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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CONSTRUCTION WORKERS  
PENSION TRUST FUN – LAKE  
COUNTY AND VICINITY, *et al.*,  
  
Plaintiffs,  
  
v.  
  
GENOPTIX, INC., TINA S. NOVA,  
DOUGLAS A. SCHULING and  
SAMUEL D. RICCITELLI,  
  
Defendants.

Civil No. 10cv2502-CAB (DHB)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS’  
MOTION TO DISMISS  
PLAINTIFFS’ AMENDED  
CONSOLIDATED CLASS ACTION  
COMPLAINT**

**[Doc. No. 38]**

Before the Court is Defendants’ Motion to Dismiss Plaintiffs’ Amended Consolidated Class Action Complaint [Doc. No. 38.] On March 8, 2012, the Court held oral argument on the motion. Xavier Jay Alvarez, Esq. and Julie A. Kearns, Esq. appeared on behalf of Plaintiffs. Koji F. Fukumura, Esq., and Peter M. Adams, Esq. appeared on behalf of the Defendants. Upon consideration of the briefing and the argument of counsel, the motion is **GRANTED IN PART AND DENIED IN PART.**

**I. BACKGROUND**

This is a securities fraud consolidated putative class action on behalf of all persons who purchased common stock of Genoptix, Inc. from July 31, 2009 - June 16, 2010 against Genoptix and certain of its officers and directors. Plaintiffs allege that Defendants issued materially false and misleading statements to the market as to the true level of demand for

1 the Company's core product— diagnostic testing services for cancers of the blood and bone  
2 marrow – by its primary customers – hematologists and oncologists operating private  
3 practices. Plaintiffs claim that Defendants repeatedly assured investors that demand was  
4 “growing” and “increasing” and that adding sales representatives to call on these physicians  
5 would directly translate into additional revenue by capturing the existing demand that  
6 exceeded sales capacity. Plaintiffs allege that while Defendants were making these  
7 statements, however, they were aware, or should have been aware, that sales representatives  
8 from all regions were experiencing declining customer demand and negative sales trends  
9 unique to Genoptix.

10 Citing to statements from six former employees serving as confidential witnesses, (the  
11 “CWs”), Plaintiffs allege that Genoptix management was aware of declining demand,  
12 including the loss of the company's largest customer during the class period, yet continued  
13 to issue positive guidance to investors without disclosing increasing difficulties the sales  
14 force was reporting. In addition to being privy to information regarding the adverse trends,  
15 Plaintiffs also allege that the Individual Defendants personally profited from Genoptix's  
16 allegedly artificially inflated stock price by receiving millions of dollars in incentive-based  
17 executive compensation and insider trader proceeds during the class period.

18 On May 6, 2010, Genoptix announced to the market that its actual revenue for the  
19 first quarter of 2010 was approximately \$6 million lower than expected, and that Genoptix  
20 experienced “downward pressure on case volumes,” which caused a decrease in the  
21 company's share price by approximately 23% in one day. Despite the “miss” in revenues,  
22 however, management reaffirmed its FY 2010 guidance at \$230-\$240 million, attributing  
23 the first quarter loss to an unexpected shift in sales personnel to manager positions.

24 On June 16, 2010, in a press release prior to the release of the company financials for  
25 the second quarter of 2010, the company lowered its FY2010 full-year revenue guidance by  
26 approximately \$30 million. Genoptix President and CEO, Defendant Tina S. Nova,  
27 proffered several reasons for the downward adjustment in guidance, including market  
28 saturation, decreased sales force productivity, and increased competition. Following the

1 announcement, Genoptix shares experienced a one-day decline of 25%. Plaintiffs allege that  
2 the stock declined over 55% from the class period high as a result of the disclosures.

## 3 **II. PROCEDURAL HISTORY**

4 On July 12, 2012 this Court entered an order granting the Defendants' initial motion  
5 to dismiss the consolidated class action complaint. [Doc. No. 33.] In granting the motion,  
6 the Court found that the complaint was heavily focused on "forward-looking" statements,  
7 particularly the guidance that Genoptix provided to the market regarding its expected annual  
8 revenues. *Id.* at 4. The Court granted the motion to dismiss as to the forward-looking  
9 statements because Plaintiffs did not specifically allege, as to each of the forward-looking  
10 statements, that the accompanying cautionary language provided by the company was not  
11 meaningful, and it therefore failed to circumvent the Private Securities Litigation Reform Act  
12 ("PSLRA") Safe Harbor provision. *Id.* at 3-5, *citing In re Cutera Securities Litigation*, 610  
13 F.3d 1103, 1111 (9th Cir. 2010).

