IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Iron Worker Local Union No. 405 Annuity Fund, et al.,	Case Nos. 3:17 CV 63 3:17 CV 275 3:17 CV 276
Plaintiffs,	
-vs-	MEMORANDUM OPINION AND ORDER
Dollar General Corporation, et al.,	JUDGE JACK ZOUHARY
Defendants.	

Pending before this Court is Defendants' Motion to Dismiss the Consolidated Class Action Complaint (Doc. 57), which is fully briefed (Docs. 58–59, 66). This Court held a Record Hearing on November 2, 2017 (Doc. 68). (Court Reporter: Patricia Jennings.)

Plaintiffs filed this proposed class action, arguing that certain executives from Defendant Dollar General Corporation misled investors about the negative effects of reductions to government benefits received by a portion of its customers. Defendants move to dismiss the Complaint, arguing that Plaintiffs fail to: (1) allege actionable misstatements or omissions; (2) adequately plead scienter; (3) state a claim under Item 303 of SEC Regulation S-K; or (4) establish control-person liability.

BACKGROUND

According to the Complaint, Dollar General is a nationwide retail chain selling products that mostly cost less than five dollars. Before the proposed class period (March 10, 2016 to November 30, 2016), Dollar General enjoyed sustained success under a key metric valued both internally and by investors: same-store sales growth. This metric, measured quarterly and yearly, compares the amount by which sales have grown at stores operating for at least thirteen months. As of March 2016, Dollar General had experienced positive same-store sales growth for twenty-six consecutive years and thirty-two consecutive quarters (Consolidated Class Action Complaint, Doc. 46 at ¶ 2).

Dollar General describes its "core customers" as "low and fixed income households often underserved by other retailers" (*id.* at ¶ 5). These individuals "are the first to be affected by negative or uncertain economic conditions such as unemployment and fluctuating food, energy and medical costs" (*id.*). Moreover, according to the Complaint, "these customers ha[ve] an annual household income of $40,000, are 'living paycheck to paycheck,' and 'rel[y] upon government assistance'" (*id.*). More specifically, Plaintiffs allege that the "Company's core customers rel[y] on the federal government's Supplemental Nutrition Assistance Program ('SNAP'), form[erly] known as 'food stamps,' to purchase basic necessities" (*id.*). The SNAP program is funded and administered by the federal government, but benefits are paid through state governments, which retain discretion to set certain restrictions on eligibility.

While shopping for SNAP-eligible items like food, SNAP participants may also spend their discretionary income to "purchase non-eligible items such as cigarettes and alcohol" (*id.* at ¶ 6). Thus, while SNAP-eligible purchases at Dollar General accounted for only 5% to 6% of its net sales, "when one aggregates both the SNAP-eligible products and non-eligible products, the total impact of SNAP participants['] purchases on the Company's revenues likely was up to 10% to 12% of total sales for any given period" (*id.* at ¶¶ 6, 73).

Following the 2008–09 financial crisis, Congress temporarily expanded the SNAP program by providing an across-the-board increase in the amount of benefits participants could receive on a monthly basis (*id.* at ¶ 7). In addition, because of high unemployment, states were allowed to waive a restriction that able-bodied adults without dependents (ABAWDs) could only receive benefits for three out of every thirty-six months, unless they were employed at least twenty hours per week (*see* *id.*). This expansion in benefits helped discount retail chains like Dollar General grow rapidly in the years following the financial crisis. Indeed, Dollar General's net sales increased from $10.5 billion in 2008 to $17.5 billion in 2013 (*id.* at ¶ 8).

SNAP's across-the-board benefits increase expired on October 31, 2013, thus reducing the amount of benefits available to participants by $5 billion (the 2013 Reduction) (*id.* at ¶ 9). The 2013 Reduction "caused a significant and immediate deceleration in Dollar General's same-store sales beginning in November 2013 and continuing through at least the first fiscal quarter for 2014" (*id.* at ¶ 10). This was "due to lower sales of both SNAP-eligible and non-eligible products and less overall foot traffic by SNAP participants to Dollar General stores" (*id.*).

As the economy continued to recover, Dollar General's same-store sales continued to grow. But in 2015, twenty-two states announced that -- because the unemployment rate was improving -- their ABAWD waivers would expire on January 1, 2016. Consequently, as of April 1, 2016, ABAWDs in those states who previously qualified for SNAP under the waivers were no longer eligible (the 2016 Expiration) (*id.* at ¶ 11). This resulted in loss of benefits for somewhere between 500,000 and one million people (*id.* at ¶ 12). The manner in which Dollar General disclosed (or withheld) the effects of the 2016 Expiration forms the basis for Plaintiffs' claims.

The "Moneyball" Approach

In the period leading up to the 2016 Expiration, Dollar General's operations approach focused heavily on data analytics. Because of this "purportedly robust system of analyzing store and product data virtually in real time, Defendants had access to critical sales information at all times" (*id.* at ¶ 65).

In a presentation on March 24, 2016, Dollar General Executive Vice President of Store Operations, Defendant Jeff Owen, described Dollar General's analytical approach and capabilities (Doc. 46 at ¶¶ 50, 214; Doc. 59-6 at 19–20[1]):

> [W]e know exactly what are the most correlative drivers of performance and those are the things that we spend most of our time on. And what we are able to do with this and the way we approach it is we don't rely on averages or gut feel or just mere opinion or experience. We provide and we employ a data driven statistical approach to operations. We really have a scientific way that we execute and make decisions out in the field. And for those of you familiar with the term Moneyball, that is kind of the approach we take to our operating environment. And when you have as many outlets as we do it is very important, it allows us to deliver with a lot of consistency. And most importantly, the results that we achieve are not surprises and they are not new to us. We know what we are going to achieve before we ever implement.

Confidential witnesses explained that Dollar General's point-of-sale system captured data concerning SNAP sales that were turned into daily reports for each store. These reports could include the "total number of SNAP items sold," the "total dollar amount of SNAP sales," the "total number of non-SNAP items sold," the "total dollar amount of non-SNAP sales," the "average number of items per transaction (SNAP & non-SNAP)," and the "average dollars spent per transaction (SNAP & non-SNAP)" (Doc. 46 at ¶¶ 88–91). Further, Dollar General stores produced daily sales reports that "tabulated not only the sales dollar amounts generated by the use of SNAP benefits, but also the dollar amounts of non-eligible goods purchased by the SNAP participant using his or her own discretionary income" (*id.* at ¶ 93).

