

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

Case No. 08-60111-CIV-GRAHAM/TORRES

ROBERT D. DANCE, et al.,
Individually, and on behalf
of all others similarly situated,

Plaintiffs,
vs.

LEVITT CORP.,
ALAN B. LEVAN,
and GEORGE P. SCANLON,

Defendants.

ORDER

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss the Amended Complaint [D.E. 30], and Defendant's Request for Oral Argument [D.E. 32].

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises. Because the parties have fully briefed the issues, the Court finds that an oral argument is not necessary.

I. BACKGROUND

Plaintiff Robert D. Dance brought this securities fraud class action on behalf of all persons or entities who purchased the securities of Levitt Corporation ("Levitt") between January 31, 2007 and August 14, 2007 [D.E. 22 ¶ 1]. Class Members Robotti & Company, LLC and Robotti & Company Advisors were appointed Lead

Plaintiff [D.E. 17]. Defendant Levitt is a homebuilder and real estate company [D.E. 22 at ¶ 3]. Defendant Alan B. Levan ("Levan") is the Chairman and Chief Executive Officer of Levitt, and Defendant George P. Scanlon ("Scanlon") is the Chief Financial Officer and Executive Vice President [D.E. 22 at ¶¶ 24-25].

According to Plaintiff, the Defendants misrepresented the financial health of Levitt through false financial reports, causing the stock price to trade at artificially inflated levels. [D.E. 22, at ¶¶ 5, 10]. The Amended Complaint further alleges that, after the poor financial condition of the company was disclosed to the public, the price of Levitt securities dropped, causing damages to the shareholders who purchased Levitt stock during the class period [D.E. 22 at ¶ 11]. Plaintiffs argue that Defendants behavior violates Section 10(b) of the Securities Exchange Act ("Exchange Act") of 1934, 15 U.S.C. § 78j(b), and Rule 10(b)-5, 17 C.F.R. § 240.10b-5.

Before the Court is Defendants' Motion to Dismiss the Amended Complaint [D.E. 30]. Specifically, Defendants argue that Plaintiffs have failed to plead with particularity the false or misleading statements and why they are false and misleading. Furthermore, Defendants aver that the Amended Complaint does not adequately plead scienter and loss causation.

II. LAW AND DISCUSSION

A. Standards of Review

1. Motion to Dismiss Standard

In examining a motion to dismiss, a court accepts the plaintiff's allegations as true and construes the complaint in the plaintiff's favor. See, generally, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (noting that on a motion to dismiss there is an assumption that all allegations in the complaint are true). The complaint must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 1974. The factual allegations "must be enough to raise a right to relief above the speculative level." Id. at 1965. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1964-65.

2. Federal Securities Laws

Section 10(b) of the Exchange Act makes it unlawful "[t]o 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 ["SEC"] may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5, which was promulgated by the SEC, states that:

It shall be unlawful for any person, directly or

indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any devise, scheme or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate 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.

To allege a securities fraud claim under Rule 10b-5, the Plaintiff must plead: "(1) a material misrepresentation or omission; (2) made with scienter; (3) a connection with the purchase or sale of a security; (4) reliance on the misstatement or omission; (5) economic loss; and (6) a causal connection between the material misrepresentation or omission and the loss, commonly called 'loss causation.'" Mizarro v. Home Depot, Inc., 544 F.3d 1230 (11th Cir. 2008).

3. Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act

Like other fraud claims, securities fraud claims are subject to Fed. R. Civ. P. 9(b)'s requirement to "state with particularity the circumstances constituting fraud." To comply with Rule 9(b), the complaint must state "(1) precisely what statements were made in what documents or oral representations or what omissions were made,

and (2) the time and place of each such statement and the person responsible for making (or in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." Mizarro, 544 F.3d at 1237 (quoting Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956, 972 (11th Cir. 2007)). In other words, the Complaint must set forth the "who, what, when, where, and how: the first paragraph of any newspaper story." Carpenters Health and Welfare Fund v. The Coca Cola Co., 2002 U.S. Dist. Lexis 28072, at *17 (N.D.Ga., Aug. 19, 2002).