14 With respect to the remaining allegedly false statements, the Court found that  
15 Plaintiffs did not adequately plead that the Individual Defendants acted with the requisite  
16 state of mind to meet the scienter requirement. *Id.* at 5-6. Specifically, the Court found that  
17 the complaint lacked allegations to support the assumptions that the CWs were in a position  
18 to be personally knowledgeable of the information alleged. *Id.* at 6, *citing Zucco Partners,*  
19 *LLC v. Digimarc Corp*, 552 F.3d 981, 996 (9th Cir. 2009). Plaintiffs filed their Amended  
20 Complaint on August 10, 2012. [Doc. No. 37.]

## 21 **III. LEGAL STANDARDS**

22 To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)  
23 of the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter,  
24 accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*  
25 *v. Twombly*, 550 U.S. 554, 570 (2007). A claim has facial plausibility when the plaintiff  
26 pleads factual content for the court to draw the reasonable inference that the defendant is  
27 liable for the conduct alleged. *Id.* at 556.

28 Since this is an action for securities fraud, Plaintiffs are subject to a heightened

1 pleading standard, and the Amended Complaint “must satisfy the dual pleading requisites  
2 of Federal Rule of Civil Procedure 9(b) and the PSLRA.” *In re VeriFone Holdings, Inc.*  
3 *Securities Litigation*, 704 F.3d 694, 701 (9th Cir. 2012), *citing Zucco Partners*, 552 F.3d at  
4 990-91. Specifically, Rule 9(b) requires that a party “state with particularity the  
5 circumstances constituting the fraud...” Fed. R. Civ. P. 9(b). And the PSLRA requires that  
6 a complaint “specify each statement alleged to have been misleading, the reason or reasons  
7 why the statement is misleading, and, if an allegation regarding the statement or omission  
8 is made on information and belief, the complaint shall state with particularity all facts upon  
9 which that belief is formed.” 15 U.S.C. § 78u-4(b)(1)(B); *In re Cutera*, 610 F.3d at 1107.  
10 Plaintiffs must also “state with particularity facts giving rise to a strong inference that the  
11 defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A).

#### 12 **IV. ANALYSIS**

##### 13 **A. EXCHANGE ACT § 10(b) AND SEC RULE 10b-5 CLAIMS**

14 Rule 10b-5 makes it unlawful “to make any untrue statement of a material fact or to  
15 omit to state a material fact necessary in order to make the statements made, in the light of  
16 the circumstances under which they were made, not misleading.” 17 C.F.R. § 240.10b-5(b).  
17 To adequately state a claim that Defendants made material misrepresentations or omissions  
18 in violation of § 10(b) and Rule 10b-5, Plaintiffs must allege: “(1) a material  
19 misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the  
20 misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the  
21 misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Matrixx*  
22 *Initiatives, Inc. v. Siracusano*, – U.S. –, 131 S. Ct. 1309, 1317 (2011) (internal quotations  
23 omitted). Defendants move to dismiss the Amended Complaint with prejudice, arguing that  
24 Plaintiffs have failed to sufficiently plead a misrepresentation, scienter, or loss causation.

##### 25 **1. Misrepresentation or Omission of a Material Fact**

26 Critical to Plaintiffs’ § 10(b) claim is their ability to plead and prove that the  
27 Defendants made statements that were misleading as to a material fact. *Id.* at 1318. A  
28 statement or omission is misleading if “it would give a reasonable investor the ‘impression

1 of a state of affairs that differs in a material way from the one that actually exists.” *Berson*  
2 *v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008) quoting *Brody v.*  
3 *Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th.Cir. 2002). See also *Matrixx*, 131  
4 S.Ct. at 1318 (“materiality requirement is satisfied where there is a substantial likelihood  
5 that the disclosure of the omitted fact would have been viewed by the reasonable investor  
6 as having significantly altered the “total mix” of information made available.”) (internal  
7 quotations omitted).