The data from these reports were synthesized by district managers and passed up the corporate chain. According to one confidential witness, from at least 2015 through August 2016, "sales and

---

[1] In evaluating a motion to dismiss a securities fraud action, this Court may consider documents integral to the complaint, as well as public records or other materials subject to judicial notice. *Ashland, Inc. v. Oppenheimer & Co., Inc.*, 648 F.3d 461, 467 (6th Cir. 2011); *Bovee v. Coopers & Lybrand CPA*, 272 F.3d 356, 360–61 (6th Cir. 2001).

data from the previous week along with the adverse or positive factors affecting the sales were discussed" at weekly meetings attended by the CFO and, occasionally, the CEO, as part of a "forecast review" (*id.* at ¶¶ 99–100).

Store Relocations

Another strategy Dollar General employed to boost revenues (and same-store sales growth) was called "relocation." According to a former regional manager, "Dollar General would open a brand new store across the street from another store that was underperforming on same-store sales" (*id.* at ¶ 17). This new store, called a "relocation store," was "assigned the same store number as the older, underperforming store across the street, which then allowed the sales of this brand-new store to be included in the Company's same-store sales metric despite the fact that the [relocation] store had not been opened for 13 months or more" (*id.*).

Release of Fourth Quarter 2015 Results

On March 10, 2016, Dollar General released its financial results for fourth quarter and fiscal year 2015. In the press release, the Company reported same-store sales growth for the year of 2.8%, with 2.2% growth for the fourth quarter (Doc. 59-4 at 2; *see* Doc. 46 at ¶ 158). It further stated that Dollar General "expected to have annual same-store sales growth of 2% to 4% for the foreseeable future, with a target of 3% growth in same-store sales for" fiscal year 2016 (Doc. 46 at ¶ 158).

The press release cautioned, however, that economic conditions affecting disposable income could hinder the Company's ability to reach its growth targets (Doc. 59-4 at 6–7). Moreover, it cautioned readers to evaluate the Company's projections in connection with the "Risk Factors" identified in its most recent Form 10-K (*id.* at 8). The "Risk Factors" described in that document included the following statement (Doc. 59-2 at 6):

> We believe many of our customers have fixed or low incomes and generally have limited discretionary spending dollars. Any factor that could adversely affect that disposable income would decrease our customers' spending and could cause our customers to shift their spending to products other than those sold by us or to our less profitable product choices, all of which could result in lower net sales. . . . Factors that could reduce our customers' disposable income and over which we exercise no influence include . . . decreases in government subsidies such as unemployment and food assistance programs.

The Form 10-K Risk Factors also included a discussion of Dollar General's relocation efforts. In fact, an entire section of the Risk Factors was devoted to discussing how future growth and sales could be adversely affected by an inability to "open, relocate or remodel stores profitably and on schedule" (*id.* at 7). It also stated that the "ability to open, relocate and remodel profitable stores is a key component of [Dollar General's] planned future growth" (*id.*). Moreover, it disclosed that Dollar General's same-store sales calculation "include[d] stores that have been remodeled, expanded, or relocated" (*id.* at 10).

On the same day the press release was issued, Dollar General held a conference call with investors to discuss its fourth quarter earnings. Before making any statements about its financial projections, the Company cautioned analysts to review the Risk Factors identified in its press release and SEC filings (Doc. 59-5 at 3–4). It also stated that it did "not intend and specifically disclaim[ed] any duty to update [its] expectation regarding where in the range of guidance fiscal 2016 net sales, same-store sales or diluted EPS may fall" (*id.* at 4).

During the prepared-remarks portion of the call, Dollar General's CEO, Defendant Todd Vasos, noted that the Company's 2.8% same-store sales growth marked the twenty-sixth consecutive year in which that metric had increased (Doc. 59-5 at 4; *see* Doc. 46 at ¶ 159). In addition, Dollar

General's CFO, John Garratt, confirmed that the Company "anticipate[d] that same-store sales growth [would] be near the middle of the model's 2% to 4% growth rate" (Doc. 59-5 at 8).[2]

During the Q&A portion of the conference call, Meredith Adler, an analyst with Barclays Capital, asked Vasos about potential rule changes that could affect Dollar General's ability to accept SNAP payments (*id.* at 12–13; *see* Doc. 46 at ¶ 161):

> Q: [J]ust a quick question about SNAP, which I know is not a huge piece of your revenues. But I think the FDA is talking about making some changes to qualify for SNAP. And I'm wondering if you guys are looking at that and kind of what you think that means for your business.
>
> A: Meredith, we are watching that and we, as you know and you mentioned earlier, SNAP for us is approximately 5% of our sales. So it really has -- it's not a huge piece of the business, but yet our core consumer does rely on SNAP benefits in a lot of cases. But in saying that, the great thing here about Dollar General, and we will continue to monitor it, is that we offer her a great value proposition at the price. So whether she's pinched [a little bit] with SNAP or not, she can definitely come here to Dollar General and get all her needs. And we will continue to deliver on that promise to her because she actually comes to us to make sure we can deliver on it.
>
> Q: So you will adjust your offering if you need to satisfy any new rules?
>
> A: Absolutely. We think that we are in pretty good shape right now and if we need to add an item or two, a couple lines, then we are very willing to do that. As you know, we've got our Plus store and our Market stores out there and they are [a] great test bed for all of that. And so, we know exactly what sells in there. And if we need to add some things into our traditional stores we will add the best items based on those sales that we already know in our existing stores.

Peter Keith, an analyst with Piper Jaffray, asked Vasos a follow-up question concerning Dollar General's ability to hit its same-store sales growth target (Doc. 59-5 at 14; *see* Doc. 46 at ¶ 160):

---

[2] The Complaint erroneously attributes this statement to Vasos (Doc. 46 at ¶ 159).

> Q: I want to focus in on the outlook for same-store sales at the midpoint of the 2% to 4% range. So it kind of implies 3%. Just looking at the last two quarters you guys were running in the low 2%s, so the guidance suggests some acceleration in 2016. I guess I was hoping you could expand upon that, if you think some of the Company specific initiatives will help get you there or do you see something on the macro front or even near-term that looks encouraging?
>
> A: I think as you look at this, first of all I want to say our merchandise initiatives should gain traction as it goes through the year. The laps are a little tougher in the beginning of the year and get a little easier toward the back. But make no bones about it, our initiatives that we've got this year are the strongest that I've seen here in the last two to three years. Not only the perishable one that I just talked about, but as I talked about in my prepared remarks, our health and beauty initiative as well as our party and stationary pieces really should help drive some of those initiatives as we go forward. You couple that with the work that our operators are doing on on-shelf availability and making product available when the consumer comes in the door at a very high rate, we think that guiding in where we did makes a lot of sense. But we feel very confident as we go forward this year into 2016 where that comp is headed.

