UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SACHA BERLIK, BERIT BLOCK, PAUL DEAN, JENNIFER GOLDBERG, JAN HEUMUELLER, SHANE KEATS, CHRISTOPHER LE MAY, CHRISTOPHER LOBDELL, and LAURA WALTON,

Plaintiffs,

v.

MICHAEL BAKER; EDWARD CRAWLEY; JEFFREY BUSSGANG; FLYBRIDGE CAPITAL PARTNERS II, L.P.; FLYBRIDGE NETWORK FUND II, L.P.; JEFFREY FAGNAN; ATLAS VENTURE FUND VIII, L.P.; ACCOMPLICE FUND I L.P.; ACCOMPLICE FUND II, L.P.; JOHN JARVE; MENLO VENTURES X, L.P.; MENLO ENTREPRENEURS FUND X, L.P.; MMEF X, L.P.; DON BUTLER; THOMVEST VENTURES LTD.; THOMVEST VENTURE CAPITAL SRL; DAN DEMMER; WILLARD SIMMONS; MARK JUNG; SANDRO CATANZARO; and R. BRUCE JOURNEY;

Defendants.

Case No. 21-CV-11723-AK

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

A. KELLEY, D.J.

This is a collective action brought by Plaintiffs Sacha Berlik, Berit Block, Paul Dean, Jennifer Goldberg, Jan Heumueller, Shane Keats, Christopher Le May, Christopher Lobdell, and Laura Walton (collectively, "Plaintiffs") against Defendants Michael Baker; Edward Crawley; Jeffrey Bussgang; Flybridge Capital Partners II, L.P; Flybridge Network Fund II, L.P.; Jeffrey

Fagnan; Atlas Venture Fund VIII, L.P.; Accomplice Fund I L.P.; Accomplice Fund II, L.P.; John Jarve; Menlo Ventures X, L.P.; Menlo Entrepreneurs Fund X, L.P.; MMEF X, L.P.; Don Butler; Thomvest Ventures LTD.; Thomvest Venture Capital SRL; Dan Demmer; Willard Simmons; Mark Jung; Sandro Catanzaro; and R. Bruce Journey (collectively, "Defendants").

The dispute in this matter centers around a no-longer-extant, privately held digital software company called DataXu, Inc. ("DataXu" or the "Company"). [Dkt. 1 ("Compl.") at ¶ 1]. Plaintiff Sacha Berlik is "the former owner of a company acquired by DataXu in 2011 and 2012, partially in exchange for stock in DataXu," while the remaining Plaintiffs were "DataXu employees who purchased shares in DataXu through various employee stock option plans." [Id. at ¶ 2]. The complaint alleges that, through Defendants' control of DataXu, Defendants sold Plaintiffs DataXu securities "while intentionally and recklessly concealing and failing to disclose that Defendants (1) would create or had created fraudulent devices … that could and would deprive Plaintiffs of the value of their securities upon the sale or merger of the company; (2) could and would execute these fraudulent devices upon the sale or merger of DataXu and[;] (3) through the fraudulent implementation of [the devices at issue], cause the value of Plaintiffs' contributions and interests in DataXu to be transferred directly to Defendants, resulting in the total loss to Plaintiffs of their investments." [Id. at ¶ 4]. Plaintiffs have brought a single count against Defendants, asserting these alleged facts constitute disclosure fraud in violation of Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (hereinafter, "Section 10(b)") and Rule 10b-5, 17 C.F.R. § 240.10b-5 (hereinafter, "Rule 10b-5"), promulgated pursuant to Section 10(b). [Compl. at ¶ 267].

Defendants have moved to dismiss the complaint with prejudice pursuant to Federal Rules of Civil Procedure 8(a) (general rules of pleading claim for relief), 9(b) (heightened

pleading requirements when pleading fraud or mistake), and 12(b)(6) (failure to state a claim), as well as under the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4 & 5 (heightened pleading standards for allegations of securities fraud). [See Dkt. 30 at 1–2].