The Private Securities Litigation Reform Act ("PSLRA") further increased the pleading standard in securities fraud cases by requiring that the complaint "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1)(B).

4. Scienter Pleading Standard

The PSLRA also raised the standard for pleading scienter. Mizarro, 544 F.3d at 1238. Specifically, the complaint must, "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). The Eleventh Circuit has interpreted this language to require that the plaintiff "allege facts supporting a strong inference of scienter 'for each defendant with respect to each violation.'" Mizarro, 544 F.3d at 1238 (quoting Phillips v. Scientific Atlanta, Inc., 374 F.3d 1015, 1016 (11th Cir. 2004)).

Although it raised the pleading standard for scienter, the PSLRA did not modify the substantive intent requirements. Mizarro, 544 F.3d at 1238. According to the Eleventh Circuit, "§ 10(b) and Rule 10b-5 require a showing of either an 'intent to deceive, manipulate or defraud,' or 'severe recklessness.'" Mizarro, 544 F.3d at 1230 (quoting Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 (11th Cir. 1999)). The Eleventh Circuit has described "severe recklessness" as being "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." Mizarro, 544 F.3d 1230, 1238 (quoting Bryant, 187 F.3d at 1284).

In sum, the Plaintiff must plead "with particularity facts giving rise to a strong inference that the defendants either intended to defraud investors or were severely reckless when they

made the allegedly materially false or incomplete statements." Mizarro, 544 F.3d at 1238. A "strong inference" of scienter is an inference that is "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Tellabs, Inc. V. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S.Ct. 2499, 2510, 168 L.E.2d 179 (2007). When determining whether a "strong inference" of scienter exists, the Court "must consider the complaint in its entirety." Tellabs, 127 S.Ct. at 2509. Furthermore, "omissions and ambiguities count against inferring scienter." Tellabs, 127 S.Ct. at 2511.

B. Defendants' Motion to Dismiss

1. Pleading Fraud with Particularity

Asset Impairment Allegations

In the Amended Complaint, Plaintiff alleges that Levitt materially overstated its financial results because it failed to timely record an impairment in the value of its homebuilding inventory in Levitt and Sons ("LAS") [D.E. 22 at ¶ 38]. Plaintiff argues that this failure violated Generally Accepted Accounting Principles ("GAAP"), Statement of Financial Accounting Standard ("FAS") No. 144, which states in relevant part:

For purposes of this Statement, impairment is the condition that exists when the carrying amount of a long-lived asset (asset group) exceeds its fair value. An impairment loss shall be recognized only if the carrying amount of a long-lived asset (asset group) is not recoverable and exceeds its fair value. The carrying amount of a long-lived asset (asset group) is not recoverable if it exceeds the sum of the

undiscounted cash flows expected to result from the use and eventual disposition of the asset (asset group).

...

A long-lived asset (asset group) shall be tested for recoverability whenever events or changes in circumstances indicate that its carrying amount may not be recoverable. The following are examples of such events or changes in circumstances:

a. A significant decrease in the market price of a long-lived asset (asset group)

b. A significant adverse change in the extent or manner in which a long-lived asset (asset group) is being used in its physical condition

c. A significant adverse change in legal factors or in the business climate that could affect the value of a long-lived asset (asset group) including an adverse action or assessment by a regulator

d. An accumulation of costs significantly in excess of the amount originally expected for the acquisition or construction of a long-lived asset (asset group)

e. A current-period operating or cash flow loss combined with a history of operating or cash flow losses or a projection or forecast that demonstrates continuing losses associated with the use of a long-lived asset (asset group)

f. A current expectation that, more likely than not, a long-lived asset (asset group) will be sold or otherwise disposed of significantly before the end of its previously estimated useful life.

GAAP, SFAS No. 144.

Defendants argue that the Amended Complaint fails to plead particularized facts demonstrating that an impairment was permissible, much less required, before it was taken. Furthermore,

Defendants argue that the Amended Complaint does not allege which particular assets were impaired, when, or by how much. Defendants also argue that the Complaint fails to allege what the cash flow analysis was, or what it should have been, and that pro formas were required to conduct an impairment analysis. Finally, Defendants argue that the Complaint fails to demonstrate why each alleged misstatement was misleading.