Following the earnings release, several analysts issued reports noting the importance of the same-store sales estimates and opining "that Dollar General was well-equipped to handle any changes to the macro environment" (Doc. 46 at ¶ 162). For example, Buckingham Research Group noted that Dollar General's same-store sales growth exceeded consensus expectations and that "[m]ost important for the stock today, in our view, is the company's comp [same-store sales] performance and outlook" (*id.* at ¶ 163). A Credit Suisse report issued the same day opined that Dollar General's projections were "clearly encouraging" and concluded that the Company's 2016 "goals [were] highly achievable regardless of the macro environment given the defensive growth nature of the story" (*id.*). BMO Capital and Jefferies each also issued favorable reports that day, noting that merchandise initiatives were expected to drive same-store sales acceleration, with Jefferies concluding that "[j]udging from the tone of the [call], it sound[ed] like the year [wa]s starting off well" (*id.* at ¶ 164).

On March 22, 2016, Dollar General filed its Form 10-K for fiscal year 2015 with the SEC, confirming the numbers released earlier that month (Doc. 59-3 at 13). It also included the same statements concerning Risk Factors identified in the previous Form 10-K, as well statements about its store relocation efforts (*see id.* at 9–10, 14). Specifically, the March 2016 Form 10-K again identified "decreases in government subsidies such as unemployment and food assistance programs" as a factor that could adversely affect sales (*id.* at 9), and it again disclosed that Dollar General's same-store sales metric included stores that had been relocated (*id.* at 14).

Plaintiffs nevertheless allege that the March 10, 2016 statements by Dollar General and Vasos were materially false and misleading, arguing that: (1) SNAP *participants* accounted for significantly more than 5% of Dollar General's sales, even if SNAP *sales* accounted for only 5%; (2) when Dollar General's core customer received less in SNAP benefits, she did not continue to shop there; (3) given the effects of the 2013 Reduction, Dollar General knew or was reckless in not knowing that the 2016 Expiration would be as bad or worse; (4) the initiatives outlined by Defendants would not adequately address the effects of the 2016 Expiration; and (5) Defendants did not alert managers about the 2016 Expiration or implement a plan to ensure the Company did not lose business from the ABAWDs who lost their SNAP benefits (Doc. 46 at ¶ 168).

Release of First-Quarter 2016 Results

On May 26, 2016, Dollar General announced its financial results from first quarter 2016, including same-store sales growth of 2.2% (*id.* at ¶ 169; Doc. 59-8 at 4). During that day's conference call with analysts, Vasos stated that "[i]n an environment where many retailers struggled, we delivered good performance" (Doc. 59-8 at 4; *see* Doc. 46 at ¶ 170). He also noted that both customer traffic and "average ticket" had increased for the thirty-third consecutive quarter (*id.*).

During the Q&A portion of the call, Vasos fielded a question about same-store sales trends from Raymond James analyst Dan Wewer (Doc. 59-8 at 11; *see* Doc. 46 at ¶ 172):

> Q: [B]ack at the investor day, the long-term growth algorithm had one scenario where same-store sales could be as strong as 4%. When you look at the timing of the market share initiatives revolving around the customer segmentation work, what is a realistic time frame from when the type of same-store sales growth could become visible? Is that a 2017 or a 2018 time line?
>
> A: Dan, when we looked and we put this algorithm together, we felt very confident over the long-term that we could stay within those guardrails of 2% to 4%. And the initiatives that are just now rolling out in 2016, the majority of them are just now starting to roll out and will continue to rollout in Q2 and into Q3, and start to come to fruition even greater in the end of Q3 and Q4. And then, as I indicated, we are further along on our strategic planning right now than we've been in the last eight years here. And that gives me great solace that, as we continue to move into 2017 and beyond, that there will be . . . very robust initiatives going forward to drive that top line. So we are very confident in that 2% to 4%, and there will be ebb and flow in there, but we feel that we have all of the initiatives we need to make sure we deliver that.
>
> Q: Do you think that the current economic environment for your core customer is sufficient for Dollar General same-store sales to get in a 3.5% to 4% rate? Or does some macro improvement -- will that be needed to get to that kind of objective?
>
> A: When you look at our core customer today, she is always under pressure, as I indicated. Her income and her spending rates are usually under pressure. The great thing about our model is we do very well in either of those two scenarios. Where she has a little bit more money, she spends a little bit more [on] non-consumable goods. And when she doesn't have as much, she may pull back there but then utilizes us more on consumable and everyday staples that she knows she can get at an everyday low price. And the great thing that just came out of this segmentation work, Dan, that we are really encouraged about is this Millennial shopper that is already making up about 24% of our sales line. And as we continue to learn more about her over time and be able to service her better, we again feel confident on that sales line and be able to deliver that as we move forward.

Vasos also discussed same-store sales growth with Citigroup analyst Alvin Concepcion (Doc. 59-8 at 16–17; *see* Doc. 46 at ¶ 170):

> Q: I am wondering if you could talk about second-quarter same-store sales trends to date. It sounds like there was a lot of noise in April with Easter shift and weather, so I am wondering if we can get a sense of how things are currently looking. And related to that, I think you previously expressed confidence that you could accelerate comps to the 3% range for the year. Is that still your view?

> A: Again, when you look at it, the quarter ended up exactly the way we thought it would from a shape perspective, exactly the way we planned it. Again, we really feel confident long-term, and we look at this long-term, that in fact we have the initiatives in place and we have the strategic planning already moving forward to ensure that we can keep those comps moving as we go through this year and in the years to come. So again, we are confident in that 2% to 4%, that guardrail we put up, and we want to just continue to move through that.

