but note that because the CDX switch was sold at a higher profit margin than most other WAXS products, a given percentage of CDX switch revenues accounted for an even greater percentage of WAXS's earnings. The mergers also had a significant impact on the make-up of WAXS's management and Board of Directors. In December of 1998, John D. Phillips ("Phillips"), who had been CEO of Resurgens, was appointed as the new President and CEO of WAXS. Lindsay Wallace, formerly the President and CEO of NACT, was named Executive Vice President and COO of WAXS's Equipment Group. In addition, several new outside Directors were elected to the Board.

Throughout the relevant time period, WAXS and Defendants presented the CDX switch as a low-cost product targeted at emerging international markets and informed the market that the product was new and that WAXS had just begun to market and deploy the product. Defendants state that WAXS warned the market about the risks inherent in new product development such as the complexity and uncertainty of developing new, technologically advanced products and services; the possibility that new, complex products may contain undetected errors or failures when introduced; and, that these errors could result in a loss or delay in market acceptance of products as well as damage the company's reputation and financial condition. Plaintiffs dispute these assertions and state that generalized statements in Securities and Exchange Commission ("SEC") filings about deferral of orders, cancellation of orders, or return of products did not warn investors about known problems with the CDX switch.

Defendants state that the public statements made by WAXS regarding the CDX switch did not result in statistically significant price reactions and in no way inflated the price of WAXS's stock. Defendants state that of the announcements in 1997 and 1998 identified by Plaintiffs in the Amended Complaint in this case, only five coincided with statistically significant price reactions. Defendants assert that the market's reaction to these announcements was only temporary and that the price returned to the range predicted within two to three days. Defendants state that neither Plaintiff purchased WAXS stock between the time of these announcements and the time the stock price returned to its predicted range. Plaintiffs dispute these assertions and allege

that WAXS's public statements concerning the CDX switch contained material misstatements and omissions that caused the price of WAXS to be higher than it would have been had those statements disclosed all material information.

On January 5, 1999, WAXS announced: (1) that it had retained BT Alex Brown to advise it regarding strategic alternatives for its non-core businesses; (2) that it would take $90 million in special charges related primarily to the NACT, Telco and Resurgens mergers; (3) that while it expected revenues to be in line with analysts' expectations, its earnings per share would fall short of expectations for the quarter and year ending December 31, 1998; and (4) that the primary reason for the fourth quarter earnings shortfall was reduced margins in the resale of refurbished Northern Telecom switches and a lack of significant sales of CDX switches during the quarter due to the timing of customer buildouts. In response to this announcement, WAXS's stock price declined $8.875, a 41.8% decline from $21.25 on Monday January 4, 1999 to $12.374 on Tuesday January 5, 1999.

In mid-January 1999, Phillips, the new President and CEO, decided that the functionality of the CDX switch should be integrated into NACT's STX switch and that WAXS would cease supporting the CDX switch as a stand-alone product. Defendants West and Odom strongly disagreed with this decision. [4] However, Plaintiffs contend that WAXS abandoned the CDX switch due, in part, to customer dissatisfaction with the product and the lack of

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[4] Defendants West and Odom both left the company following this decision.

any significant sales during the third and fourth quarters of 1998. The reason WAXS stopped supporting CDX as a stand-alone product is thus disputed.

On February 11, 1999, WAXS announced: (1) finalized results for the quarter and year ending December 31, 1998; (2) earnings per share of $0.08 (rather than $0.15 as pre-announced on January 5, 1999); (3) additional one-time charges; (4) plans to sell non-core businesses; (5) special charges related to consolidations, downsizing and restructuring; and (6) that "in line with [its] recent decision to integrate the Class 5 functionality of CDX and the Class 4 functionality of NACT's STX switch into a next generation technology platform, reserves for potential doubtful accounts and potential inventory obsolescence were established to minimize the company's balance sheet exposure related to CDX, a relatively new international product." Following this announcement, WAXS's stock price declined $3.3125 or 28.8% from $11.50 on Thursday, February 11, 1999 to $8.1875 on Friday, February 12, 1999.

