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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re SUPPORTSOFT, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS	CASE NO.: C 04-5222 SI REPLY IN SUPPORT OF MOTION TO DISMISS THE AMENDED CONSOLIDATED CLASS ACTION COMPLAINT Date: November 18, 2005 Time: 9:00 a.m. Dept: Courtroom 10 Before: Honorable Susan Illston

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INTRODUCTION

Plaintiffs concede that defendants disclosed SupportSoft customers were increasingly entering into perpetual licensing arrangements during the Class Period. Plaintiffs also concede that defendants accurately projected that the percentage of ratable license revenue would continue to decline during the Class Period. In fact, SupportSoft's ratable revenue declined to 17% in the third quarter of 2004 – squarely within the estimated range defendants projected. Given this disclosure, plaintiffs' case rests on their theory that, while defendants fully disclosed the trend towards perpetual licensing, they failed to disclose that they were "pushing" perpetual conversions to disguise another alleged trend: slowing sales. Neither plaintiffs' Complaint nor their Opposition Brief contains any facts to substantiate this theory.

Plaintiffs' sole basis for their allegation that SupportSoft's sales were slowing is confidential source No. 5's conclusory assertions to that effect. ¶¶ 51-52. No. 5, however, does not identify any basis for his assertion that sales were slowing. He does not allege what, if any, access he had to internal sales pipeline information. He does not refer to any internal forecasts or pipeline reports, let alone any internal meetings where alleged slowing sales were discussed. He provides only the name of *one* customer who converted its contract to perpetual terms during the Class Period, but he does not provide any details, such as when, why, or in what amount. Without any allegation as to the basis of No. 5's assertions, plaintiffs' Complaint must fail.

Plaintiffs' allegation that SupportSoft's sales were declining is also not remotely plausible. If new business were slowing, one would expect SupportSoft to report decreasing revenues going forward once all the ratable contracts had been "flipped." SupportSoft's revenues, however, quickly recovered after the shortfall was announced. To address this obvious problem, plaintiffs now try to tie the alleged declining sales to the purported execution difficulties observed by confidential source No. 2. Rather than an industry-wide trend that affected SupportSoft in only one quarter and then disappeared, plaintiffs now claim that sales were slowing because of problems with SupportSoft's products and services. The supposed problems No. 2 recounts, however, occurred in 2002 – two years before the quarterly shortfall – and were resolved. Plaintiffs also fail to explain why a customer allegedly experiencing

problems with SupportSoft's product would be induced to pay more for it up front instead of canceling their contracts altogether.

Plaintiffs attempt to excuse their confidential sources' lack of detail by arguing that they do not "recall" specifics. Yet, the Reform Act requires specifics when alleging securities fraud, not merely conclusory assertions and speculative theories. Since plaintiffs proffer no facts to cure their pleading deficiencies, their claim should be dismissed with prejudice.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE AN ACTIONABLE CLAIM FOR SECURITIES FRAUD

Defendants established that SupportSoft disclosed that it was experiencing an increasing trend towards perpetual licensing and that this trend made near-term results less predictable. Def. Mem. at 10-11. Defendants also established that SupportSoft disclosed that the percentage of revenue from ratable licensing arrangements was in a constant state of decline and would remain so during the Class Period. In fact, by the second quarter of 2004, defendants disclosed that the percentage of ratable revenue had fallen to 18%. *Id.* They also projected it would be between 15% and 20% for the rest of the year. The percentage in the third quarter was 17%. Ex. D at 13-14; Ex. E at 15.[1] Defendants' disclosure disposes of this case.[2]

Unable to challenge defendants' public disclosure, plaintiffs fault SupportSoft's CFO Mr. Beattie for stating, at the beginning of the Class Period, that ratable licensing arrangements and service were projected to comprise only 45% to 55% of SupportSoft's revenue going forward.

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[1] All references to "Ex." are to the exhibits attached to the Merav Avital-Magen declarations, filed with the opening brief ("Magen Decl.") and filed contemporaneously with this memorandum ("Supp. Magen Decl.").

[2] *See Rubin v. Trimble*, No. C-95-4353 MMC, 1997 WL 227956, at *13-14 (N.D. Cal. Apr. 28, 1997) (dismissing claims with prejudice where allegedly undisclosed shift in product mix was disclosed in company's SEC filings); *Siegel v. Lyons*, No. C-95-3588 DLJ, 1996 WL 438793, at *4 (N.D.Cal. Apr. 26, 1996) ("Because plaintiff cannot maintain a claim of omitting information which was actually disclosed [in SEC filings], the allegations of failure to disclose revenue mix information must be dismissed"); *Manson v. Muller*, [1995-96 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,957, at 93,619-20 (N.D. Cal. Oct. 12, 1995) (dismissing certain claims because of sufficient disclosures in SEC filings).