Earlier in the call, Credit Suisse analyst Ed Kelly asked Vasos about trends in consumer traffic (Doc. 59-8 at 15; *see* Doc. 46 at ¶ 174):

> Q: Can you maybe give us a little insight in terms of what you think you are seeing from the consumer at this point? We've seen out of Walmart that the big-box stock-up trip seems to be okay, but others have complained about fill-in. Just your general thoughts about what you are seeing out there today in your business from a traffic standpoint.
>
> A: Yes, when you look at it, the consumer is probably about the same as they were coming out of Q4, to be honest with you. We are seeing about the same trends. There is no doubt that she is still watching what she spends, but again, that is the nature of our core consumer. She is always looking for the ability to make sure she can deliver to her family at the lowest price. And so, that is what we are concentrated on mainly, is to ensure that we have got the right item at the right price at the right time for her. And we've been delivering that. But, the consumer right now, overall, I would tell you back to work for the most part; probably feeling a little bit more confident; but -- and spending a little bit more on her non-consumables, and we are still seeing our non-consumable growth -- but still being cautious. So, we look at that as an opportunity for us, especially for fill-in, because if she is cautious, that stock-up trip is not always in her eyesight, if you will, and at times she may be a little bit more reticent to stock up and a little bit freer to fill in. And again, with our offering and our prices, we offer a compelling reason to come to Dollar General when she does that.

Finally, as part of the Executive Overview in Dollar General's Form 10Q for first quarter 2016, Vasos stated (Doc. 59-7 at 4; *see* Doc. 46 at ¶ 175):

> Like other retailers, we have been operating for several years in an environment with ongoing macroeconomic challenges and uncertainties. Our core customers are often among the first to be affected by negative or uncertain economic conditions such as unemployment and fluctuating food, energy and medical costs, and are among the last to feel the effects of improving economic conditions. Our customer has experienced both positive and negative general economic factors during 2015 and to date in 2016, such as lower gasoline prices and unemployment rates coupled with rising rents and

> medical costs and lagging wage growth. The overall financial impact of these factors to our customers has been inconsistent and their duration is unknown.

Following the release of Dollar General's first quarter results, some analysts expressed optimism. For example, Piper Jaffray issued a report noting that Dollar General "suggested the comp trend should accelerate as the year progresses," and "unlike [Dollar Tree], [Dollar General] appears to have meaningful initiatives in place to reaccelerate comp trends by 2H" (Doc. 46 at ¶ 176). Macquarie Research issued a report concluding that "same-store strength [would] continue," and it expected same-store sales growth to "accelerate throughout FY16 as management continues to implement new initiatives" (*id.* at ¶ 177). Likewise, the Buckingham Research Group issued a report stating that Dollar General "enjoys a model that performs well almost regardless of the economic backdrop" (*id.* at ¶ 178).

Plaintiffs allege that the May 2016 statements by Dollar General and Vasos were materially false and misleading, arguing that: (1) when Dollar General's core customer received less SNAP benefits, she did not in fact continue to shop there; (2) given the effects of the 2013 Reduction, Dollar General knew or was reckless in not knowing that the 2016 Expiration would be as bad or worse; (3) the 2016 Expiration, which began affecting customers on April 1, 2016, had an immediate and significant adverse impact on same-store sales during the first quarter; (4) the initiatives outlined by Defendants would not adequately address the effects of the 2016 Expiration; (5) Defendants did not alert managers about the 2016 Expiration or implement a plan to ensure the Company did not lose the business of ABAWDs who lost their SNAP benefits; and (6) to combat the effects of the 2016 Expiration, Defendants manipulated the same-store metric by "opening up new stores across the street from older, underperforming stores, and transferring the store number of the latter store to the new store so that the new stores['] sales could be included in the same-store sales growth metric" (*id.* at ¶ 179).

Release of Second Quarter 2016 Results

On August 25, 2016, Dollar General issued a press release announcing its results for second quarter 2016, "which fell short of the Company's and market expectations" (*id.* at ¶ 191). Same-store sales growth for the quarter was 0.7%, which the Company attributed to an intensification of the competitive environment "in select regions of the country," as well as "[r]etail food deflation and a reduction in both SNAP participation rates and benefit levels, coupled with unseasonably mild spring weather," which all "proved to be stronger than expected headwinds to [Dollar General's] business" (Doc. 59-10 at 2).

During the prepared-remarks portion of that day's conference call with analysts, Vasos elaborated on the "food deflation" referred to in the press release, noting that retail prices had dropped "about 8% for milk and over 50% for eggs," which were Dollar General's "two largest products within perishables" (Doc. 59-11 at 4). Further, Vasos stated that, according to estimates, "the headwinds from price deflation and the reduction in SNAP benefits negatively impacted [Dollar General's] same-store sales for the second quarter by approximately 60 to 70 basis points" (*id.*).

Vasos further commented that the 2016 Expiration negatively affected Dollar General's core consumer (*id.* at 6; *see* Doc. 46 at ¶ 192):

> As for our core consumer, we operate with the reality that it is always challenging for her to stretch her budget given the pressures on her income and spending. We have seen an ongoing contraction in core consumer all outlet retail spending as reflected in the Nielsen panel data. Given that our core consumer skews toward a lower income household, I believe the cumulative effect of macroeconomic factors such as a reduction in SNAP participation and benefit levels and increased housing and healthcare expenses are taking a noticeable toll on her spending.

During the Q&A portion of the call, Vasos fielded a question from Wolfe Research analyst Scott Mushkin concerning the factors causing the lower same-store sales growth (Doc. 59-11 at 12):

> Q: [G]oing back to the comp, so no guidance in terms of the comp over the balance of the year. Could you maybe just speak to the cadence of comps during the second quarter and the impact that you mentioned of 60 to 70 basis points from deflation [and] SNAP, do you expect a similar impact to be ongoing?
>
> A: I would tell you that all periods in the second quarter were positive so we are very happy to have seen that. As I look forward to the back half of the year, I believe many if not most all of the same headwinds we saw in the sales line continue to be there in the back half of the year. Deflation as well as SNAP, that 60 to 70 basis points is a headwind that is not going to go away. Now trying to counter that obviously will be our price investments. Now as you know though price investments take time to resonate with the consumer and while we are very confident that it will drive units in traffic, it will take a little time for that initiative to take hold. So we are doing everything possible here to ensure that we are giving the consumer the deal that she needs so that we can continue to have her come into our store and for us to continue to capture market share.