On April 8, 1999, WAXS filed its 1998 Form 10-K that incorporated its recent announcements including restructuring charges of $23.6 million which were taken in connection with the CDX switch. Following this announcement on April 9, 1999, the stock closed at $7.785, on Monday, April 12, 1999 the stock remained flat at $7.875, on April 13, 1999, the stock price increased to $8.125, on April 14, 1999, the stock price increased to $8.813, and by April 15, 1999, WAXS's stock price had climbed back up to $10 per share.

Plaintiff Tanner obtained most of his information relating to the alleged misinformation respecting the CDX switch from the Amended Complaint, which he read after it had been filed in this case. Between November 28, 1997 and January 23, 1998, Tanner purchased 79,000 shares of WAXS stock. After the market closed on February 12, 1998, WAXS issued a press release, which included information on its intended acquisition of Resurgens and that it would not meet analysts' projections for 1997. This announcement caused the stock price to drop by $2.9375 (or 10.1%) from $30.625 on February 12 to $27.6875 on February 13. Also on February 12, 1998 but prior to the release of the negative news by WAXS, Tanner sold all of his WAXS holdings, garnering proceeds of over $2.3 million. He also "shorted" 10,000 shares of WAXS (meaning that he sold 10,000 shares that he did not yet own, with the expectation that the price would fall and he would be able to buy the shares back at a lower price and make a profit), and generated an additional $300,100 in short sale proceeds. On February 13, 1998, after the stock price dropped, Tanner covered his short sale, and repurchased 65,000 additional shares of WAXS. Plaintiff Tanner does not dispute the timing or amounts of these transactions but notes that he is not claiming any damages related to shares of WAXS stock purchased prior to April 1, 1998.

Between February 13, 1998 and July 29, 1998, Tanner accumulated more than 620,000 shares of WAXS stock, which had a value in excess of $17.5 million. Beginning in September of 1998, Tanner began selling his shares at a fairly quick pace and testified that he did so likely in reaction to the "Asian flu" that caused significant declines in the stock prices of

telecommunications companies generally. [Tanner Dep. at 131-132]. By October of 1998, Tanner calculated that he had lost more than $11 million on his investment in WAXS but testified that these losses were the result of general market forces and not the product of the alleged fraud. [Tanner Dep. at 158-159].

After WAXS's stock price fell following the January 5, 1999 announcement, Tanner began purchasing WAXS stock again and purchased 25,000 shares that day. He made an additional purchase of 5,000 shares of WAXS stock on February 13, 1999 after WAXS's stock price had dropped again following the February 11, 1999 WAXS press release announcing lower earnings than earlier predicted. Tanner purchased more shares of WAXS in May of 1999, June of 1999, and August of 2000.

On September 18, 1998, Plaintiff Monetary Fund made its initial purchase of Telco Systems stock. Its decision to invest in Telco was not affected by any statements regarding the CDX switch (or WAXS in general) but was driven by Telco's historical and forecasted earnings. [Browne Dep. at 60, 63, 68]. Monetary Fund acquired 9,379 shares of WAXS as a result of WAXS's merger with Telco but (through its representative) does not recall being aware of the merger between WAXS and Telco; was not aware that the Telco Registration Statement was filed; never read the Telco Registration Statement, and was not aware that its Telco shares had been converted into WAXS stock until December 1998. [Browne Dep. at 56-57, 66, 71-72, 75]. Monetary Fund purchased additional shares of WAXS stock after the fraud was allegedly disclosed.

The public statements that WAXS made concerning the CDX switch, the stock market's reaction to those statements, and the

knowledge that Defendants had concerning problems associated with the CDX switch are of primary importance in this case. However, because of the disputed nature of many of these facts, they will be recounted within the Court's substantive analysis.

II. Motion for Leave to File Sur-Reply

As a initial matter, Plaintiffs have made a Motion for Leave to File a Sur-Reply to Defendants' Motion for Summary Judgment. Because no authorization exists in the Federal Rules of Civil Procedure nor the Local Rules of the Northern District of Georgia for parties to file sur-replies, the allowance of a sur-reply is solely within this Court's discretion. Plaintiffs have already filed a reply to Defendants' Motion for Summary Judgment as allowed by Local Rule 7.1. L.R. 7.1, N.D. Ga. A review of Plaintiffs' Sur-Reply Motion indicates that it does not offer additional evidence or legal argument not already covered in its lengthy reply brief. Because the Court finds this sur-reply unnecessary, Plaintiffs' Motion for Leave to File a Sur-Reply is DENIED.