For the reasons set forth below, Defendants' Motion to Dismiss [Dkt. 30] is **GRANTED** and the case is **DISMISSED WITH PREJUDICE**.

I. FACTUAL BACKGROUND[1]

DataXu was a Massachusetts-based digital software company founded in 2007 by two students at the Massachusetts Institute of Technology (Defendants Simmons and Catanzaro) and their professor (Defendant Crawley). [Dkt. 1, Compl. at ¶¶ 26–28]. The Company's "core asset" was a demand-side software platform "that a service-provider owns and operates to serve users of digital advertising." [Id. at ¶ 26]. DataXu was incorporated as a Delaware corporation in August 2007 [id. at ¶ 28]; began operating as a startup in May 2008 [id. at ¶ 34]; and, from March 2009–November 2019, was registered as a foreign corporation doing business in the Commonwealth of Massachusetts [id. at ¶ 35].

Plaintiffs allege Defendants Simmons, Catanzaro, and Crawley initially "issued all or most of DataXu's then-issued and outstanding common stock to themselves," and that they "held a majority of the shares of DataXu common stock until November 8, 2019, when their common stock was extinguished." [Id. at ¶¶ 30–31]. Defendant Journey was first hired to be the Company's chief executive officer ("CEO") in August 2007 [id. at ¶ 32]; however, after Defendant Baker invested in DataXu's debt, he later "became a Director and replaced Defendant Journey as DataXu's CEO" [id. at ¶ 33].

[1] The Court accepts all factual allegations in the complaint as true on a motion to dismiss, see García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013), and such facts are set forth accordingly in this section.

At some point in 2008, DataXu's Board of Directors, "which included certain Defendants," implemented a stock option plan that included the "granting of qualified employee stock options." [Id. at ¶ 73]. These securities came in various forms, including employee stock options ("ESOs"), tax-qualified incentive stock options ("ISOs"), and non-tax qualified stock options ("NSOs"). [Id. at ¶ 41–42, 73]. The Company also issued restricted stock units ("RSUs") to "certain Employee Plaintiffs, which were units (equaling a single share of common stock) entitling the holder to acquire shares of DataXu common stock or the cash equivalent upon the holder's continued employment by DataXu, or the attainment of one or more performance milestones." [Id. at ¶ 41–42].

During the disbursal of these securities, Plaintiffs allege Defendants were aware that there were "schemes" attached that affected the use and value of these securities. [Id. at ¶ 78]. Plaintiffs' complaint refers to various "fraudulent devices, including a deemed liquidation provision, an insider-note repayment scheme, and a retention plan," which Plaintiffs refer to collectively as the "Contribution-Shifting Devices" [id. at ¶¶ 4, 44], and the Court will as well. Plaintiffs assert Defendants engaged in a fraudulent scheme by "concealing and failing to disclose, at the time sales were offered, investment decisions made, and purchases effected, the significant risk that Defendants could or would employ one or more Contribution-Shifting Devices to shift Plaintiffs' contributions to DataXu to themselves when Defendants decided to liquidate their investments," which Plaintiffs refer to overall as "the 'Contribution-Shifting Scheme.'" [Id. at ¶ 44–45].

Thus, the Plaintiffs assert that Defendants' knowledge of the possible use of these devices, in conjunction with their failure to inform the Plaintiffs of such risk, gives rise to liability under Section 10(b) and Rule 10b-5. The complaint states Plaintiffs believed that "upon

DataXu's sale or disposition other than through bankruptcy, Plaintiffs would receive their proportionate share of the capital contributed." [Id. at ¶ 79]. They allege that, had they known of the Defendants' exit options and the possible implementation of the Contribution-Shifting Devices, they would "not have joined or remained with DataXu as employees, would have required greater cash compensation, and would not have contributed capital in the form of cash or an ongoing business (in the case of C-1 Plaintiff Berlik) to acquire DataXu securities." [Id. at ¶ 56]. Plaintiffs claim that the Defendants intentionally concealed this material information to encourage employees to stay with the company and to stimulate startup growth. [Id. at ¶¶ 62, 70].