"[V]iolations of the GAAP may constitute false or misleading statements of material fact in violation of Rule 10b-5." In re Scientific-Atlanta, Inc. Securities Litigation, 239 F.Supp.2d 1351, 1363 (N.D.Ga. 2002). However, "mere allegations that statements in one report should have been made in earlier reports do not make out a claim for securities fraud." In re Serologicals Securities Litigation, No. Civ. A. 1:00-CV-1025CAP, 2003 WL 24033694, at * 10 (N.D.Ga. Feb. 20, 2003). Rather, the standard is "whether the need to write down ... was 'so apparent' to [the defendant] before the announcement, that a failure to take an earlier write-down amounts to fraud." Carpenters Health & Welfare Fund v. Coca Cola Co., No. 1:00-CV-2838-WBH, 2002 U.S. Dist. Lexis 28072, at * 57 (N.D.Ga. Aug. 19, 2002) (quoting Kriendler v. Chemical Waste Management, Inc., 877 F.Supp. 1140, 1154 (N.D.Ill. 1995); see also Serologicals, 2003 WL 24033694, at *10.

According to Plaintiff, the following changes in circumstances, which are alleged in the Amended Complaint,

triggered FAS 144 and required Levitt to begin testing for an impairment of its homebuilding inventory: a prolonged downturn in the housing market, a decrease in sales in 2006 and early 2007 despite reductions in the sale price, large impairment charges during Q1 by Pulte Homes and Lennar, land purchases at the peak of market prices, increasing costs, and a sixty percent cancellation rate for Levitt homes [D.E. 22 at ¶¶ 48-50, 61, 65(d), 80, 82, 85, 115].

Furthermore, Plaintiffs allege that, although an impairment test was required under FAS 144, Defendants failed to test for impairment in the first quarter of 2007 as demonstrated by their failure to update the pro formas, which are essential to accurately conduct impairment tests [D.E. 22 ¶ 63-66, 90]. Yet, in their first quarter 2007 Form 10-Q, Defendants stated that such tests were being conducted on a quarterly basis and reported an impairment charge that was false [D.E. 22 ¶ 63-66]. Plaintiffs also allege that when the pro formas were finally prepared in July 2007, the resulting impairment charge, as reported in the Form 10-Q for the second quarter of 2007, was \$63 million. [D.E. 22 at ¶ 63-66]. Finally, Plaintiffs allege that Defendant Levan knew that the pro formas were not being updated sometime between September and December 2006 and July 2007, and that Defendant Scanlon signed the company's SEC filings [D.E. 2 at ¶¶ 25, 65, 89-90].

The court finds that Plaintiffs' asset impairment claims are pled with sufficient particularity. Accepting the allegations in the Complaint as true, Plaintiffs plead with particularity facts demonstrating that Defendants had an obligation to perform an impairment analysis for the home building inventory, but failed to do so. See Serologicals, 2003 WL 24033694, at *14, fn. 5. Furthermore, the allegations indicate that despite the failure to perform the analysis, Defendants represented to the public that an impairment analysis was being performed on a quarterly basis, and recorded a false impairment charge on their first quarter 2007 Form 10-Q. Finally, the allegations indicate that the need to write down was so apparent before the second quarter impairment announcement that a failure to take an earlier write-down amounted to fraud. Carpenters, 2002 U.S. Dist. Lexis 28072, at * 57.

January 31, 2007 Press Release

Plaintiff alleges that statements in the January 31, 2007 Press Releases are false because they "fail to disclose the rapidly deteriorating financial condition of Levitt." [D.E. 22 at ¶ 47]. Specifically, Plaintiff alleges that LAS had "rapidly declining cash flows, impaired land inventory, and was in violation or in danger of violating key covenants with its lenders." Plaintiff also alleges that the statement regarding the unavailability of impairment numbers for the quarter is misleading. [D.E. 22 at ¶ 47]. In support of these statements, Plaintiff includes

information provided by confidential witnesses [D.E. 22 at ¶ 48]. The Court finds that, with respect to the January 31, 2007 Press Releases, Plaintiff has pled particularized facts detailing what material omissions were made and why the statements were misleading. However, with respect to the allegation that Levitt "was in violation or in danger of violating key covenants with its lenders," the Court finds that Plaintiffs has failed to state with particularity the facts on which this allegation is based. See 15 U.S.C. § 78u-4(b)(1)(B).