8 Here, the alleged misrepresentations in the Amended Complaint can be generally  
9 categorized as 1) statements as to projected revenues, and 2) statements as to past and  
10 current demand.

#### 11 a. Projected Revenues and Safe Harbor Protection

12 The Amended Complaint has significantly reduced the amount of allegedly  
13 misleading forward looking statements. Plaintiffs, however, still maintain that Defendants’  
14 statements regarding projected revenue guidance, and expected incremental annual revenue  
15 per sales person added, were false and misleading. The Court has already found in its prior  
16 order that such statements are forward-looking, and it is undisputed that Genoptix identified  
17 them as such. [Doc. No. 33 at 4, *citing* 15 U.S.C.A. § 78u-5(i)(1).] These statements are  
18 thus only actionable if the Amended Complaint “sufficiently alleges that, for each of the  
19 challenged forward-looking statements, the accompanying cautionary language provided  
20 was not meaningful.” *Id.*, *citing In re Cutera*, 610 F.3d at 1113.

21 Plaintiffs amended the complaint to include allegations that the false and misleading  
22 statements concerning the company’s revenue and income guidance were not adequately  
23 addressed by Defendants’ risk disclosures because such warnings consisted of “vague,  
24 boilerplate language.” ¶ 48(c).<sup>1</sup> Plaintiffs further allege that “[t]hese disclosures **did not**  
25 address with any specificity the underlying, adverse facts known by defendants [*i.e.*  
26 decreasing customer demand]... that eliminated any reasonable basis upon which to issue  
27

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28 <sup>1</sup> All citations to “¶” refer to the Amended Complaint unless otherwise stated.

1 the Class Period guidance.” *Id.* (Emphasis in original).

2 Pertinent to the company’s statements regarding revenue guidance, Genoptix issued  
3 cautionary statements with headings as follows:

4 - “We have a limited operating history and we are unable to predict with certainty  
5 whether we will be able to continue our revenue growth and become increasingly  
6 profitable.” [Doc. No. 22-5 at 196 (10Q dated July 30, 2009); *Id.* at 275 (10K dated  
7 February 25, 2010); *Id.* at 318 (10Q dated May 6, 2010).]

8 - We may experience difficulties in managing our growth and our growth rate may  
9 decline.” [*Id.* at 189-90, 229-30, 267, 311-12.]

10 - “Some of the potential risks and uncertainties that could cause actual results to differ  
11 from the results predicted include, without limitation,...the Company’s ability to hire  
12 personnel and manage its growth and the competitive landscape within our industry...” [*Id.*  
13 at 208, 248, 293, 330.]

14 The Ninth circuit addressed the adequacy of cautionary language in *In re Cutera*,  
15 where it described the defendant’s statements prior to analyst calls as follows:

16 ‘these prepared remarks contain forward-looking statements concerning future  
17 financial performance and guidance,’ that ‘management may make additional  
18 forward-looking statements in response to[ ] questions,’ and that factors like Cutera's  
19 ‘ability to continue increasing sales performance worldwide’ could cause variance in  
20 the results. Cutera affirmatively warned that its ability to compete and perform in the  
industry depended on the ability of its sales force to sell products to new customers  
and upgraded products to current customers, and that failure to attract and retain sales  
and marketing personnel would materially harm its ability to compete effectively and  
grow its business.

21 610 F.3d at 1112. The Ninth Circuit found such warnings to sufficiently warrant safe harbor  
22 protection under the PSLRA (*id.*), and this Court finds that Genoptix’s cautionary statements  
23 are substantially similar to those issued by Cutera. Accordingly, the Court finds that  
24 Genoptix’s cautionary statements as to revenue projections were sufficiently meaningful  
25 under the facts alleged such that the statements constituting revenue projections fall within  
26 the safe harbor under the PSLRA, and are thus not actionable here. Defendants’ motion to  
27 dismiss based on the company’s revenue projections is **GRANTED**.

28 /

**b. Statements as to Past and Current Demand**

1  
2 In reviewing the Amended Complaint as a whole, the Court finds that the focus of  
3 Plaintiffs' allegations has shifted from allegations of misleading revenue guidance to  
4 allegations that Defendants were issuing false and misleading statements to the market with  
5 respect to the demand for Genoptix's products and services. Upon consideration of the  
6 alleged misrepresentations as to demand, the Court finds that such statements reflect past  
7 and current demand and are therefore not forward looking. *See e.g.* ¶ 77 (February 25, 2010  
8 statement that "these revenues reflect the *continued strong demand* for our high-quality  
9 service...") (emphasis in original).