III. Motion for Summary Judgment

A. Standard

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. Whatley v. CNA Ins. Cos., 189 F.3d 1310, 1313 (11th Cir. 1999).

Summary judgment is improper "if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 594 (11th Cir. 1995). Conclusory allegations based on subjective beliefs are insufficient to create a genuine issue of material fact. Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000); Ramsey v. Leath, 706 F.2d 1166, 1170 (11th Cir. 1983). Conversely, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Thus, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)(internal citations omitted).

B. Applicable Law

Plaintiff Tanner claims that Defendants violated section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act")

and Rule 10b-5 promulgated thereunder. He also claims that Defendants are liable as controlling persons under section 20(a) of the Exchange Act and section 15 of the Securities Act of 1933 (the "Securities Act"). Plaintiff Monetary Fund claims that Defendants violated sections 11 and 12 of the Securities Act.

1. <u>Section 10(b) and Rule 10b-5 claims</u>

Section 10(b) of the Exchange Act is a catch-all provision designed to prevent fraud not specifically prohibited under other sections of the Exchange Act or the Securities Act. Section 10(b) makes it unlawful for any person "[t]o use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). By the terms of section 10(b), no acts are illegal or prohibited unless they violate a rule or regulation promulgated by the SEC. The SEC therefore promulgated Rule 10b-5 which fleshes out the prohibition outlined in section 10(b). Rule 10b-5 specifically prohibits three types of actions:

(1) general defrauding "device[s], scheme[s], or artifice[s],"

(2) the making of any untrue statements of material fact or the omission of material fact necessary to make statements not misleading, or

(3) engaging in any act, practice or course of business that operates as a fraud or deceit upon any person in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2000).

To allege a Rule 10b-5 violation, a plaintiff must show: (1) a misstatement or omission, (2) of a material fact, (3) made with

scienter, (4) on which plaintiff relied, (5) that proximately caused plaintiff's injury. See Ziemba v. Cascade Intern., Int'l, 256 F.3d 1194, 1202 (11th Cir. 2001).

a. Materiality

In a Rule 10b-5 violation, "[m]aterially misleading statements or omissions by a defendant constitute the primary element." In re Miller Indus., Inc. Sec. Litig., 120 F. Supp.2d 1371, 1380 (N.D. Ga. 2000) (citing Basic, Inc. v. Levinson, 485 U.S. 224, 246-47 (1988)). "A false statement or omission will be considered `material' if its disclosure would alter the total mix of facts available to an investor and `if there is a substantial likelihood that a reasonable shareholder would consider it important' to the investment decision." Id. (citing Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985)). Thus, materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information. Basic, 485 U.S. at 240.

b. Scienter

Scienter is also a necessary element of a section 10(b) and Rule 10b-5 violation. Aaron v. SEC, 446 U.S. 680, 695 (1980). According to the United States Supreme Court, scienter means "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n. 12 (1976). The United States Court of Appeals for the Eleventh Circuit has advised that "[a] showing of severe recklessness satisfies the scienter requirement." Ziemba, 256 F.3d at 1202. It has defined severe recklessness as follows:

> Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.

Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1282 n.18 (11th Cir. 1999). While allegations of motive and opportunity such as insider stock sales, may contribute to an inference of severe recklessness, Plaintiffs cannot, standing on these allegations alone, demonstrate scienter. Bryant, 187 F.3d at 1285-86.

c. Reliance

The reliance requirement establishes the casual link between the defendant's activities and the plaintiff's injuries and prevents federal securities law from affording unlimited liability. Ross v. Bank South, 885 F.2d 723, 728 (11th Cir. 1989) (citing Lipton v. Documation, 734 F.2d 740, 742 (11th Cir. 1984)). Under certain circumstances, a presumption of reliance may be established when a requirement of actual reliance would make recovery a practical impossibility. Id. This presumption, deemed fraud-on-the-market, is based on the hypothesis that in a modern and efficient securities market, the market price of the stock incorporates all available public information. Basic, 485 U.S. at 246-47. Therefore, any person who trades shares relies on the integrity of the market price and misleading statements will defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. Id. at 241-42, 246. The Basic Court advised that the presumption is rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either

the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." Basic, 485 U.S. at 248. Thus, when an alleged misrepresentation does not affect the market price of the security in question, the presumption is rebutted and a fraud-on-the-market theory of recovery may not be used to satisfy the reliance element. See Nathenson v. Zonagen Inc., 267 F.3d 400, 415 (5th Cir. 2001).