Opp. Mem. at 5-7. According to plaintiffs, Mr. Beattie failed to disclose the shift toward perpetual contracts earlier and that this trend was only disclosed in "SEC filings made months later." *Id.* at 6. SupportSoft, however, had been documenting the trend towards perpetual licensing, and its effects, well before the beginning of the Class Period. *See, e.g.* Ex. Q at 11-12 (disclosing ratable license revenue falling from 39% in Q2 2002 to 27% in Q2 2003 and attributing "[t]he increase in license revenue" in part to "an increase in our licensing mix to more perpetual arrangements"); Ex. A at 12 (disclosing that ratable license revenue fell from 41% in Q3 2002 to 21% in Q3 2003 and attributing "[t]he increase in license fees" in part to "an increase in our license revenue mix to more immediate arrangements relative to ratable arrangements.").

Plaintiffs fail to allege any facts demonstrating that Mr. Beattie actually knew on January 20, 2004 or earlier that the percentage of ratable revenue would actually be much lower during the Class Period.[3] Plaintiffs contend that defendants knew SupportSoft's sales were slowing and knew they would enter into perpetual licensing arrangements to disguise this trend. Opp. at 3-4. Plaintiffs, however, allege no facts to support their assertion that SupportSoft's sales were slowing. *See infra at* 4-8.

Absent such facts, plaintiffs' claim amounts to accusing defendants of failing to disclose that the trend towards perpetual licensing was the result of defendants' "pushing." Def. Mem. at 11. Yet, there is nothing inherently illegal about entering into perpetual licensing arrangements or in offering incentives to upgrade a customer from one type of license to a different, more expensive, type of license. Defendants were under no obligation to characterize their decisions to enter into perpetual licensing arrangements as "pushing," rather than merely being willing to agree to terms that a customer found more favorable. Without particularized allegations that defendants were instigating conversions to disguise an undisclosed trend, plaintiffs fail to state an actionable claim as a matter of law.

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[3] If the challenged statement is forward-looking, the Reform Act requires plaintiffs to plead with particularity that the defendant made the challenged statement with "actual knowledge . . . that the statement was false or misleading." 15 U.S.C. § 78u-5(c)(1)(B)(i).

II. PLAINTIFFS FAIL TO SATISFY THE REFORM ACT'S HEIGHTENED PLEADING REQUIREMENTS

A. Plaintiffs Fail to Allege Facts To Support Their Assertion That Defendants Were "Pushing" Perpetual Licenses To Disguise Slowing Sales

Defendants established that plaintiffs fail to plead adequately facts to support their claim that defendants were "pushing" perpetual conversions to disguise slowing sales. Def. Mem. at 13. The Complaint is devoid of facts relating to alleged slowing sales. Indeed, none of plaintiffs' allegations, if proven, would contradict SupportSoft's public disclosure.

Plaintiffs acknowledge that the meat of their Complaint relies on the accounts of confidential sources. Opp. Mem. at 12-19. In so doing, they rely heavily on the Ninth Circuit's recent decision in *In re Daou Systems, Inc. Securities Litigation*, 411 F.3d 1006 (9th Cir 2005). Such reliance is misplaced. Plaintiffs correctly note that *Daou* requires the Court to consider allegations as an integrated whole. Opp. at 1. In *Daou*, however, the confidential sources provided customer names, dates, amounts, and the quarterly financial effect of alleged accounting manipulations. For example, one confidential source alleged that Daou prematurely recognized 20% of a $1-1.5 million contract with Candler Health Systems in the final days of the third quarter of 1997 in the absence of a customer signature. 411 F.3d at 1019-20. Plaintiffs' allegations here, take as a whole, do not approach this level of detail.