10 In order for these statements to remain actionable, therefore, Plaintiffs must  
11 sufficiently allege falsity – that the statements were false or misleading when made.  
12 *Ronconi v. Larkin*, 253 F.3d 423, 430 (9th Cir. 2001). To support their allegations of falsity,  
13 Plaintiffs present six CWs who all claim that during the class period the Individual  
14 Defendants were aware that demand was decreasing at the same time that they were making  
15 statements to the market that demand was increasing. *See generally* ¶¶ 136-165. Thus the  
16 Court must determine whether these witnesses' accounts "provide an adequate basis for  
17 believing that the defendants' statements were false" or misleading. *In re Daou Sys., Inc.*,  
18 411 F.3d 1006, 1015 (9th Cir. 2005) (citation omitted); 15 U.S.C. § 78u-4(b).

19 Defendants challenge the reliability of the CWs, arguing that the Amended Complaint  
20 does not cure the Court's original finding that the CWs lacked personal knowledge. *See*  
21 Doc. No. 33 at 6 ("Nor have Plaintiffs alleged with particularity facts supporting their  
22 assumptions that the confidential witnesses were in a position to be personally  
23 knowledgeable of the information alleged.") (citing *Zucco Partners*, 552 F.3d at 996). While  
24 Defendants are correct that the Amended Complaint does little to add to the CW accounts  
25 themselves, as stated above, the Amended Complaint as a whole shifts the focus to  
26 misrepresentations of demand as opposed to revenue guidance. The Amended Complaint  
27 sufficiently alleges that the CWs held positions within Genoptix wherein they would have  
28 had first hand knowledge of demand. Thus, the Court finds that the CW allegations are now

1 sufficient to show how each CW was in a position to personally know whether Defendants'  
2 statements about demand were in accord with the demand trends they were personally  
3 experiencing. *See Berson*, 527 F.3d at 985 (finding CWs credible where it was “entirely  
4 plausible” that they “would know, or could reasonably deduce, that the company had  
5 suffered [the alleged] setbacks.”) (*citing Daou*, 411 F.3d at 1015-16).

6 Defendants also argue that the allegedly misleading statements were unactionable  
7 “corporate optimism.” [Doc. No. 38-1 at 16-17.] As to the statements regarding the strength  
8 of demand, however, the Court is not persuaded by this argument. “In the Ninth Circuit  
9 ‘vague, generalized assertions of corporate optimism or statements of ‘mere puffing’ are not  
10 actionable material misrepresentations under federal securities laws’ because no reasonable  
11 investor would rely on such statements.” *City of Royal Oak Retirement System v. Juniper*  
12 *Networks, Inc.* 880 F.Supp.2d 1045, 1063 (N.D. Cal. 2012), *quoting In re Impac Mortg.*  
13 *Holdings, Inc. Sec. Litig.*, 554 F.Supp.2d 1083, 1096 (C.D. Cal. 2008). Here, however, the  
14 complaint alleges that Defendant Nova specifically identified “the satisfaction of our  
15 physician customers and demand for our services [as] the key drivers of our success.” ¶ 77.  
16 Therefore the Court finds that representations as to demand were not “mere puffery,” but  
17 rather information upon which a reasonable investor would rely in making her investment  
18 decisions.

19 Moving forward, the Court must assess whether Defendants’ demand statements were  
20 false or misleading at the time they were issued. Having carefully reviewed the CW  
21 accounts, and the Amended Complaint as a whole, Defendants’ demand statements are  
22 actionable, but not for the entirety of the class period.

