

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19<sup>th</sup> day of September, two thousand eleven.

PRESENT: DENNIS JACOBS,  
Chief Judge,  
ROBERT A. KATZMANN,  
DEBRA ANN LIVINGSTON,  
Circuit Judges.

- - - - -X  
INTER-LOCAL PENSION FUND GCC/IBT,  
MACOMB COUNTY EMPLOYEES' RETIREMENT  
SYSTEM,

Plaintiffs-Appellants,

SUSAN W. COYNE, on behalf of herself and all others  
similarly situated, THOMAS A. COYNE, on behalf of himself  
and all others similarly situated, AMALYE CALVERT, on behalf  
of herself and all others similarly situated,

Plaintiffs,

-v.-

10-3477

1 GENERAL ELECTRIC COMPANY, JEFFREY R.  
2 IMMELT, KEITH S. SHERIN,  
3

4 Defendants-Appellees.  
5  
6

7 - - - - -X

8  
9 **FOR APPELLANTS:** Susan K. Alexander (Andrew J. Brown, Brian  
10 O. O'Mara, Robbins Geller Rudman & Dowd  
11 LLP, San Diego, CA, on the brief)  
12 Robbins Geller Rudman & Dowd LLP  
13 San Francisco, CA  
14

15 **FOR APPELLEES:** Greg A. Danilow (Paul Dutka, Gregory  
16 Silbert, on the brief),  
17 Weil, Gotshal & Manges LLP  
18 New York, NY  
19  
20

21 Appeal from a judgment of the United States District  
22 Court for the District of Connecticut (Underhill, J.)  
23 granting Appellees' motion to dismiss and dismissing  
24 Appellants' complaint.  
25

26 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
27 **AND DECREED** that the district court's judgment is **AFFIRMED**.  
28

29 Plaintiffs appeal from an order dismissing their  
30 securities fraud class action against the General Electric  
31 Company ("GE" or the "Company"), its Chief Executive Officer  
32 Jeffrey Immelt, and its Chief Financial Officer Keith Sherin  
33 under Federal Rule of Civil Procedure 12(b)(6). We assume  
34 the parties' familiarity with the underlying facts, the  
35 procedural history, and the issues presented for review.  
36

37 We review de novo a district court's dismissal of a  
38 complaint under Federal Rule of Civil Procedure 12(b)(6).  
39 Teamsters Local 445 Freight Div. Pension Fund v. Dynex  
40 Capital Inc., 531 F.3d 190, 194 (2d Cir. 2008). We must  
41 "accept[] all factual allegations as true and draw[] all  
42 reasonable inferences in favor of the plaintiff." ECA &  
43 Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan  
44 Chase Co., 553 F.3d 187, 196 (2d Cir. 2009). "To survive a

1 motion to dismiss, a complaint must plead enough facts to  
2 state a claim to relief that is plausible on its face." Id.  
3 (internal quotation marks omitted).  
4

5 The complaint alleges violations of Section 10(b) of  
6 the Securities Exchange Act of 1934 (the "Exchange Act"), 15  
7 U.S.C. § 78j(b), Rule 10b-5 promulgated thereunder, 17  
8 C.F.R. § 240.10b-5, and Section 20(a) of the Exchange Act,  
9 15 U.S.C. § 78t(a). "[T]o state a claim under Rule 10b-5, a  
10 plaintiff must allege that, in connection with the purchase  
11 or sale of securities, the defendant made material  
12 misstatements or omissions of material fact, with scienter,  
13 and that the plaintiff's reliance on the defendant's actions  
14 caused injury to the plaintiff." Slayton v. Am. Express  
15 Co., 604 F.3d 758, 765 (2d Cir. 2010). Moreover, a  
16 complaint alleging a 10b-5 violation is subject to the  
17 heightened pleading requirements of the Private Securities  
18 Litigation Reform Act ("PSLRA"), which requires, inter alia,  
19 that the complaint "state with particularity facts giving  
20 rise to a strong inference that the defendant acted with the  
21 required state of mind." 15 U.S.C. § 78u-4(b)(2). In  
22 determining whether a complaint adequately pleads scienter  
23 under the PSLRA, we must consider "plausible nonculpable  
24 explanations for the defendant's conduct" and a complaint  
25 "will survive . . . only if a reasonable person would deem  
26 the inference of scienter cogent and at least as compelling  
27 as any opposing inference one could draw from the facts  
28 alleged." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551  
29 U.S. 308, 324 (2007).  
30