January 31, 2007 Conference Call

Defendants' argue that the challenged statements in the 2007 Conference Call were not pled with sufficient particularity, and in any event, are protected by the PSLRA's safe harbor for forward looking statements. "In that safe harbor, corporations and individual defendants may avoid liability for forward-looking statements that prove false if the statement is 'accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.'" Harris v. IVAX, 182 F.3d 799, 803 (11th Cir. 1999). The PSLRA defines a forward looking statement as:

(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission;

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

(E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or

(F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

15 U.S.C. § 78u-5(i)(1). The Court finds that the challenged statements in the January 31, 2007 Conference Call were pled with sufficient particularity. With respect to the safe harbor for forwarding looking statements, the Court finds that only one challenged statement is forward looking -- Levan's win-win statement regarding the merger with BFC. Specifically, Defendant Levan stated that the merger is "a win-win for everybody. It's a win for Levitt. It's a win for BFC. It's a win for shareholders of both companies" [D.E. 22 at ¶ 52]. This statement is a "statement of future economic performance."

Furthermore, the statement is accompanied by meaningful cautionary statements. Specifically, Levitt referred the listeners to the warnings in its press releases from the same day and its SEC filings [D.E. 31, Ex. 6 at 2]. Also, Levitt stated the following at the beginning of the conference call: "These forward looking statements are based largely on the expectations of BFC Financial Corporation and/or Levitt Corporation and involve inherent risks and uncertainties that are subject to change based on factors, which are, in many instances, beyond the respective Company's control." [D.E. 31, Ex. 6 at 2]. Furthermore, in a January 31, 2007 press release that was attached to Levitt's Form 8-K, Levitt included basically the same warning and added: "These [risks] include, but are not limited to, risks and uncertainties associated with the cancellation of existing sales contracts and the Company's ability to consummate sales contracts included in the backlog. Additionally, the financial information in this press release is preliminary and actual financial results may differ" [D.E. 31, Ex. 5 at 63]. During the Conference Call, Levitt also stated that "the likelihood of impairments at the Levitt side over the next few quarters is probably high, only from the standpoint that we have seen other homebuilders who have taken huge impairment hits" [D.E. 22 at ¶ 52; D.E. 31, Ex. 6 at 12].

To come within the safe harbor, Defendants did not need to warn of every factor that ultimately caused the statement not to

come true. Harris v. IVAX Corp., 998 F.Supp. 1449, 1454 (S.D. Fla. 1998). "It is sufficient that the cautionary statements identify meaningful and important factors that could affect future performance. Harris, 998 F.Supp. at 1454.

Based on the foregoing, the Court finds that the "win-win" statement falls within the safe harbor for forward-looking statements and is, therefore, not actionable.

March 7, 2007 Press Release

Defendants claim that the allegations regarding the March 7, 2007 Press Release are pled with insufficient particularity and fail to demonstrate why the challenged statements were misleading. Furthermore, Defendants argue that the challenged statements are protected by the safe harbor for forward looking statements.

The Court agrees that the March 7, 2007 Press Release falls within the safe harbor for forward looking statements. According to the Amended Complaint, the press release is incomplete and fails to allege facts relating to LAS's financial distress [D.E. 22 at ¶ 58]. Plaintiff challenges the following statement in the press release:

In the event of prolonged weak demand, additional capital will be necessary to strengthen the Company's balance sheet, and various alternative strategies are being explored to ensure the Company maintains sufficient liquidity in this uncertain market. This need contributed to the Board's decision to accept a merger offer from BFC Financial Corporation (NYSE Area: BFF) in January. We remain optimistic about the long term

opportunities available in the homebuilding market, and Florida in particular, but must remain vigilant in preserving resources in the event of an extended downturn and having the financial strength to exploit the opportunities when the market returns to normalized growth.