Defendants used 409 valuations to assess at what price-point ESOs could be sold for. [Id. at ¶ 94]. However, Plaintiffs claim that these valuations were not complete considering that the Contribution-Shifting Devices were not disclosed. [Id. ¶¶ 97–98]. Plaintiffs allege this lack of disclosure led to the common stock valuations to be "overstated and illusory." [Id. at ¶ 99]. Plaintiff Berlik received C-1 preferred stock after his business was acquired by DataXu for approximately $4.15 million. [Id. at ¶ 106]. DataXu and Plaintiff Berlik entered into what is referred to as the Mexad Agreement, in which the C-1 preferred stock was given in three equal disbursements from 2013 to 2015. [Id. at ¶ 124]. Defendants did not tell Plaintiff Berlik about the deemed-liquidation device during these dealings. [Id. at ¶¶ 114–16]. The complaint alleges that if Plaintiff Berlik had been told of such, it is likely he would not have sold the company to DataXu and would not have accepted stock instead of cash. [Id. at ¶ 116]. The other Plaintiffs collectively received over $227,000 in common stock from 2010 to 2018 during their employment with DataXu. [Id. at ¶ 106].

From 2009 to 2015, Defendants Bussgang, Fagnan, Jarve, and Butler purchased Series A, B, C, D, E, and F preferred Data Xu stock on behalf of their respective companies. [Id. at ¶¶ 163–212]. Each of these stock options gave them the right to become a member of the DataXu Board of Directors. [Id. at ¶¶ 163–212]. The complaint alleges that starting in 2009, the Defendants amended and restated DataXu's certificate of incorporation repeatedly to create these preferred stocks. [Id. at ¶ 129]. The Certificate of Incorporation designated that those with Preferred stock would have a voting right in the business and set up the deemed liquidation device to assign favored footing to those with Preferred stock when the company was purchased—specifically excluding C-1 preferred stock. [Id. at ¶¶ 129–34]. The Plaintiffs never had access to the Certificate of Incorporation or DataXu's financial statements. [Id. at ¶¶ 91, 222]. Around the same time of the last Certificate of Incorporation amendment, the Plaintiffs heard that DataXu rejected a $380 million purchase offer from Amobee, Inc. [Compl. at ¶ 84].

Plaintiffs allege they were given two presentations regarding the value and use of the ESOs and RSUs in 2015 and 2016. [Id. at ¶¶ 80, 85]. Neither presentation mentioned the deemed-liquidation device or the need for DataXu to be sold at a significantly high price for the share price to be greater than $0. [Id. at ¶¶ 83, 88–89].

On October 22, 2019, the Plaintiffs received a copy of DataXu's "Notice Under Section 228 of the Delaware General Corporation Law." [Id. at ¶ 238]. The Plaintiffs were told that DataXu was merging and becoming a subsidiary of Roku, Inc. [Id. at ¶¶ 239–40]. They were also told that they would not be getting any proceeds from the transaction since they were owners of common stock. [Id. at ¶ 241]. Roku's Form 10-K, as publicly filed with the Securities and Exchange Commission in March 2020, revealed significant information to the Plaintiffs regarding the conditions on their stock prior-to and during the Merger Agreement,

including the language and implementation of the deemed-liquidation device. [Id. at ¶¶ 243–45]. The Plaintiffs learned that following the Merger Agreement, DataXu altered its accounting for "redeemable convertible preferred stock" to "conform with public company standards." [Id. at ¶¶ 246–47]. The Form 10-K filed by Roku in March 2020 also revealed that $78.7 million in cash and $69.7 million of Roku's Class A common stock was given in return for the acquisition of DataXu. [Id. at ¶ 259].