Raymond James & Associates analyst Dan Weber followed up with a question on the drop in customer transactions (*id.* at 13; *see* Doc. 46 at ¶ 193):

> Q: Just one other follow-up, the drop in customer transactions per store, I believe that is the first time that has happened since the buyout back in 2008. Where do you think that business shifted? Was it to the mass merchants and perhaps they are able to take advantage of the lower gasoline pricing and their customers becoming more mobile as a result?
>
> A: When we look at it, the headwind of SNAP for us really was a big deal and also our core consumer continues to be under a lot of pressure. I know that when we look at globally the overall US population, it seems like things are getting better but when you really start breaking it down and you look at that core consumer that we serve on the lower economic scale that is out there, that demographic, things have not gotten any better for her. And arguably they are worse because rents are accelerating, healthcare is accelerating on her at a very, very rapid clip. And now you couple that in upwards of 20 states where they have reduced or eliminated the SNAP benefit and it has really put a toll on her. That SNAP benefit reduction and/or elimination happened in April. That was the kickoff and you could see it immediately in the numbers. So I believe those are the things that are affecting her today, again, our core customer. And by the way, we have seen this play out before. If you dial the clock back to October of 2013 and coming into November of 2013 when the last large SNAP benefit reduction happened, it happened almost exactly the same way on our comps and how we saw

> traffic. Obviously we were up at a little bit higher level at that time but rest assured that our traffic slowed tremendously then, very similar to as it did now. The difference here is we are going to take aggressive price actions to get that consumer back in the store. She needs a little motivation to get back in. We need to help her stretch her budget for a time period until she figures it out. Our core customer is very resilient. They will figure it out over time but they need a little help as they tend to now try to figure out how to make ends meet with less money during the month.

The same day, Dollar General issued its Form 10-Q for the quarter, in which it noted that its "core customer ha[d] experienced both positive and negative general economic factors during the first half of 2016, such as lower gasoline prices and unemployment rates coupled with rising rents and medical costs, a continued reduction in SNAP participation rates and benefit levels and stagnant wage growth" (Doc. 59-9 at 4; *see* Doc. 46 at ¶ 195).

Following Dollar General's announcement of its disappointing earnings, its stock price tumbled in heavy trading, dropping 18% from its price the previous day (Doc. 46 at ¶ 197). Some analysts attributed the drop largely to Dollar General's disappointing same-store sales comps, noting the effect of the 2016 Expiration (*see id.* at ¶ 198).

Release of Third Quarter 2016 Results

On December 1, 2016, Dollar General issued a press release announcing its results for third quarter 2016, which again fell short of expectations (Doc. 59-12 at 2; *see* Doc. 46 at ¶ 200). Same-store sales for the quarter decreased by 0.1%, which the Company attributed in part to "an acceleration in headwinds from average unit retail price deflation and reductions in SNAP benefits in the 2016 third quarter as compared to the 2016 second quarter" (*id.*).

In the prepared-remarks portion of that day's earnings conference call, Vasos explained that the combined effects of commodity deflation and the 2016 Expiration had been more dramatic than previously estimated and reported (Doc. 59-13 at 4):

> As the deflation cycle continued in the quarter, we have reevaluated how we are looking at the impact, ultimately taking a more broad-based view. Rather than limiting our view to commodity cost of milk and eggs, we expanded our analysis to the average unit retail price deflation. Applying this broader view of deflation to both our second and third quarters, we experienced a greater impact in the third quarter as compared to the second quarter. We estimate that the combined headwinds from the average unit retail price deflation and reduction in SNAP benefits negatively impacted our same-store sales for the third quarter by approximately 150 to 175 basis points and for our second quarter by approximately 100 to 115 basis points. We believe many of these issues are transitory in nature.

In the Q&A portion of the call, in response to a question from Goldman Sachs analyst Alison Levens, Vasos elaborated on the effect of the 2016 Expiration (Doc. 59-13 at 12; *see* Doc. 46 at ¶ 201):

> Q: [C]an you provide more detail regarding what changed with respect to the SNAP headwinds in 3Q versus 2Q?
>
> A: When we look at it, it was about the same. When we look at our SNAP-affected states, I will give you a little color. Really what is interesting here is a lot like Q2, Q3 was pretty close to about the same, but if you look at it, it affects about 56% of our store base in the states that have reduced or eliminated these SNAP benefits and those states that have had the reduction or elimination, they are approximately 100 basis points worse in comp. That gives you a real good idea of how impactful those SNAP benefits reductions have been. Again, we feel it is transitory. We will move through that as we move through 2017, but, right now, that's why we have really taken a real hard look at reducing prices for those core consumers, especially in and around those states because they need us right now based on what we see.

On the same day, Dollar General released its Form-10Q for the quarter, in which it again disclosed that a reduction in SNAP benefits was one of the "primary macroeconomic factors" affecting its core customers (Doc. 46 at ¶ 202). And following the release of its third-quarter results, Dollar General's stock price dropped by 5% on heavy volume, with some analysts attributing the drop to Dollar General's disappointing same-store sales growth (*id.* at ¶¶ 204–10).

STANDARD OF REVIEW

An action may be dismissed if the complaint fails to state a claim upon which relief may be granted. Federal Civil Rule 12(b)(6). When ruling on a motion to dismiss, this Court must accept all well-pled factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Haviland v. Metro. Life Ins. Co.*, 730 F.3d 563, 566–67 (6th Cir. 2013). Although a complaint generally need not contain "detailed factual allegations," it must have more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, a complaint will survive a motion to dismiss only if it "contain[s] 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) (internal quotation and citation omitted). A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

The heightened pleading standard under Federal Civil Rule 9(b) applies to claims sounding in fraud, which must be stated "with particularity." The Sixth Circuit instructs that to satisfy Rule 9(b), a plaintiff must "allege the time, place, and content of the alleged misrepresentation," as well as "the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir. 2010) (internal quotation and citation omitted).

In a case alleging securities fraud, the Private Securities Litigation Reform Act of 1995 (PSLRA) imposes additional requirements. Under the PSLRA, plaintiffs must "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). Further, "with respect to each act or omission alleged," plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2). For an inference of scienter to be considered "strong," it "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). "In examining scienter, [this Court] must decide whether all of the facts alleged, *taken collectively*, meet the PSLRA's requirements." *Ashland*, 648 F.3d at 469 (emphasis in original).

DISCUSSION

Defendants move to dismiss all of Plaintiffs' claims. They contend the claims under Section 10(b) of the Securities Exchange Act (Count I, against Defendants Dollar General and Vasos) must be dismissed because Plaintiffs fail to plead a materially false or misleading statement or omission and/or fail to allege facts creating a strong inference that any of the challenged statements were made with the required scienter. They further assert that the claims under Section 20(a) of the Act (Count II, against Defendants Vasos and Owen) fail because the Complaint does not state a primary claim or, in the alternative as to Owen, because Plaintiffs fail to adequately allege control over the challenged statements.