[D.E. 22 at ¶ 57; D.E. 31, Ex. 6 at 48]. The Court finds that the aforementioned are statements of the plans and objectives of management for future operations, and statements of future economic performance. Furthermore, the statements were accompanied by cautionary language at the end of the press release that stated in pertinent part:

Any number of important factors which could cause actual results to differ materially from those in the forward-looking statements include, but are not limited to, risks and uncertainties with: the impact of economic, competitive and other factors affecting Levitt Corporation ... and its operations; the market for real estate in the areas where the Company has developments, including the impact of market conditions on the Company's margins and fair value of our real estate inventory; the accuracy of the estimated fair value of our real estate inventory and the potential for further write-downs or impairment charges ... the Company's ability to maintain sufficient liquidity in the event of a prolonged downturn in the housing market; the Company's ability to access additional capital on acceptable terms, if at all, including through BFC Financial Corporation ("BFC") and the Company's success at managing the risks involved in the foregoing.

[D.E. 31, Ex. 7 at 46]. Based on the foregoing, the Court finds that the challenged statements in the March 2007 Press Release fall within the safe harbor for forward-looking statements and are, therefore, not actionable.

May 9, 2007 Press Release

Plaintiff alleges that certain statements in the May 9, 2007 Press Release are false. Specifically, Plaintiff challenges the statement: "We continued to invest in our sales and marketing initiatives in an attempt to increase traffic and conversions, and we are pleased that the early results from these efforts have been positive" [D.E. 22 at ¶ 59]. According to Plaintiff, this statement is false because it fails to disclose that the small profit achieved was due to Levitt's failure to record an impairment of its land inventories [D.E. 22 at ¶ 60].

Defendants' argue that the aforementioned statement is vague and general and, therefore, inactionable. The Court disagrees. In finding that the statement is actionable, the Court distinguishes Next Century Communications Corp. v. Ellis, 318 F.3d 1023 (11th Cir. 2003). In Next Century, the Eleventh Circuit found that the description of a company's performance as "strong" was mere puffing and, therefore, inactionable. In reaching this conclusion, the Eleventh Circuit determined that a characterization of performance as "strong" was "not the sort of empirically verifiable statement that can be affirmatively disproven, as it is inherently a label expressive of, and generated by, opinion." Next Century, 318 F.3d at 1028. In contrast, in the instant case, the description of early results as "positive" indicates an increase in traffic and conversions and, therefore, in revenues and profits. Whether an

increase occurred is empirically verifiable. It is also worth noting that Next Century is not a federal securities fraud case; rather, it involved a common law fraud claim brought under Georgia law. Based on the foregoing, the Court finds that the "positive" statement is actionable.

Plaintiff also challenges the statement "we initiated and pursued expense management initiatives with a focus on reducing operating costs without affecting our product, customer service standards or core operating platform" [D.E. 22 at ¶ 59]. Citing to the testimony of confidential witnesses, Plaintiff alleges that the statement is false because it fails to disclose that Levitt only achieved the cost savings by using inferior materials and squeezing contractors [D.E. 22 at ¶ 60]. The Court finds that, with respect to the aforementioned statement, Plaintiff has pled particularized facts detailing what material omissions were made and why the statements were misleading.

July 30, 2007 Statement

In a report dated July 30, 2007, a Levitt spokesperson stated that both Levitt and BFC were waiting for SEC approval of the merger. The spokesperson was quoted as stating: "'That's pretty much what's going on - the back and forth with the SEC ... [u]ntil they get that final approval they won't be able to put out a preliminary proxy. But there's nothing else holding (the deal) up, other than the proxy.'" [D.E. 22 at ¶ 68; D.E. 36]. Plaintiffs

allege that the "July 30, 2007 Statement is false because SEC approval was not the only issue holding up the merger" [D.E. 22 at ¶ 69]. According to the Amended Complaint, the merger was unlikely because BFC was concerned about Levitt's financial position [D.E. 22 at ¶ 69]. Furthermore, Plaintiff cites to BFC's August 14, 2007 letter to Levitt regarding its decision to terminate the Merger. According to the Amended Complaint, the letter states that BFC's decision was based on the adverse changes which have occurred at Levitt since January, and there is no mention of the SEC's delay as a contributing factor [D.E. 22 at ¶ 69]. The Court finds that Plaintiff has pled particularized facts that indicate that the statement was false when made.