1. Confidential Source No. 5[4]

Defendants established that confidential source No. 5's allegations that sales were slowing during the Class Period are wholly conclusory. Def. Mem. at 16-17; ¶ 51 ("sales had been slowing during the first two quarters of 2004"); ¶ 52 ("new business had slowed"). Nowhere does No. 5 provide any specifics regarding the basis for his belief. He fails to allege what, if any, insight he had into SupportSoft's sales pipeline. No. 5 is only able to identify *one* customer that allegedly converted to a perpetual licensing arrangement during the Class Period. ¶ 52. No. 5 fails to explain exactly when this conversion took place or how much revenue it

[4] Little argument is required for confidential sources Nos. 1 and 3 since both sources left SupportSoft's employ well before the Class Period and fail to allege any facts that would contradict SuppportSoft's public disclosure. Def. Mem. at 13-14; ¶¶ 37-38.

represented. Instead, No. 5 claims only that this contract was "major." *Id.* Most importantly, No. 5 fails to allege any facts demonstrating that this alleged conversion was as a result of defendants' purported "pushing," rather than a legitimate business reason. *Id.*

Plaintiffs respond by arguing that Defendants are being hyper-critical in faulting No. 5 "for not having memorized the amount of the contract[.]" Opp. Mem. at 17. Yet, alleging the amount at issue is critical to the survival of plaintiffs' claims. *Daou*, 411 F.3d at 1020-21. Further, as this Court has previously held, "[w]ithout more information, this Court has no basis for relying on the witness' statements as sufficient to draw an inference of fraud under the requirements of the PSLRA." *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1112 (N.D. Cal. 2003) (dismissing complaint based on confidential witness statements where, *inter alia*, complaint "does not include detail as to . . . what caused [the witness] to believe this.").

Plaintiffs attempt to excuse these failings by citing to the First Circuit's decision in *In re Stone-Webster, Inc. Sec. Litig.*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,300, at 96,528 (1st Cir. July 14, 2005). According to plaintiffs, this case stands for the proposition that the Complaint need not prove a *prima facie* case to survive dismissal at the pleading stage. Opp. at 18. In *Stone-Webster*, however, the complaint contained particularized allegations naming "ten contracts, aggregating over $1.4 billion, which were allegedly underbid by margins of 10% and 40% and were expected to produce losses." [Current Binder] Fed. Sec. L. Rep. (CCH) at 96,527. While the Court found that such allegations satisfied the Reform Act's "requirement of clarity and basis," it, nonetheless, found them deficient because they failed to allege the size of the loss and its effect, if any, on the Company's financial results. *Id.* at 96,528-29. Plaintiffs' allegations here fall far short of the allegations deemed inadequate in *Stone-Webster*.

Moreover, the notion that SupportSoft's sales were slowing during the first two quarters of 2004 and that defendants were disguising this trend by forcing conversions is not remotely plausible given SupportSoft's subsequent financial results. SupportSoft reported increasing

revenue for the quarters following the miss (Def. Mem. at 6),[5] even though, according to plaintiffs, "by the end of the second quarter of 2004, there were no more ratable contracts left to flip." ¶ 52. Plaintiffs do not explain how, if the alleged fraud were designed to disguise a trend of slowing sales, the trend would not manifest itself on an ongoing basis after the alleged fraud was disclosed and the supply of ratable contracts to convert had allegedly run dry.

2. Confidential Source No. 2

Aware of the implausibility of their assertions that defendants were disguising the impact of an industry-wide trend that, once disclosed, only affected SupportSoft for one quarter, plaintiffs now try to link the alleged declining sales with their allegations of "execution difficulties" at SupportSoft. Opp. at 13-15. Defendants, however, established that the confidential source (No. 2) on which they rely for these allegations is not remotely reliable. Def. Mem. at 19-20.

No. 2 left SupportSoft over one year before the quarterly shortfall. ¶ 35.[6] Thus, he could not have personal knowledge of the reasons for the miss. Def. Mem. at 19-20. No. 2 alleges that various product issues "led to dissatisfaction by [certain customers] and to SupportSoft's loss of contracts." ¶ 35. No. 2, however, names only two customers that experienced problems and fails to specify the amounts of their contracts, the financial impact of the problems, or even that

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[5] Contrary to plaintiffs' contentions, this Court can consider SupportSoft's SEC filings not referenced in the Complaint. *In re Calpine Corp. Sec. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003) ("In a securities action, a court may take judicial notice of public filings when adjudicating a motion to dismiss...."); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2005 WL 1910923, at *5 (N.D. Cal. Aug. 10, 2005) (taking judicial notice of SEC filings filed after the class period); *Shurkin v. Golden State Vintners, Inc.*, No. C 04-3434 MJJ, 2005 WL 1926620, at *5 (N.D. Cal. Aug. 10, 2005) (taking judicial notice of documents filed with the SEC where excerpts were not referenced in the Complaint); *In re Netflix, Inc. Sec. Litig.*, No. C04-2978 FMS, 2005 WL 1562858, at *5 (N.D. Cal. June 28, 2005) (taking judicial notice of documents filed with the SEC outside of the class period).