Section 10(b) Claims

To state a claim under Section 10(b) of the Securities Exchange Act, "a plaintiff must allege, in connection with the purchase or sale of securities, the misstatement or omission of a material fact, made with scienter, upon which the plaintiff justifiably relied and which proximately caused the plaintiff's injury." *Frank v. Dana Corp.*, 547 F.3d 564, 569 (6th Cir. 2008) (internal quotation and citation omitted). "A misrepresentation or an omission is material only if there is a substantial likelihood that 'a reasonable investor would have viewed the misrepresentation or omission as having significantly altered the total mix of information made available.'" *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004) (citation omitted). In other words, a "fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (internal quotation and citation omitted).

The PSLRA created a limited safe harbor for "forward-looking statements," which include statements about future economic performance and the assumptions underlying those predictions. *Helwig v. Vencor, Inc.*, 251 F.3d 540, 547–48 (6th Cir. 2001) (en banc). *See also* 15 U.S.C. § 78u-5(i)(1). These statements are actionable only if (1) a reasonable investor would find the statement material; (2) the defendant failed to identify its statement as forward looking or provide "meaningful cautionary statements;" and (3) the defendant made the statement "with actual knowledge . . . that [it] was false or misleading." 15 U.S.C. § 78u-5(c)(1). *See also Miller v. Champion Enters., Inc.*, 346 F.3d 660, 672 (6th Cir. 2003).

Further, a defendant is liable for omitting a fact only if he had a duty to disclose it. *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 669 (6th Cir. 2005). If a defendant discovers new information that makes a prior statement "inaccurate, incomplete, or misleading," the defendant may have a duty to disclose. *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 471 (6th Cir. 2014). And a defendant who speaks voluntarily on a subject when he has no duty to do so "assume[s] a duty to speak fully and truthfully on th[at] subject." *Helwig*, 251 F.3d at 561 (citation omitted).

Under Federal Civil Rule 9(b) and the PSLRA, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* (quoting 15 U.S.C. § 78u-4(b)(2)). This inference must be "at least as compelling as any opposing inference one could draw from the facts alleged," when considering the complaint in its entirety. *Tellabs*, 551

U.S. at 324. If the alleged misrepresentation or omission concerns "hard information" -- such as historical data or other information that is objectively verifiable -- then the plaintiff must plead facts showing that the defendant acted "with at least recklessness." *In re Omnicare*, 769 F.3d at 473. If the alleged misrepresentation or omission concerns "soft information" -- such as predictions or opinions -- then the plaintiff must also establish that the statement was "made with knowledge of its falsity." *Id.*

The March 10, 2016 Statements

Plaintiffs challenge several statements by Vasos during the March 10 investor conference call regarding Dollar General's "core customer" and its projections for same-store sales growth. As a general matter, the Complaint relies on unwarranted factual inferences. For example, Plaintiffs treat the ABAWDs who lost benefits in the 2016 Expiration as synonymous with Dollar General's "core customer." But those individuals made up only a small portion (about 2%) of all SNAP participants, a correspondingly smaller percentage of Dollar General's "core customers" (*see* Doc. 46 at ¶ 12; Doc. 59-20 at 2). In context, there is no reason to believe Vasos' statements about "core customers" were intended to focus on this specific segment of its customer base. Likewise, Plaintiffs imply that the 2016 Expiration was the primary cause of Dollar General's inability to meet its same-store sales targets that year. But the statements released by Dollar General later that year suggest that price deflation was at least as significant, if not more so (*see* Docs. 59-10, 59-11, 59-12, 59-13).

<u>Five Percent of Sales</u>. With respect to specific statements, Plaintiffs challenge the description of SNAP as "approximately 5% of our sales" and "not a huge piece of the business" (*see* Doc. 46 at ¶ 161; *supra* at 7). The Complaint alleges that even if SNAP-eligible *products* represented 5% of Dollar General's sales, purchases by SNAP *participants* accounted for 10% to 12% of sales (Doc. 46 at ¶ 73). Further, previous SNAP reductions significantly affected Dollar General's business (*id.* at

¶¶ 110–16). Plaintiffs argue that failing to acknowledge this additional hard information made Vasos' statements materially misleading by omission.

But Vasos made these statements in response to an analyst question describing SNAP as "not a huge piece of your revenues" (Doc. 59-5 at 12). The analyst then followed up by asking whether Dollar General would adjust its product offerings, if necessary, to satisfy any new FDA rules (*id.*). This context suggests that the analyst was asking about SNAP *products*, rather than SNAP *participants*. Regardless, Vasos explicitly acknowledged that Dollar General's core customer "does rely on SNAP benefits in a lot of cases" (*id.*) -- the very disclosure Plaintiffs contend was missing and therefore made the statement misleading. Viewed in context, no reasonable investor could interpret Vasos' statement as a "reassurance" that the 2016 Expiration would have no material effect on Dollar General's business. The statement was not misleading and therefore is not actionable.

Shopping Habits. Plaintiffs also challenge another statement by Vasos during the same exchange. Vasos commented that "the great thing here about Dollar General . . . is that we offer [our core customer] a great value proposition at the price. So whether she's pinched [a little bit] with SNAP or not, she can definitely come here to Dollar General and get all her needs. And we will continue to deliver on that promise to her because she actually comes to us to make sure we can deliver on it" (Doc. 46 at ¶ 161; *supra* at 7). Plaintiffs point out that during the 2013 SNAP Reduction, Dollar General's core customer either stopped shopping there or at least "made fewer trips and purchases, and spent less money" (Doc. 66 at 18; *see* Doc. 46 at ¶¶ 44, 168, 194). They argue that failing to disclose this historical information made the statement materially false or misleading.

But "generalized statements of optimism that are not capable of objective verification" are not material for purposes of a securities fraud claim. *In re Ford Motor Co.*, 381 F.3d at 570. Vasos merely opined that Dollar General's core customers are looking for a good value, which is why they choose to shop at Dollar General. No reasonable investor would interpret a statement that someone "can" shop somewhere as an assurance that she "would" continue to shop there in the future. *See In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (holding a misrepresentation or omission is material only if "a reasonable investor would have viewed the misrepresentation or omission as having 'significantly altered the total mix of information made available'") (citation omitted).