August 9, 2007 Press Release

Plaintiffs allege that the August 9, 2007 Press Release is false because it fails to disclose material information. Specifically, Plaintiffs state that Levitt and Sons was in violation of the financial covenants on its large debt load with several lenders [D.E. 22 at ¶ 71]. Plaintiffs further allege that these debt payments were in danger of being accelerated [D.E. 22 at ¶ 71].

The Court finds that, with respect to the May 9, 2007 Press Release, Plaintiff has pled particularized facts detailing what material omissions were made and why the statements were

misleading. However, Plaintiffs have not pled with particularity the facts on which these allegations are based.

Recoverability of Levitt Corporation's Loans to Levitt and Sons

In its third quarter 2007 Form 10-Q, Defendants announced that their loans and advances to LAS would not be recovered because LAS lacked the financial resources to pay now or in the foreseeable future [D.E. 22 at ¶ 106]. In a press released issued on October 11, 2007, Levitt stated that its decision to take impairment charges in connection with LAS was based on the "continued deterioration of the homebuilding market and the belief that, based on market conditions for the foreseeable future, Levitt Corporation's investment and the loans made to LAS will likely not be recoverable through future cash flows" [D.E. 22 at ¶ 108]. Plaintiff alleges that Levitt intentionally concealed the unrecoverability of its loan to LAS during the class period [D.E. 22 at ¶ 109]. Plaintiff cites to statements from confidential witnesses regarding the marked decline in home sales during the first half of 2006 and the fourth quarter of 2006 [D.E. 22 at ¶ 112-13]. Furthermore, during the January 31, 2007 Conference Call, Seth Wise, President of Levitt Corporation, stated that the cancellation rate for houses was 60% in the fourth quarter of 2006 [D.E. 22 at ¶ 115].

The court finds that Plaintiffs' allegations regarding the recoverability of loans to LAS are pled with sufficient particularity. Accepting the allegations in the Complaint as true,

Plaintiffs plead with particularity facts demonstrating that Defendants knew that the loan to LAS was not recoverable as early as January 2007, but failed to report this information in its first quarter and second quarter reports and press releases. Furthermore, the allegations indicate that the unrecoverability of the loans was so obvious that Levitt's failure to announce this fact earlier amounted to fraud.

2. Scierter

Defendants argue that Plaintiffs do not plead scierter adequately because allegations of GAAP violations do not satisfy the "severe recklessness" standard under the Reform Act. The Eleventh Circuit has stated that "allegations of violations of GAAS or GAAP, standing alone, do not satisfy the particularity requirement of Rule 9(b)." Ziemba v. Cascade International, Inc., 256 F.3d 1194, 1208-09 (11th Cir. 2001). However, "courts have held that allegations of violations of GAAP or GAAS, coupled with allegations of ignoring 'red flags' can be sufficient to state a claim for securities fraud." Ziemba, 256 F.3d at 1210 (citing In re Sunbeam Securities Litigation, 89 F.Supp.2d 1326, 1344-47 (S.D.Fla. 1999)). "In order to plead fraudulent accounting practices with particularity, a complaint should show facts that support the inference that the defendants 'recklessly disregarded the deviance [from GAAP] or acted with gross indifference to the misrepresentations in its financial statements.'" In re Scientific

-Atlanta, Inc. Securities Litigation, 239 F.Supp.2d 1351, 1366 (N.D.Ga. 2002). "Relevant facts are the magnitude of the accounting error, whether the defendants had prior notice of the error, and whether the defendants played any role in calculating and disseminating the financial statement." Scientific-Atlanta, 239 F.Supp.2d 1366.