31 We conclude that the complaint does not plead facts  
32 giving rise to a strong inference of scienter. The required  
33 state of mind in a 10b-5 action is "an intent to deceive,  
34 manipulate or defraud." Ernst & Ernst v. Hochfelder, 425  
35 U.S. 185, 191 n.7 (1976). Scienter can be established  
36 "either (a) by alleging facts to show that defendants had  
37 both motive and opportunity to commit fraud, or (b) by  
38 alleging facts that constitute strong circumstantial  
39 evidence of conscious misbehavior or recklessness." Shields  
40 v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir.  
41 1994). "[T]he absence of a motive allegation is not fatal,"  
42 Tellabs, 551 U.S. at 325; but unless a complaint alleges  
43 facts supporting a motive to commit fraud, the

1 circumstantial evidence of scienter must be "correspondingly  
2 greater." ECA, 553 F.3d at 198-99.

3  
4 The complaint pleads no facts to suggest that any of  
5 the Appellees had a motive to commit fraud. It is alleged  
6 that Appellees received performance-based compensation tied  
7 to the Company's stock price and that Appellee Immelt had  
8 underperformed relative to his predecessor, Jack Welch, and  
9 may have felt pressure to generate greater returns for  
10 shareholders. These allegations are legally insufficient to  
11 establish motive for scienter purposes. See id. at 198  
12 ("Motives that are common to most corporate officers, such  
13 as the desire for the corporation to appear profitable and  
14 the desire to keep stock prices high to increase officer  
15 compensation, do not constitute 'motive' for purposes of  
16 this inquiry."). The complete absence of any motive to  
17 commit fraud on the part of Appellees is underscored by the  
18 fact that their alleged misstatements concerning the  
19 Company's quarterly earnings prospects were made no more  
20 than a few weeks before GE would inevitably be required to  
21 report its quarterly earnings to the market. "It is hard to  
22 see what benefits accrue from a short respite from an  
23 inevitable day of reckoning." Shields, 25 F.3d at 1130.  
24 The complaint simply does not allege any facts to suggest  
25 that Appellees "benefitted in a concrete and personal way  
26 from the purported fraud . . . ." Novak v. Kasaks, 216 F.3d  
27 300, 311 (2d Cir. 2000).

28  
29 Having failed to establish any cognizable motive to  
30 commit securities fraud, we conclude that Appellants'  
31 circumstantial evidence of fraud does not give rise to the  
32 strong inference of scienter required by the PSLRA. There  
33 are several vague and general averments that Appellees  
34 Immelt and Sherin had access to internal corporate documents  
35 and data during the class period, including real-time  
36 customer and sales information. Although a strong inference  
37 of scienter may arise when a complaint alleges that  
38 defendants "knew facts or had access to information  
39 suggesting that their public statements were not accurate,"  
40 id. at 311, such an allegation must "specifically identify  
41 the reports or statements containing this information." Id.  
42 at 309. Appellants have not alleged any facts indicating  
43 that the content of the reports or data to which Appellees  
44 were privy was inconsistent with their statements in the

1 class period. Appellants also argue scienter based on one  
2 post hoc statement by Appellee Sherin acknowledging that  
3 Appellees knew the Company faced risks in March of 2008.  
4 But Appellees' awareness of general unspecified market risk  
5 does not contradict any of their public statements about the  
6 Company's financial prospects. Even if Appellee Sherin's  
7 statement is taken to refer to more particular risks to the  
8 Company's business operations, Appellants have failed to  
9 allege that Appellees were aware of those risks at the time  
10 of their public statements that month about the Company's  
11 financial prospects such that their statements were not  
12 "consistent with reasonably available data." Id. Sherin's  
13 statement therefore does not create the strong inference of  
14 scienter required by the PSLRA. See id. at 308-09. Because  
15 the complaint does not adequately plead scienter, it fails  
16 to state a plausible claim for relief based on a violation  
17 of Rule 10b-5. Since the complaint does not allege a  
18 primary violation of the securities laws, it also fails to  
19 state a claim for control person liability under Section  
20 20(a) of the Exchange Act. See ATSI Commc'ns, Inc. v. Shaar  
21 Fund, Ltd., 493 F.3d 87, 108 (2d Cir. 2007).

22  
23 For the foregoing reasons, the judgment of the district  
24 court is hereby **AFFIRMED**.

25  
26  
27 FOR THE COURT:  
28 CATHERINE O'HAGAN WOLFE, CLERK  
29