[6] Plaintiffs argue that this is "precisely the period that defendants were referring to" in the October 16, 2003 and January 20, 2004 statements regarding SupportSoft's "technical service and support leadership" and membership in "an elite group of companies that delivered record revenues in difficult economic times." Opp. at 14. SupportSoft, however, reported record results on those dates, which results are not challenged. ¶¶ 21, 23. Moreover, such results could not have been a result of "flipping" term to perpetual deals because, according to plaintiffs, confidential source No. 1 "established that, prior to the Class Period and through mid-2003 95% of sales were ratable contracts." Opp. at 13.

the contracts were lost as a result. For one customer (Chase Manhattan), No. 2 claims that the issues arose in 2002 – two *years* before the quarterly occurred. *Id*.

More fundamentally, plaintiffs fail to explain why existing customers allegedly experiencing product problems could be induced to enter into perpetual arrangements and pay *more* for these products up front, rather than just canceling their contracts altogether. The allegation that defendants were disguising slowing sales arising from product problems simply does not make sense. *Daou*, 411 F.3d at 1015 (assessment of confidential witness allegations includes evaluation of "the coherence and plausibility of the allegations").

3. Confidential Source No. 4

Defendants established that confidential source No. 4's account is inadequately alleged because, while No. 4 identifies two customers who converted to perpetual contracts, he or she fails to offer any specifics, such as when or why they converted or how much revenue their contracts represented. Def. Mem. at 15. In particular, plaintiffs claim that the two customers converted "to perpetual contracts during confidential source no. 4's tenure" (¶ 45), which could have been any time "from 1999 until April of 2004." (¶ 40). Plaintiffs respond by arguing that the pleading requirements in this Circuit do not require "ability to recall all customers or name every contract affected by the [alleged] fraud." Opp. at 17. Yet, the Reform Act does not excuse failing memories when evaluating an accusation of securities fraud.[7] Moreover, considering that plaintiffs contend that "flipping" contracts was pervasive at SupportSoft (*id.* at 4), No. 4's inability to recall more than two incidents of "flipping" over a five-year period is telling.

4. Defendants' Alleged Admissions

Defendants established that plaintiffs' reliance on Ms. Basu's alleged post-Class Period

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[7] *Cf. In re Business Objects S.A. Sec. Litig.*, No. C 04-2401 MJJ, 2005 WL 1787860, at *6 (N.D. Cal. July 27, 2005) (dismissing confidential witness allegations where "[t]he witnesses' conclusory statements include phrases such as 'product integration problems' and 'customer confusion,' but offer no insight into the pervasiveness of such problems."); *In re Metawave Communication Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1069 (W.D. Wash. 2003) (dismissing allegations based on a former Metawave sales director responsible for sales of products in a region of the United States because they were "opinion, vague, and do not show any basis of personal knowledge.").

statements arise from their own strained interpretation of her comments. Ms. Basu merely acknowledged the negative impact of the previously disclosed trend towards perpetual licensing.[8] She did not, as plaintiffs allege, "admit" to an undisclosed change in SupportSoft's business model. Def. Mem. at 17-18.

Plaintiffs respond by returning again to Mr. Beattie's statement on January 20, 2004 "that SupportSoft was going forward with its blended model." According to plaintiffs, Mr. Beattie's statement was false because he failed to disclose a "change in the model [which was] acknowledged by Ms. Basu in her statement of October 20, 2004." Opp. at 7. Putting aside plaintiffs' lack of factual support for the alleged falsity of Mr. Beattie's statement, it is clear from the transcript of the analyst call that Ms. Basu did *not* state that SupportSoft was abandoning its blended model. ¶ 54. Instead, she merely noted that SupportSoft was moving toward more perpetual contracts (*id.*), a trend SupportSoft disclosed prior to and throughout the Class Period. Def. Mem. at 7-8; *supra* at 2-3.

