

DEC 21 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM WOLLRAB, On behalf of
himself and all others similarly situated;
PLUMBERS & PIPEFITTERS
NATIONAL PENSION FUND; LOUIS V.
IMUNDO; GARY GELMAN; ILENE
ARMOUR; STANLEY SVED; PHILIP G.
FISHER; PILAR M. FISHER; SARAH
MATESKI,

Plaintiffs,

And

POLICEMEN'S ANNUITY AND
BENEFIT FUND OF CHICAGO,

Plaintiff - Appellant,

v.

SIEBEL SYSTEMS, INC.; THOMAS M.
SIEBEL; KENNETH A. GOLDMAN; R.
DAVID SCHMAIER,

Defendants - Appellees.

No. 06-15129

D.C. No. CV-04-00983-CRB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted December 6, 2007
San Francisco, California

Before: KOZINSKI, Chief Judge, COWEN,^{**} and HAWKINS, Circuit Judges.

We affirm the district court's dismissal of Appellant's securities fraud class action complaint against Siebel Systems, Inc. ("Siebel") for failure to satisfy the heightened pleading requirements of the Private Securities Litigation Reform Act.

Even if Siebel's statements about the Siebel 7 software were more than mere puffery, Appellant did not plead sufficient facts to give rise to a strong inference that Siebel knew of problems with the Siebel 7 at the time that the company was touting the product. See Ronconi v. Larkin, 253 F.3d 423, 432 (9th Cir. 2001) ("Honest optimism followed by disappointment is not the same as lying or misleading with deliberate recklessness.")

In addition, even assuming Siebel did intentionally "push" some deals into the first quarter of 2002, its results for that quarter were not misleading because Siebel warned that its January sales were unusually strong and not likely to be repeated, thus negating any impact of the "revenue cushioning" Siebel was allegedly trying to

^{**} The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

accomplish. See In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1085 (9th Cir. 2002). Nor were Siebel's statements that the quarter would be "as challenging" as the first quarter false or misleading simply because the results wound up being lower.

Furthermore, although Appellant illustrates various methodological problems with the customer satisfaction survey, it does not sufficiently plead facts giving rise to a strong inference that Siebel *knew* of those design flaws when announcing the results. As the district court noted, most of Siebel's conduct regarding the survey was also consistent with good business practices. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2509-10 (2007) (court must consider plausible opposing explanations as well as inferences favoring the plaintiff). Although it was arguably misleading to represent that the survey was conducted by an "independent" company, the complaint does not state sufficient facts regarding the actual interest Siebel held in the survey company, whether the "independent" representation was materially misleading or, more importantly, how this relationship affected the survey itself.

The district court did not err in describing this as a case in which the whole is not greater than the sum of the parts; that is, even considered in its entirety, the complaint does not give rise to a strong inference of scienter. Tellabs, 127 S. Ct. at 2509. Appellant does not point to any specific, additional, relevant information that it could supply if given an opportunity to amend, and we conclude that the district

court did not abuse its discretion by dismissing the complaint with prejudice. See Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990); ATSI Comm. v. Skaar Fund, Ltd., 493 F.3d 87, 108 (2d Cir. 2007).

AFFIRMED.