Plaintiffs do not simply allege that GAAP violations occurred. Rather, Plaintiffs allege that an error occurred, that Defendants had prior notice of the error, and that Defendants played a role in calculating and disseminating the financial statement. Specifically, the Amended Complaint alleges that Alan Levan had been asking for, but not receiving, pro formas for the development projects at Levitt and Sons from approximately September 2006 to July 2007 [D.E. 22 at ¶¶ 27, 65(a), 65(g), 89]. Plaintiffs further allege that Alan Levan requested that Seth Wise, the President of Levitt, provide the pro formas and, after waiting several months without receiving them, hired a forensic accounting firm to compile them [D.E. 22 at ¶ 65(a), 89]. According to the Complaint, this information was obtained from a confidential witness who is a former employee of Defendant. [D.E. 22 at ¶¶ 27, 65(a)]. The same confidential witness "confirmed that Scanlon should have been aware of the need for pro formas and Levan's repeated unanswered requests for updated pro formas." [D.E. 22 at ¶ 94]. The complaint further alleges that, ultimately, Levitt hired a former employee in July

2007 to compile the pro formas. According to this employee, the pro formas had not been compiled since sometime between September and December 2006 [D.E. 22 at ¶ 65(g)].

The Amended Complaint also alleges that both Levan and Scanlon were aware of circumstances that necessitated an impairment analysis. During the January 31, 2007 Conference Call, Levan admitted that current events obligated Levitt to test for impairment [D.E. 22 at ¶ 80]. The Complaint also alleges that Defendant Scanlon participated in conference calls with securities and market analysts, suggesting that Scanlon was on the January 31, 2007 Conference Call [D.E. 22 at ¶ 25].

Furthermore, both Scanlon and Levan signed the first quarter 2007 Form 10-Q, which was filed in March 2007 [D.E. 22 at ¶ 82]. As was discussed previously, this report included the statement that impairment analyses were being conducted on a quarterly basis, which, according to Plaintiff, was false because the pro formas had not been updated since approximately September 2007. Furthermore, this report included an impairment charge that Plaintiff alleges was false. According to the Amended Complaint, the statements in the first quarter 2007 Form 10-Q also identified changes in circumstances that necessitated an impairment analysis, as discussed previously [D.E. 22 at ¶ 82]. Finally, Plaintiff alleges that the individual defendants had access to all of LAS's financial information via a software system that compiled

information on sales, constructions starts, closings, and costs
[D.E. 22 at ¶ 86]

Based on the foregoing, the Court finds that the allegations give rise to a strong inference that Defendant Levan acted with severe recklessness. Tellabs, 551 U.S. at 127. This inference is cogent and at least as compelling as the opposing inferences put forth by Defendants. Furthermore, although Defendants argue that their outside auditors gave them a clean opinion as to their financial statements, they do not dispute Plaintiff's contention that the statements were not examined in accordance with GAAS.

With respect to Defendant Scanlon, the Court finds that Plaintiff has insufficiently alleged his knowledge of the failure to update pro formas and, as a result, to conduct the impairment analysis. Furthermore, although Plaintiff alleges in general that Defendant Scanlon participated in conference calls, there is no detailed allegation that he participated in the January 31, 2007 conference call. Thus, Defendants' motion to dismiss is granted with respect to Defendant Scanlon.

3. Loss Causation

Loss causation is the "causal connection between the material misrepresentation and the loss." Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341 (2005). In order to prove loss causation, Plaintiffs must demonstrate "that the untruth was in some reasonably direct, or proximate way responsible for his loss." Robbins v. Koger

Properties, Inc., 116 F.3d 1441, 1447 (11th Cir. 1997) (quoting Huddleston v. Herman Y MacLean, 640 F.2d 534, 549 (5th Cir. 1981)).

"[T]he plaintiff need not show that the defendant's act was the sole and exclusive cause of the injury he has suffered; he need only show that it was substantial, i.e. a significant contributing cause." Robbins, 116 F.3d at 1447. "In other words, plaintiff must show that the misrepresentation touches upon the reasons for the investment's decline in value." Robbins, 116 F.3d at 1447.

According to Defendants, Plaintiff fails to allege a corrective disclosure or revelation of truth regarding the misstatement or omission that is connected to the drop in stock price. See Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (finding no loss causation where the complaint fails to allege that the Defendant's share price fell significantly after the truth became known).