### 23 ***2009 Statements***

24 The Court agrees with Defendants that the Amended Complaint lacks supporting  
25 allegations that the company was experiencing adverse trends in demand as of July 2009.  
26 Indeed none of the CW accounts are specific as to a particular time in 2009 that the  
27 company was experiencing decreased demand but rather generally state “during 2009” or  
28 “by 2009.” *See e.g.* ¶¶ 146-149, 151, 153, 159. The closest allegation attempting to

1 pinpoint a time during that year is CW1's account, which generally states, without further  
2 specification as to timing, that "Genoptix knew it was losing its largest account with the  
3 Georgia Cancer Center by mid 2009." *Id.* at ¶ 145. This alone is insufficient to establish that  
4 Defendants' statements made in July 2009 were false or misleading when made. The same  
5 is true for statements made in September of 2009. The motion to dismiss as to all July and  
6 September 2009 statements is therefore **GRANTED**.

7 The Court is persuaded, however, by Defendants' post-class period revelation in the  
8 company's 10-Q filing for the quarter ended September 30, 2010 that decreased lab testing  
9 volumes, insourcing of diagnostic testing by physician practices, transitions to new business  
10 models, and the closing, or downsizing, of community-based hem/onc practices were  
11 "market and economic trends, along with the previously mentioned competitive and industry  
12 challenges, [that ] have impacted our successive quarterly results over the course of the prior  
13 12 month period." ¶ 134. This, coupled with CW accounts as to personal experience with  
14 decreasing demand, is sufficient to allege falsity, but only as to the time in which the CW  
15 statements match up with Defendants' alleged misrepresentations or omissions once the  
16 negative adverse trends were (or should have been) apparent to the Individual Defendants.

17 A review of the alleged misrepresentations made in November 2009, the earliest  
18 statements that would have been encompassed by the 12 month trend, reveals that primarily  
19 forward- looking, revenue projections were made at that time. *See* ¶ ¶ 58 (expected  
20 revenue); ¶ 60 (expectation of \$2.5 million in average annual revenue per additional sales  
21 person); ¶ 61 (expected revenues, EPS guidance); ¶ 65 (increasing EPS guidance); ¶ 66  
22 (expected revenue per sales person). As set forth above, those statements are not actionable  
23 because they are protected by the PSLRA safe harbor.

24 As to the remaining statements, the Court finds that the CW accounts are insufficient  
25 to support that any of these statements were false when made. As the Court has already  
26 found, the CW statements do not specify when in 2009 the negative trends were apparent,  
27 and there is not enough alleged to support Plaintiffs' assertion that Defendants' statements  
28 regarding the strength of demand, or their lack of concern regarding the decline in growth

1 in the third quarter, were false or misleading at that time. *See* ¶¶ 59, 62-64. The motion to  
2 dismiss as to Defendants' November 2009 statements is likewise **GRANTED**.

3 ***2010 Statements***

4 The Court finds that the CW accounts do sufficiently allege that by "early 2010"  
5 adverse trends in demand should have apparent to such a metric-driving company as  
6 Genoptix. CW1, a sales specialist throughout the class period, alleges that the negative  
7 trends in demand were impacting his/her sales, and had "significantly worsened beginning  
8 in 2010," and that he/she experienced increased competition, market saturation, problems  
9 with being out-of network, and physicians moving out of private practice and into the  
10 hospital setting. *See* ¶¶ 136-142. Other CW accounts corroborate the adverse trends by  
11 early 2010. *See* ¶¶ 146-147 (CW 2 - market saturation, in-network competition); 151-153  
12 (CW3- market saturation, sales representatives' difficulties in achieving quotas, "client  
13 billing" problems); 155-156 (CW4 – high sales force turnover, declining test samples by  
14 early 2010, physicians closing practices in early 2010); 158-161 (CW5 - as of April 2010,  
15 decreasing demand, reduced volumes of test samples, physicians moving to hospitals, high  
16 sales force turnover). CWs also reported that the company had lost its largest account, the  
17 Georgia Cancer Center, by early 2010. *See* ¶¶ 145 (CW1), 148-149 (CW2).

18 Moreover, CW1's account alleges that such negative trends, and the failure for sales  
19 reps to meet their quotas, were frequently discussed on national sales calls in which  
20 management participated. ¶143. And CW5 describes daily emails distributed to senior  
21 management reflecting reduction in daily sample volumes. ¶ 160.