Further, Plaintiffs' argument that Dollar General should have known the 2016 Expiration would have a profound impact on its business, merely because the 2013 Reduction had such an impact, is not persuasive. While Vasos later noted that the 2016 Expiration's effect on comps was "almost exactly the same" as the 2013 Reduction (Doc. 59-11 at 13; *see* Doc. 46 at ¶ 194), that does not mean Dollar General could or should have predicted that result. Indeed, the Complaint acknowledges that the 2013 Reduction was very different from the 2016 Expiration -- the first imposed across-the-board reductions to all SNAP participants (Doc. 46 at ¶ 110), whereas the second totally eliminated benefits for a small portion of participants (*id.* at 117). Plaintiffs plead no facts supporting an inference that Dollar General should have forecasted the same result in 2016 as in 2013.

Merchandise Initiatives. Finally, Plaintiffs challenge Vasos' characterization of Dollar General's merchandise initiatives. In response to an analyst question about increasing same-store sales, Vasos described the initiatives as "the strongest that I've seen here in the last 2 to 3 years," and he noted "our health and beauty initiative as well as our party and stationary pieces really should help drive some of those initiatives as we go forward" (Doc. 59-5 at 12; *see* Doc. 46 at ¶ 160; *supra* at 8). He concluded that he felt "very confident as we go forward this year into 2016" (*id.*). Plaintiffs contend this statement was materially misleading by omission because Dollar General had no initiatives planned to address the impact of the 2016 Expiration.

Vasos' description of the strength of the initiatives and his own confidence are "generalized statements of corporate optimism." *See In re Ford Motor Co.*, 381 F.3d at 570 ("'Immaterial statements include vague, soft, puffing statements or obvious hyperbole' upon which a reasonable investor would not rely.") (quoting *In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002)). Further, his comment about the effect of specific initiatives is inherently forward looking. This statement is protected by the safe harbor because it was both identified as forward looking during the March 10 conference call (Doc. 59-5 at 3) and was "accompanied by meaningful cautionary statements" in Dollar General's Form 10-K, which expressly identified "decreases in government subsidies" and "[f]ailure to achieve successful implementation of our initiatives" as potential Risk Factors (Doc. 59-3 at 9–10). *See Miller*, 346 F.3d at 672.

Further, Vasos was responding to a general question about initiatives to increase same-store sales. He did not suggest that any of Dollar General's initiatives were targeted at the 2016 Expiration. Plaintiffs repeatedly emphasize that Dollar General developed no such initiatives and failed to "warn" its local store managers about the impending doom on the horizon. This argument is unpersuasive for at least two reasons. First, the fact that Dollar General did not warn its managers about the potential impact of the 2016 Expiration, or educate them on how best to counter it, undermines Plaintiffs' scienter allegations. Second, Dollar General was not required to direct its initiatives at the customers affected by the 2016 Expiration, and its failure to do so cannot form the basis for a securities fraud claim. *See Sante Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("We thus adhere to the position that 'Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.'") (citation omitted). A business is not required to identify and implement the "best" strategy for counteracting shifting economic conditions. What it cannot do is mislead investors by withholding material information about those decisions. The allegations in the Complaint do not suggest that happened here.

The May 26, 2016 Statements

Plaintiffs' arguments concerning the May 2016 statements suffer from most of the same deficiencies. They still treat "core customer" as synonymous with those customers affected by the 2016 Expiration, and they still presume that the 2016 Expiration was the primary cause of Dollar General's failure to meet its projections. As with the March 2016 statements, there is no reason to infer that Dollar General should have known (based on the 2013 Reduction) that it could not achieve its 2016 projections. Nor is there any reason to find the statements actionable merely because Dollar General did not have a plan in place to specifically target customers affected by the 2016 Expiration.

<u>Same-Store Sales Projections</u>. After Vasos' prepared remarks, an analyst asked whether he still believed Dollar General would be able to "accelerate comps to the 3% range" for 2016 (Doc. 59-8 at 16). Vasos responded that he felt "confident longterm" and believed that Dollar General's merchandise initiatives and strategic planning would allow it to "continue to move through" the 2% to 4% "guard rail" (*id.* at 17; *see* Doc. 46 at ¶ 171; *supra* at 10–11). Earlier in the call, another analyst asked for a "realistic time frame" in which Dollar General might be able to achieve 4% same-store sales growth (Doc. 59-8 at 11). Vasos responded that he felt "very confident" in the 2% to 4% guard rail based on Dollar General's algorithm, and he believed the Company had "all the initiatives we need to make sure we deliver that" (*id.*; *see* Doc. 46 at ¶ 172; *supra* at 10).

Vasos' statements about his confidence in Dollar General's projections are not actionable. Not only are they inherently forward looking, he also stressed that his confidence was based on the success of the Company's initiatives *in the longterm*. Plaintiffs plead no facts that could create an inference Dollar General knew its initiatives would fail and prevent the Company from achieving its

2016 projections. Plaintiffs' bare allegations that Dollar General knew or was reckless in not knowing that its initiatives would not succeed -- or even their more specific allegations that Dollar General had access to sales data reflecting lagging SNAP sales -- are insufficient to render Vasos' "confidence" in the Company's longterm success either materially false or misleading. *See Pension Fund Grp. v. Tempur-Pedic Int'l, Inc.*, 614 F. App'x 237, 243 (6th Cir. 2015) ("The pension funds nevertheless argue that Tempur-Pedic's 2012 financial guidance was not, in fact, forward looking because it omitted how Serta had already affected the company's sales growth. But they find no support in our precedent for characterizing financial projections as representations of historical or current fact. Under the PSLRA, we ask if a statement meets the statutory definition of forward looking; if it does, we look to whether the defendant meaningfully alerted investors to the risks that might prevent it from reaching its financial targets.").

Core Consumer. Plaintiffs also challenge Vasos' statement that Dollar General "do[es] well in either of . . . two scenarios": when the core consumer "has a little bit more money, she spends a little bit more on those nonconsumable goods. And when she doesn't have as much, she may pull back there but then utilizes us more on consumable and everyday staples that she knows she can get at an everday low price" (Doc. 59-8 at 12; *see* Doc. 46 at ¶ 173; *supra* at 10). Again, Plaintiffs argue this statement was materially false or misleading based on the effects of the 2013 Reduction and the 2016 Expiration, which "had an immediate and significant adverse effect on Dollar General's same-store sales" (Doc. 46 at ¶ 179).