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint [Dkt. 1, Compl.] with this Court on October 21, 2021. [Id.] After Defendants waived service [see Dkts. 4–24], they timely filed the instant Motion to Dismiss [Dkt. 30] on January 18, 2022 [id.], along with an accompanying memorandum of law [Dkt. 31] and declaration in support [Dkt. 32]. On February 15, 2022, Plaintiffs filed opposition [Dkt. 36], and on March 8, 2022, Defendants filed their reply [Dkt. 38]. The Court heard oral argument from the parties at a motion hearing on July 25, 2022, after which it took the matter under advisement. [See Dkt. 46].

III. DISCUSSION

a. Legal Standards

Defendants have moved to dismiss the complaint for what they argue are pleading deficiencies on four grounds: failure to meet general rules of pleading under Fed. R. Civ. P. 8(a); failure to plead fraud with sufficient particularity pursuant to Fed. R. Civ. P. 9(b); failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6); and deficiencies under the heightened pleading

requirements for securities fraud cases pursuant to the PSLRA, § 78u-4 & 5. [See Dkt. 30 at 1–2].

Fed. R. Civ. P. 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "A court is not 'bound to accept as true a legal conclusion couched as a factual allegation.'" Griffin v. Cohen, 14-CV-30147-MGM, 3 (D. Mass. May. 22, 2015) (internal citation omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). More specifically, Fed. R. Civ. P. 9(b) provides that a plaintiff alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake," while "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). And, even more specifically, the PSLRA "erects additional pleading hurdles by requiring that the plaintiff's complaint 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.'" In re Raytheon Sec. Litig., 157 F. Supp. 2d 131, 146 (D. Mass. 2001) (quoting 15 U.S.C. § 78u–4(b)(1)).

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must allege sufficient facts to state a claim for relief that is actionable as a matter of law and "plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Reading the complaint "as a whole," the Court must conduct a two-step, context-specific inquiry. García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must perform a close reading of the claim to distinguish the factual allegations from the conclusory legal allegations contained therein. Id. Factual allegations must be accepted

as true, while conclusory legal conclusions are not entitled credit. Id. A court may not disregard properly pled factual allegations even if actual proof of those facts is improbable. Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011). Second, the Court must determine whether the factual allegations present a "reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (citation omitted).

"In enacting the PSLRA, Congress intended to raise the standards plaintiffs must meet to survive a motion to dismiss, for defendants to have a fair chance to test the viability of a complaint, and for courts to carefully scrutinize complaints." N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc., 537 F.3d 35, 57 (1st Cir. 2008). Complaints made under the PSLRA must "allege the time, place, and content of the alleged misrepresentations with specificity," and "also the 'factual allegations that would support a reasonable inference that adverse circumstances existed at the time of the offering, and were known and deliberately or recklessly disregarded by defendants.'" Greebel v. FTP Software, Inc., 194 F.3d 185, 193–94 (1st Cir. 1999).

b. Analysis of Plaintiffs' Claims Under Rule 10b-5(b) (Misrepresentation or Omission Liability) and Rule 10b-5(a) and (c) (Scheme Liability)

Before analyzing whether Plaintiffs have met all their pleading requirements under the abovementioned rules and statute, the Court must address the parties' dispute regarding which claim or claims Plaintiffs have attempted to plead in the first place. The complaint itself includes only one count and specifies only that such count arises under "Section 10(b) of The [Securities and] Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b5, promulgated thereunder" [Dkt. 1, Compl. at ¶ 267], without specifying which subsection or subsections the

alleged violations are claimed to arise under. Nevertheless, determining this is critical to the Court's adjudication of this motion and its ability to hear Plaintiffs' claims.

Defendants have directed this Court [see, e.g., Dkt. 38 at 5–6] to several recent decisions from district courts outside this Circuit, In re Teva Sec. Litig., 512 F. Supp. 3d 321 (D. Conn. 2021), reconsideration denied, No. 3:17-CV-558 (SRU), 2021 WL 1197805 (D. Conn. Mar. 30, 2021); Hogan v. Pilgrim's Pride Corp., No. 16-CV-02611-RBJ, 2021 WL 5565805 (D. Colo. Nov. 29, 2021); and In re Mindbody, Inc. Sec. Litig., 489 F. Supp. 3d 188 (S.D.N.Y. 2020), all of which support the proposition that claims for disclosure fraud under Rule 10b-5(b) cannot be simply retitled or recharacterized into claims of scheme liability under Rule 10b-5(a) or (c).