22 When combined with the post-class period statement in November of 2010  
23 acknowledging a trend in declining demand over the prior 12 month period (¶ 134), the  
24 Court finds that the allegations in the Amended Complaint provide an adequate basis for  
25 believing that the Defendants' statements as to continued strong demand, beginning with  
26 the company's release of its results for FY 2009 on February 25, 2010, and extending  
27 throughout the remainder of the class period, were false or misleading when made. *See*  
28

1 *Daou*, 411 F.3d at 1015.<sup>2</sup>

2 As to Defendants' representations regarding demand for Genoptix's services (as  
3 opposed to revenue guidance) from February 2010 through the end of class period,  
4 therefore, the Court will next analyze whether the Amended Complaint adequately pleads  
5 the remaining elements of the securities claims alleged.

## 6 2. Scienter

7 In order to defeat the motion to dismiss, Plaintiffs must, as to each act or omission,  
8 "state with particularity facts giving rise to a strong inference that the defendant acted with  
9 the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). The PSLRA requires that the  
10 Court dismiss the complaint if the Plaintiffs do not meet this standard. 15 U.S.C. § 78u-  
11 4(b)(3). In determining whether Plaintiffs have adequately pled scienter, the Court must 1)  
12 accept all factual allegations as true, 2) consider "whether all of the facts alleged, taken  
13 collectively, give rise to a strong inference of scienter, not whether any individual  
14 allegation, scrutinized in isolation, meets that standard," and 3) take into account "plausible  
15 opposing inferences." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23  
16 (2007). "[T]he inference of scienter must be more than merely 'reasonable' or  
17 'permissible'—it must be cogent and compelling, thus strong in light of other explanations."  
18 *Id.* at 324. Therefore, if a "reasonable person" would consider the inference of scienter "at  
19 least as compelling as any opposing inference one could draw from the facts alleged," then  
20 the Amended Complaint is sufficient to withstand the motion to dismiss. *Id.*

21 The Court must "review 'all the allegations holistically'" when determining whether  
22 scienter has been sufficiently pled. *In re VeriFone.*, 704 F.3d at 702, quoting *Matrixx*, 131  
23 S.Ct. at 1324. The Court will thus consider a holistic review of the allegations to determine  
24 whether they combine to create a strong inference of intentional conduct or deliberate  
25 recklessness, and whether such allegations are sufficient to withstand a motion to dismiss.

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26  
27 <sup>2</sup> While the alleged January 25, 2010 false statements arguably fall into the "early 2010"  
28 category, the Court does not find that the CW accounts support the falsity of either statement, and the  
motion to dismiss as to the January 2010 statements is likewise **GRANTED**. See ¶ 72 ("we treat our  
patients and our Hem/Oncs in a friendly billing approach"); ¶ 73 (announcing company was "pleased"  
with their 2009 results, and giving preliminary, forward looking revenue guidance on FY 2010).

1 *See Id.* at 703.

2 As discussed *supra*, the Court finds that the focus of Plaintiffs' allegations in the  
3 Amended Complaint have shifted away from forward looking revenue projections, and more  
4 heavily towards alleged misrepresentations about the level of demand the Company was  
5 experiencing. In light of this shift, the Court finds that the CWs do have the requisite  
6 personal knowledge with respect to the level of demand they observed as sales people, as  
7 well as the Individual Defendants' knowledge in light of CWs who participated in national  
8 sales phone calls with management (¶ 143), or who were copied on email distributions the  
9 management received (¶ 160).

10 The Court finds that Plaintiffs have met their burden as to statements made from  
11 February 25, 2010 through the end of the putative class period. Plaintiffs allege that the  
12 Individual Defendants made repeated representations to the market that the company "is and  
13 always has been very metric driven, very focused on tracking real-time results," (¶ 36) and  
14 that "[e]verything is shared with management and all the way down through the  
15 organization" (¶ 71). They further provide CW accounts asserting that in the first half of  
16 2010, negative adverse trends were being discussed on national sales calls which  
17 management attended (¶ 143), and email distributions reporting actual demand which  
18 management received (¶ 160). And such allegations are further corroborated by post class  
19 period statements that demand had actually been declining over the prior 12 month period.  
20 ¶ 134.