In the Amended Complaint, plaintiff alleges that Defendants' false and misleading statements caused Levitt's common stock to be overvalued and artificially inflated [D.E. 22 at ¶ 123]. Furthermore, Plaintiff alleges that he purchased Levitt's stock at the artificially inflated prices. [D.E. 22 at ¶ 123]. Finally, Plaintiff alleges that "[a]s a direct result of Defendants' disclosures on May 15, 2007, August 9, 2007 and August 15, 2007, the price of Levitt common stock fell precipitously, falling by more than a collective \$6.00 per share, or approximately 70%.

These removed the inflation from the price of Levitt common stock, causing real economic loss to investors who had purchased Levitt common stock during the Class Period. The 70% decline in the price of Levitt Common stock after these disclosures came to light was a direct result of the nature and extent of Defendants' fraud finally being revealed to investors and the market" [D.E. 22 at ¶ 103-05, 125].

Elsewhere in the Complaint, Plaintiff demonstrates that the August 9, 2007 Press Release disclosed an impairment charge associated with Levitt's homebuilding inventory of \$63 million [D.E. 22 at ¶ 70]. According to Plaintiff, these additional impairments should have been recognized in the first quarter of 2007, and the failure to disclose the impairment earlier maintained stock prices at an artificially high level [D.E. 97-99]. Plaintiff further alleges that after the announcement of the disclosures in the August 9, 2007 press release, "on the next trading day, shares of the Company's stock fell \$0.62 per share, or over 12%, to close at \$4.41 per share. Over the next two trading days, shares of the Company's stock fell an additional \$0.66 per share, or over 15%" [D.E. 22 at ¶ 104].

Based on the foregoing, the Court finds that Plaintiff has adequately plead loss causation.¹

¹ Although the Amended Complaint references changes in stock prices as a result of disclosures on May 15, 2007 and August 15, 2007, Plaintiff did not address these disclosures in the

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss the Amended Complaint [D.E. 30] is **GRANTED in part and DENIED in part.**

Accordingly, it is hereby,

ORDERED AND ADJUDGED that this case is **DISMISSED without prejudice** against Defendant Scanlon. It is further

ORDERED AND ADJUDGED that Plaintiff shall be given leave to file a Second Amended Complaint to correct the pleading deficiencies discussed in this Order (i.e. the failure to plead scienter with respect to Defendant Scanlon, and to identify the facts on which the violation of financial covenants allegations are based. It is further

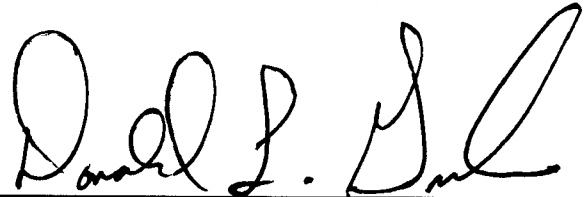
ORDERED AND ADJUDGED that all allegations that were determined to fall within the safe harbor are **DISMISSED with prejudice**, and Plaintiff shall delete those allegations from the Second Amended Complaint. It is further

Opposition brief. Furthermore, the Court's review of the Amended Complaint did not reveal any fraud allegations with respect to a May 15, 2007 statement, nor with respect to the August 15, 2007 press release, which merely announced the termination of the merger [D.E. 22 at ¶¶ 72, 105, 125]. Regardless, since the Amended Complaint alleges that the disclosure of the impairment charge in the August 9, 2007 Press Release was connected to the drop in stock price, the Court finds that loss causation is pled adequately.

ORDERED AND ADJUDGED that Plaintiff shall have thirty (30) days from the date of this Order to file a Second Amended Complaint. Failure to file a Second Amended Complaint by this date will result in this action being dismissed with prejudice against Defendant Scanlon, and the dismissal with prejudice of the violation of financial covenants allegations. It is further

ORDERED AND ADJUDGED that Defendants' Request for Oral Argument [D.E. 32] is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2009.

A handwritten signature in black ink, appearing to read "Donald L. Graham". The signature is written in a cursive style with large, sweeping loops.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Edwin G. Torres
All Counsel of Record