Teva is particularly helpful in illustrating this principle, stating:

> "Rule 10b-5(b) applies to misrepresentation or omission claims, and Rules 10b-5(a) and (c) apply to scheme liability claims." Fischler Kapel Holdings, LLC v. Flavor Producers, LLC, 2020 WL 6939887, at *8 (C.D. Cal. Nov. 25, 2020). Claims for "scheme liability" are "premised on deceptive conduct that is independent of misrepresentations or omissions." In re Mindbody, Inc. Sec. Litig., 2020 WL 5751173, at *19 (S.D.N.Y. Sept. 25, 2020). "[T]he three subsections of Rule 10b-5 are distinct, and courts must scrutinize pleadings to ensure that misrepresentation or omission claims do not proceed under the scheme liability rubric." In re Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 161 (S.D.N.Y. 2012)."

In re Teva Sec. Litig., 512 F. Supp. 3d 321, 336 (D. Conn. 2021), reconsideration denied, No. 3:17-CV-558 (SRU), 2021 WL 1197805 (D. Conn. Mar. 30, 2021).

"Generally speaking, 'scheme liability' claims under Rule 10b-5(a) or (c) are distinct from Rule 10b-5(b) claims 'because they are based on deceptive conduct rather than deceptive statements.' Hogan v. Pilgrim's Pride Corp., No. 16-CV-02611-RBJ, 2021 WL 5565805, at *3 (D. Colo. Nov. 29, 2021) (quoting West Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc., 357 F. Supp. 3d 950, 977 (D. Minn. 2014)). Put another way, "[u]nlike a misrepresentation or omission claim under Rule 10b–5(b), scheme liability claim is aimed at

'inherently deceptive conduct' and does not require a misleading statement or omission." In re Mindbody, Inc. Sec. Litig., 489 F. Supp. 3d 188, 216 (S.D.N.Y. 2020) (quoting In re Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 160–61 (S.D.N.Y. 2012)).

While Plaintiffs' complaint repeatedly asserts that Defendants engaged in a "scheme," it does so in conclusory fashion, rendering these assertions the type of legal, non-factual conclusions not afforded the Court's deference at the pleadings stage. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Several such mentions simply comprise one word in the boilerplate allegation of a fraudulent "scheme, artifice, and device." [See Compl. at ¶¶ 3, 11, 24]. Others are similarly conclusory—for example, adding the word "scheme" without any further context as to what makes the allegation a scheme, or statements like: "Defendants devised and executed a scheme to maximize the return of or on capital that they contributed to DataXu by appropriating the value of Plaintiffs' contributions to themselves." [Compl. at ¶ 44].

In contrast, the sole count of the complaint is titled "Claim for Disclosure Fraud," with the description below stating it arises out of "Defendants' fraudulent material omissions in the offer and sales of securities to Plaintiffs." This section of the complaint is particularly telling, as it heavily emphasizes "Defendants' material misrepresentations, made by omissions, half-truths, and otherwise" [id. at ¶ 276], and "statements and misstatements made to [Plaintiffs] by Defendants and Defendants' agents" [id. at ¶ 273], with nothing approximating the requirements for pleading scheme liability under Rule 10b-5(a) and (c).

Plaintiffs hardly fare better in their opposition—where they point to remarkably few citations of their own complaint—given that the ultimate goal of that brief was to demonstrate that specifics alleged in their complaint stand for particular propositions and meet specific requirements. Moreover, despite focusing nearly exclusively on an argument attempting to

characterize (or recharacterize) their allegations as falling under the scheme liability provisions of Rule 10b-5(a) and (c), Plaintiffs almost seem to admit their original theory was 10b-5(b) when they state "Plaintiffs allege that Defendants fraudulently induced Berlik to purchase DataXu preferred stock, and at an inflated price, by failing to disclose to Berlik the effect of the [deemed liquidation device]" [Dkt. 36 at 23], which "reversed the default distribution model and expectations based on that model. Fraudulent inducement *violates Rule 10b-5(b)* and renders the contract of sale rescindable (or voidable)." [Id.] (emphasis added).