If Dollar General's "core consumers" were limited to (or even predominantly) ABAWDs, subject to the 2016 Expiration, then perhaps Vasos' statement could be false or misleading based on lagging SNAP sales. But his statements are not so limited; they refer to the broader Dollar General "core consumer," not just unemployed, able-bodied adults without dependents. The Complaint alleges no facts suggesting this statement was historically and "objectively false or misleading." *In re Omnicare*, 769 F.3d at 470. In fact, given that Dollar General had twenty-six consecutive years of same-store sales growth, it is neither false nor misleading to suggest that the Company does well when its core consumer faces varying economic conditions.

Plaintiffs also challenge Vasos' statement that Dollar General's core consumer was "probably about the same" in May 2016 as she was "coming out of Q4" (Doc. 59-8 at 15; *see* Doc. 46 at ¶ 174; *supra* at 11). They argue this statement was materially false because the 2016 Expiration -- which began April 1, 2016 -- had taken a "noticeable toll" on sales by the following month (Doc. 46 at ¶¶ 179, 193). Plaintiffs therefore contend that Vasos failed to disclose a known negative trend.

Again, Vasos' statement described Dollar General's core consumer, generally, not the subset comprised of ABAWDs. And he made the statement during a conference call to discuss first quarter earnings. In this context, the statement was not false or misleading because same-store sales growth *was* about the same between fourth quarter 2015 and first quarter 2016 -- 2.2% for fourth quarter 2015, and either 2% or 2.2% for first quarter 2016 (Doc. 46 at ¶¶ 158, 169; Doc. 59-8 at 4). But Vasos made this statement in response to an analyst question about sales "at this point" and "today" (Doc. 59-8 at 15). Thus, his question arguably was not focused on the quarterly results, but rather was asking for up-to-the-minute information on sales trends.

Assuming a reasonable investor could have understood Vasos' answer to be an up-to-the-minute report, then failing to disclose the lag in SNAP sales could be a material omission. But Plaintiffs must still plead facts creating a strong inference of fraudulent intent. They contend that Dollar General was or should have been aware of the decline in sales based on its "moneyball" data analysis and later statements that "you could see it immediately in the numbers" (Doc. 46 at ¶ 140, 216; *supra* at 14). But a statement made with the benefit of hindsight does not plausibly suggest either Vasos or Dollar General was actually aware of the negative trend at the time of the May 26 conference call. *La. Sch. Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 484–85 (6th Cir. 2010) ("Finding scienter based on such allegations would be equivalent to 'the classic fraud by hindsight case where a plaintiff alleges that the fact that something turned out badly must mean defendant knew earlier that it would turn out badly.'") (citation omitted). And the Complaint does not allege that anyone in the Company actually analyzed or reported the impact of the 2016 Expiration to senior management before that call. Plaintiffs therefore fail to adequately plead scienter. *See In re Huntington Bancshares Inc. Sec. Litig.*, 674 F. Supp. 2d 951, 966 (S.D. Ohio 2009); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 246 (3d Cir. 2017) ("[A]ctual knowledge that sales from one source might decrease is not the same as actual knowledge that the company's overall sales projections are false.").

Store Relocation Strategy. Finally, Plaintiffs allege Dollar General "manipulat[ed]" the same-store sales metric by including "relocated" stores (some of which were moved across the street from "older, underperforming stores") in its calculations (Doc. 46 at ¶ 179). But Dollar General responds that its Form 10-K "clearly disclosed" that "[w]e include stores that have been . . . relocated in our same-store sales calculation" (Doc. 58 at 24; Doc. 59-2 at 10; Doc. 59-3 at 14). Plaintiffs do not address this argument, and Dollar General accurately quotes its Form 10-K disclosures. Thus, these allegations are insufficient to state a claim.

Form 10-Q

Item 303 of SEC Regulation S-K requires companies to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations" in their Form 10-

Q filings. 17 C.F.R. § 229.303(a)(3)(ii). Plaintiffs assert that Dollar General was required to disclose the decline in sales following the 2016 Expiration in its first quarter 2016 Form 10-Q.

A violation of the disclosure requirements under Item 303 is not automatically actionable under Rule 10b-5. *See Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000); *SEC v. Conaway*, 698 F. Supp. 2d 771, 839 (E.D. Mich. 2010). The omission must still satisfy the requirements of Section 10(b): the information must be material, and the failure to disclose must make a statement misleading. *Id.* Assuming that an Item 303 violation may form the basis for liability under Rule 10b-5,[3] this claim fails for the same reasons described above. The Complaint does not allege that anyone at Dollar General actually identified a downturn in SNAP sales as of May 2016, as required to constitute a "known" trend or uncertainty. *See J&R Mktg., SEP v. Gen. Motors Corp.*, 549 F.3d 384, 391 (6th Cir. 2008) (distinguishing between trends that are "known" versus merely "knowable"); *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App'x 281, 286 (6th Cir. 2017) (alleging that a defendant "knew or should have known" does not "plausibly establish . . . actual knowledge").

Section 20(a) Claims

Section 20(a) of the Securities Exchange Act provides that "[e]very person who . . . controls any person liable under any provision of this chapter . . . shall also be liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the . . . violation." 15 U.S.C. § 78t(a). To state a control-person claim, Plaintiffs must adequately plead (1) a primary violation of Section 10(b); (2) that the individual Defendant had authority to control the general business affairs

---

[3] The Sixth Circuit has questioned this conclusion. *See In re Sofamor*, 123 F.3d at 402–03 (recognizing that "courts have been reluctant to recognize a private right of action under Item 303"). The Supreme Court granted certiorari to address this issue, *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016), *cert. granted Leidos, Inc. v. Ind. Pub. Ret. Sys.*,137 S. Ct. 1395 (2017), but the case was removed from the argument calendar in October 2017.

of the primary violator; and (3) that the individual Defendant had authority to control the specific activity resulting in the primary violation. *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 696–97 (6th Cir. 2004). Because Plaintiffs fail to state a claim for a primary violation of Section 10(b), their Section 20(a) claim also fails.

CONCLUSION

Context matters. It certainly does in this case. For example, just because the 2013 SNAP Reduction had a certain impact on Dollar General, does not necessarily mean that the 2016 Expiration would have the same, foreseeable impact. And statements about future financial growth must be viewed in light of the identified Risk Factors, which serve as a background to otherwise optimistic projections. In other words, only in context can a statement be properly examined to determine whether the Complaint satisfies the pleading requirements under the PSLRA. It is Plaintiffs' responsibility to connect the dots. This Court finds the Motion (Doc. 58) well taken and this case is dismissed.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

March 8, 2018