d. Causation

To prove the final element of a 10b-5 violation, a plaintiff must prove both "transaction causation" and "loss causation." Bruschi v. Brown, 876 F.2d 1526, 1530 (11th Cir. 1989). Transaction causation is another way of describing reliance and is "established when the misrepresentations or omissions causes the plaintiff to engage in the transaction in question." Currie v. Cayman Res. Corp., 835 F.2d 780, 785 (11th Cir. 1988) (internal citations omitted). Thus, transaction causation is akin to actual or "but for" causation. Robbins v. Koger Prop., Inc., 116 F.3d 1441, 1447 (11th Cir. 1997).

To prove loss causation, a plaintiff must show "that the untruth was in some reasonably direct, or proximate, way responsible for his loss." Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. Unit A 1981), aff'd in part, rev'd in part on other grounds, 459 U.S. 375 (1983). "If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under the Rule is not permitted." Id. Loss causation describes "the link between the defendant's misconduct and the plaintiff's economic

loss." Robbins, 116 F.3d at 1447 (quoting Rousseff v. E.F. Hutton Co., Inc., 843 F.2d 1326, 1329 n.2 (11th Cir. 1988)). However because market responses "are often the result of many different, complex, and often unknowable factors, `the plaintiff need not show that the defendant's act was the sole and exclusive cause of the injury'" rather only that it was a substantial or significant contributing cause. Id. (quoting Bruschi, 876 F.2d at 1531).

2. Sections 15 and 20(a) claims

Under both the Securities Act and the Exchange Act, any person who "controls" a liable person is equally liable. See 15 U.S.C. § 78t(a) (1997) (Section 20a); 15 U.S.C.§ 77o (1997) (Section 15). The SEC's implementing regulations define "control" as "the possession, direct or indirect, or the power to direct or cause the direction of the management policies of a person." 17 C.F.R. § 230.405. In the Eleventh Circuit, "a defendant is liable as a controlling person . . . if he or she had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." Brown v. Enstar Group, Inc., 84 F.3d 393, 396 (11th Cir. 1996). Although sections 15 and 20(a) each incorporate a special defense into their statutory provisions, the controlling person analysis under each section is identical. See In Re JDN Realty Corp. Sec. Litig., 182 F. Supp. 2d 1230, 1241 n.7 (N.D. Ga. 2002). However, if there is no primary violation of securities law, then there can be no violation under sections 15 or 20(a).

3. Section 11 claim

Section 11 of the Securities Act sets forth liability with respect to any material misstatement or omission in a registration statement. A plaintiff alleging a section 11 violation must prove that "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a) (1997) (Section 11). Thus, a plaintiff need not prove scienter or reliance for a section 11 violation.

4. Section 12(a)(2) claim

Section 12(a)(2) of the Securities Act provides a remedy against one who sells a security by means of a prospectus or oral communication, which includes an untrue statement of material fact, or omits to state a material fact necessary to make the statement, in light of the circumstances under which it was made, not misleading. 15 U.S.C. § 77*l* (1997). It does not require an intent to defraud on the part of the defendant, or even knowledge of the misrepresentation or omission. Herman & MacLean v. Huddleston, 459 U.S. 375, 381-82 (1983). Reliance on the statement by the plaintiff is also not required.

C. Analysis

1. Section 10(b) and 10b-5 claims

The following public statements made concerning the CDX switch form the basis of Plaintiff Tanner's 10b-5 claims.[5] First,

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[5] All of the public statements that Plaintiffs allege are false and misleading occurred before December of 1998, thus the Court will limit its review to those statements. The Court also concentrates only on the alleged fraud with regard to the CDX