Even on Plaintiffs' interpretation of Teva [see Dkt. 36 at 15–16], the facts would seem to be in line with what the judge there said constituted a claim for misrepresentation or omission liability under Rule 10b-5(b), as opposed to scheme liability under Rule 10b-5(a) and (c). The Court is unpersuaded as to why the fact of a triggering event or decision (namely, the decision to utilize the deemed liquidation device through the Roku buyout in November 2019) causing the fraud/loss to be complete, should somehow necessitate the characterization of these claims as a "scheme" falling under Rule 10b-5(a) and (c).

Additionally, at no time, including after the filing of Defendants' Motion to Dismiss, did Plaintiffs seek leave to amend their complaint—and the Court agrees with Defendants that "it is difficult to imagine there are additional relevant facts that would state a claim" [Dkt. 38 at 20, n. 20], in light of both the complaint's length (at 290 paragraphs and 69 pages), as well as Plaintiffs' decision not to seek leave to amend. Instead, Plaintiffs have argued in their opposition to the instant motion that the complaint "alleges that Defendants employed devices and engaged in a scheme to defraud or, alternatively, engaged in acts and practices that defrauded and deceived Plaintiffs in order to expropriate Plaintiffs' contributed capital to DataXu. As a

consequence, Defendants violated Rule 10b-5(a) and (c), *not exclusively or necessarily* Rule 10b-5(b)." [Dkt. 36 at 7–8] (emphasis added).

Ultimately, this case would seem to epitomize one where understanding the difference between factual assertions to be taken as true and legal conclusions to be analyzed closely is of paramount importance. Plaintiffs' use of the word "scheme" in their complaint and painstaking attempts to broadly argue that both Rule 10b-5(a) and (c) should apply here are ultimately unconvincing. Essentially, the Court agrees with Defendants' characterization that, "[t]o be sure, the Complaint described the three 'devices,' but its theory was not that the devices comprised a scheme, but rather that Defendants failed to ***disclose*** the devices when Plaintiffs bought their stock" [Dkt. 38 at 6–7] (citation omitted) (emphasis in original), thereby necessitating review for dismissal as a claim plead pursuant to Rule 10b-5(b) only.

c. Applicability of the Statute of Repose

28 U.S.C. § 1658 ("Section 1658") provides that private civil actions alleging fraud under the Securities Exchange Act must be brought "not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). The first of these, Section 1658(b)(1), provides a two-year statute of limitations—time that begins to run only once a cause of action has accrued. Here, that means the earlier of when a plaintiff "did in fact discover, or [] when a reasonably diligent plaintiff would have discovered, the facts constituting the violation." Aronson v. Advanced Cell Tech., Inc., 902 F. Supp. 2d 106, 126 (D. Mass. 2012) (citing Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010)).

The second subsection, Section 1658(b)(2), is a statute of repose. "Unlike the 2–year statute of limitations, '[t]he five-year period of repose serves 'as a cutoff' and 'tolling principles

do not apply.'" Aronson, 902 F. Supp. 2d at 127 (quoting Goldenson v. Steffens, 802 F. Supp. 2d 240, 257–58 (D. Me. 2011) (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991))). Despite having the same ultimate function of serving to time-bar a would-be plaintiff's claims, statutes of repose and statutes of limitations are fundamentally distinct. "[S]tatutes of repose are enacted to give more explicit and certain protection to defendants," the purpose of which is "to create an absolute bar on a defendant's temporal liability." California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2049–50 (2017) (internal quotations and citations omitted). The additional certainty provided by a statute of repose over a statute of limitations reflects the higher societal value of such certainty in the contexts where these stricter time-barring statutes are enacted (typically, those involving business or financial markets).