21 Viewing the Amended Complaint holistically, as it must, the Court finds that the  
22 allegations that the Individual Defendants knew, or recklessly disregarded, that the company  
23 was experiencing declining demand, including the loss of its largest account, at the time that  
24 they were representing increasingly strong demand to the market, are at least as compelling  
25 as an inference that the Defendants were unaware of such negative trends at the time they  
26 were making such representations. *Tellabs*, 551 U.S. at 324. *See also In re VeriFone*, 704  
27 F.3d at 708 ("Recklessly turning a 'blind eye' to impropriety is equally culpable conduct  
28 under Rule 10b-5."); *Nursing Home Pension Fund v. Oracle Corp.*, 380 F.3d 1226, 1234

1 (9th Cir. 2004) (finding strong inference of scienter where top executives maintained a  
2 “detail-oriented management style” that would have made them “aware of the allegedly  
3 improper conduct); *Daou*, 411 F.3d at 1022 (finding hands-on management style, including  
4 monitoring of relevant databases, weighed in favor of scienter). The motion to dismiss on  
5 the grounds of scienter is therefore **DENIED**.

6 / **3. Loss Causation**

7 In order to plead the element of loss causation, Plaintiffs must provide Defendants  
8 with notice of “what the relevant economic loss might be or what the causal connection  
9 might be between that loss and the misrepresentation.” *Dura*, 544 U.S. at 347. *See also*  
10 *Daou*, 411 F.3d at 1025 (“the plaintiff must demonstrate a causal connection between the  
11 deceptive acts that form the basis for the claim of securities fraud and the injury suffered by  
12 the plaintiff.”). Unlike the prior-discussed elements, this element is subject to the less  
13 rigorous pleading standard under the Federal Rules of Civil Procedure, requiring a “short  
14 and plain statement of the claim showing that the pleader is entitled to relief,” and “is not  
15 meant to impose a great burden upon a plaintiff.” *Dura*, 544 U.S. at 347, *quoting* Fed. Rule  
16 Civ. Proc. 8(a)(2). Thus, if the Amended Complaint pleads facts sufficient “to raise a  
17 reasonable expectation that discovery will reveal evidence of loss causation,” Plaintiffs have  
18 met their burden for purposes of the motion to dismiss. *In re Gilead Sciences Securities*  
19 *Litigation*, 536 F.3d 1049, 1057 (9th Cir. 2008).

20 The Court finds that Plaintiffs meet this standard here. The Amended Complaint  
21 alleges that negative trends revealed in partial and full disclosures to the market caused the  
22 share price to decline. *See e.g.* ¶¶ 115, 118-119, 120, 198-202. Such allegations are  
23 sufficient to create a connection between the alleged representations as to the company’s  
24 performance and the stock price once the truth was revealed. *See Daou*, 411 F.3d at 1026  
25 (finding allegation of declined stock price following revelation of company’s true financial  
26 condition to be adequate for purposes of motion to dismiss). The motion to dismiss as to  
27 the loss causation element is therefore **DENIED**.

28 /

1                   **B. EXCHANGE ACT § 20(a) Control Person Liability**

2                   Defendants challenge Plaintiffs' § 20 claim on the grounds that such a claim cannot  
3 stand if the § 10(b) claim has failed. [Doc. No. 38 at 23.] Since the Court has found that  
4 Plaintiffs have stated a viable § 10(b) claim, as limited by the Court's findings above, the  
5 motion to dismiss the § 20 claim is **DENIED**.

6                   **V. CONCLUSION**

7                   For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED IN PART**  
8 **AND DENIED IN PART**. As set forth in detail above, the motion to dismiss is granted as  
9 to forward looking statements regarding the company's projected revenue, and any  
10 statements made prior to February 25, 2010. Defendants are ordered to file an answer to the  
11 Amended Complaint, as to the narrowed claims consistent with this order, on or before  
12 April 4, 2013. This motion is granted without prejudice to Plaintiffs seeking leave to  
13 reassert the broader claims should discovery reveal good cause to do so.

14                   The parties shall contact the chambers of Magistrate Judge Bartick within three days  
15 of the date of this order to schedule an Early Neutral Evaluation Conference, a Case  
16 Management Conference, and a date by which the parties shall submit a joint discovery plan  
17 consistent with this order. Defendants' unopposed Request for Judicial Notice [Doc. No.  
18 38-2,] is **GRANTED**.

19                   **IT IS SO ORDERED.**

20 DATED: March 22, 2013

21  
22                     
23                   **CATHY ANN BENCIVENGO**  
24                   United States District Judge  
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