Here, with regard to the applicability of Section 1658(b)(2) to alleged violations of Section 10(b) of the Securities Exchange Act, "[a] 'violation' of [S]ection 10(b) occurs ... on the date that the alleged fraudulent misrepresentation is made or, in the case of an omission, on the date a duty to disclose the withheld information arises." Aronson, 902 F. Supp. 2d at 127 (quoting Nw. Human Servs., Inc. v. Panaccio, No. 03-CV-157, 2004 WL 2166293, at *18 (E.D. Pa. Sept. 24, 2004)). Crucially, however, the alleged misrepresentation or omission "must have occurred *before* the purchase and sale of the securities." Aronson, 902 F. Supp. 2d at 128 (citing Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1487 (9th Cir. 1991) ("conduct actionable under Rule 10b–5 must occur before investors purchase the securities, if—as here—they allege fraud induced them to make the purchase"); In re Exxon Mobil Corp. Sec. Litig., 387 F. Supp. 2d 407, 422 (D. N.J. 2005) ("it is a matter of simple logic that any such misrepresentation or omission must have occurred prior to the 'purchase or sale' of securities"); Haft v. Eastland Fin. Corp.,

772 F. Supp. 1315, 1318 (D. R.I. 1991) (in order for plaintiff to maintain a claim under Section 10(b), alleged misrepresentations "must have occurred prior to [plaintiff's] purchase or sale of securities")).

In this action, every Plaintiff except for Plaintiff Le May purchased his or her shares prior to October 21, 2016[2] [see Compl. at ¶¶ 106, 124; Dkt. 31 at 18], meaning the clock on the misrepresentations or omissions they allege had already run out by the time these Plaintiffs filed their claims in this case. As Defendants correctly note [see Dkt. 31 at 17–18, n. 20], the Supreme Court has made clear that the statute of repose provided by Section 1658(b)(2) is "an unqualified bar on actions instituted '5 years after such violation,' giving defendants *total* repose after five years" Merck, 559 U.S. at 650 (emphasis added) (internal citation omitted) (quoting 28 U.S.C. § 1658(b)(2)). As such, and in light of the Court's finding that the Plaintiffs here did not allege scheme liability pursuant to Rule 10b-5(a) or (c), but rather disclosure fraud liability under Rule 10b-5(b), the applicable statute of repose necessitates dismissal of all Plaintiffs' claims except for those brought by Plaintiff Le May.[3]

d. Plaintiff Le May's Claims

With Plaintiff Le May's claim the only one remaining, the Court now turns to whether the facts as alleged in the complaint meet the various applicable pleading requirements for his claims specifically. Noting the Court's findings above that the Plaintiffs did not allege scheme liability pursuant to Rule 10b-5(a) or (c), Le May's claim is analyzed as a claim for disclosure fraud liability under Rule 10b-5(b).

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[2] October 21, 2016 is five years to the day before Plaintiffs filed this action—and thus, the latest possible date on which any Plaintiff could have purchased shares and not had his or her claims barred by Section 1658's statute of repose.

[3] Plaintiff Le May purchased 27,380 common stock shares for $11,071.10 in March 2018. [Compl. at ¶ 106].

First, the Court finds that Defendants' argument that they "could not have had a duty to disclose the . . . Retention Plan, which did not come into existence until years later, and which they are not (and could not be) alleged to have been contemplating at the time of any purchase" [Dkt. 31 at 20] is correct. The Court's analysis, therefore, focuses on whether Le May sufficiently plead a claim regarding the Deemed Liquidation Clause and 2017 Bridge Notes. To survive Defendants' motion to dismiss, Le May must have alleged the six elements of a 10b–5 claim: "(1) a material misrepresentation or omission; (2) scienter, or a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008).

Le May's claim alleges that Defendants sold him DataXu securities while "intentionally and recklessly concealing and failing to disclose" the existence of a Contribution-Shifting Device (specifically the Deemed Liquidation Clause) prior to his purchase of 27,380 common stock shares in March 2018. [Compl. at ¶ 4, 106]. "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." Chiarella v. United States, 445 U.S. 222, 235 (1980). "Section 10(b) does not create an affirmative duty to disclose." In re Genzyme Corp. Sec. Litig., 754 F.3d 31, 41 (1st Cir. 2014). A duty to disclose arises in the "relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation" because "of the necessity of preventing a corporate insider from . . . taking unfair advantage of the uninformed minority stockholders." Chiarella, 445 U.S. at 228–29. Finally, the duty to disclose "extends to omissions only where affirmative statements are made and the speaker fails to 'reveal [ ] those facts that are needed so that what was revealed would not be so incomplete as to mislead.'" In re Bos. Sci. Corp. Sec. Litig., 686 F.3d 21, 27 (1st Cir. 2012). An omission is

material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." See Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

Here, Plaintiff Le May was a DataXu employee "who accepted stock-based compensation in lieu of cash compensation and/or as additional employment incentive" [Compl. at ¶ 21]. Although the relationship of an employee who accepts securities in lieu of cash compensation may qualify as a "relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation," Chiarella, 445 U.S. at 228–29, Defendants correctly argued that Le May failed to plead with particularity—or indeed, to plead at all—the existence of a duty required for him to have correctly plead his claim. Indeed, Plaintiffs' Complaint fails to reference a duty at all.

Le May's claim also fails to meet the pleading requirements for scienter. "Plaintiffs must 'state with particularity facts giving rise to a *strong inference* that the defendant acted,'" Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308 (2007) (quoting 15 U.S.C. § 78u–4(b)(2)) (emphasis added), with intent "to deceive, manipulate, or defraud,'" id. (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)). Le May not only fails to plead facts that lead to a strong inference that the Defendants acted with the intent to deceive, manipulate, or defraud him—rather, as with his pleading regarding duty, explained above, he fails to plead any facts regarding scienter at all. In essence, as Defendants pointed out in their motion to dismiss, Le May's scienter claim is more reminiscent of a logical fallacy than an argument supported by facts.

Finally, Le May's attempts to plead the reliance element are also deficient. "To survive a motion to dismiss in a case not involving 'fraud on the market,' the Complaint must allege facts

showing that Plaintiffs 'justifiably relied' on Defendants' representations in connection with the purchase or sale of a security. Paraflon Invs., Ltd. v. Fullbridge, Inc., No. 16-12436, 2019 WL 3759522, at *9 (D. Mass. Aug 9. 2019), aff'd, 960 F.3d 17 (1st Cir. 2020). Le May's statement that he "reasonably relied, to [his] detriment, on the statements and misstatements made to [him] by Defendants and Defendants' agents in making decisions to purchase DataXu shares" is nothing more than a conclusory statement unsupported by facts. [Compl. at ¶ 273]. Even looking at the complaint as a whole, Le May fails to plead any facts that show a cognizable link between any statements (let alone misstatements or omissions) by the Defendants and his reason for purchasing DataXu securities. [See generally, Compl.].

Le May's failure to plead sufficient facts to support his claim regarding material misrepresentations or omissions, scienter, and reliance means his claim must also meet the fate of his fellow plaintiffs, and is therefore dismissed.

IV. CONCLUSION

The Court is not unsympathetic to Plaintiffs' claims—yet Plaintiffs here would seem to ask this Court to take action that must instead be taken up by Congress—namely, stricter, more specific, regulations and disclosure requirements surrounding Contribution-Shifting Devices like those at issue here. The laws on the books today, however, especially in conjunction with the heightened pleading requirements under Fed. R. Civ. P. 9(b) and the PSLRA, simply do not allow this Court to take any action other than dismissal.

In conclusion, Defendants' Motion to Dismiss [Dkt. 30] is **GRANTED** and the case is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

September 30, 2022

/s/ Angel Kelley
ANGEL KELLEY
U.S. DISTRICT JUDGE