Plaintiffs also insist that Ms. "Basu's statement about being able to quote contracts as term or perpetual contracts" is an admission that "defendants were able to determine whether a contract was ratable or perpetual." Opp. at 19. Not so. At best, Ms. Basu's statement could be interpreted that SupportSoft would attempt to *quote* a contract as ratable to reverse the trend.[9] It did not mean that the customer would necessarily go forward with the deal on ratable terms. Defendants' lack of control over their customer choices is evident by SupportSoft's post-Class Period disclosure. SupportSoft's ratable licensing revenue continued to decline, notwithstanding

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[8] Plaintiffs incorrectly claim that their characterization of Ms. Basu's statements cannot be challenged on a motion to dismiss. "However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Communications Corp*. 16 F.3d 1271, 1276 (D.C. Cir. 1994); *Jakobe v. Rawlings Sporting Goods Co*., 943 F. Supp. 1143, 1150 (E.D. Mo. 1996). Plaintiffs fail to allege any facts supporting the inference they draw from Ms. Basu's statements.

[9] Ms. Basu's actual statement was: "So even if the customers turn their original term licenses … into perpetual when they buy new deals from us, then we can make those term deals, and that's, in fact, some of the changes we've already put together this quarter is to go back and be able to quote those only as term deals." Ex. U at 10.

Ms. Basu's expressed desire.[10]

III. PLAINTIFFS FAIL TO SATISFY THE REFORM ACT'S HEIGHTENED PLEADING REQUIREMENTS FOR SCIENTER

A. Plaintiffs' Confidential Sources Do Not Raise a Strong Inference of Scienter

Defendants established that plaintiffs' scienter allegations fall far short of the Reform Act's strict pleading requirements because they fail to allege facts demonstrating that defendants were deliberately "pushing" conversions to disguise slowing sales. Def. Mem. at 21-22; *see also In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833, 842-43 (N.D. Cal. 2000) ("[U]nder the standard articulated by the Ninth Circuit, plaintiffs must allege facts sufficient to create an inference of, at minimum, deliberate recklessness.").

In their Opposition Brief, plaintiffs rely heavily on the confidential sources' claims that Defendants Beattie and Basu allegedly kept a close watch on sales by participating in various unspecified meetings, forecast calls, and by "reviewing sales data and decisions on revenue recognition." Opp. at 21. Plaintiffs' generic allegations of defendants' "hands-on management style" (*id.* at n.11) are wholly inadequate, especially given the absence of particularized factual allegations that sales were actually slowing. As this Court has recognized, "plaintiffs must do more than allege that these key officers had the requisite knowledge by virtue of their 'hands on' positions, because that would eliminate the necessity for specially pleading scienter, as any corporate officer could be said to possess the requisite knowledge by virtue of his or her position." *Autodesk*, 132 F. Supp. 2d at 844.

To overcome this fatal deficiency, plaintiffs resort to misrepresenting the allegations of the Complaint. They claim that No. 5 "stated that he attended meetings along with both Beattie

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[10] Although, by the end of 2004, SupportSoft estimated that ratable arrangements would represent approximately 10% to 20% going forward, that percentage dropped to 6% in the first quarter of 2005. Ex. R at 23; Ex. S at 16. By the second quarter of 2005, SupportSoft estimated that the range of ratable revenue would be between 5% and 10%. Ex. T at 18. It also stated that, "[m]ost of the ratable license revenue recognized in the first half of 2005 related to license arrangements from previous periods. Most new license arrangements so far in 2005 have resulted in, and in [the] future will likely result in, immediate rather than ratable license revenue." *Id.* at 14.

and Basu during the first two quarters of 2004 at which slowing sales, and SupportSoft's strategy for addressing them, were discussed. (¶¶ 50-51)." Opp. at 21-22. At the outset, plaintiffs fail to allege any specifics regarding such meetings, such as attendees, dates and specific matters discussed.[11]

Even if plaintiffs were to provide such detail, the paragraphs of the Complaint they cite do not allege that slowing sales were discussed at these meetings. Rather, these paragraphs allege only that Defendants Beattie and Basu were "flipping" contracts "just to make the quarterly estimates expected by Wall Street, and knew that flipping the ratable contracts to perpetual contracts would decrease future revenues and earnings, an issue that Basu and Beattie discussed at meetings attended by confidential source no. 5." ¶ 51. This allegation does not demonstrate that defendants intentionally entered into perpetual arrangements to disguise slowing sales. It merely corroborates what SupportSoft disclosed, namely that taking revenue up-front, rather than over time, could impact future revenues:

> As we continue to enter into more perpetual licenses rather than term licenses in the future, we will experience a larger impact on our near-term results of operations and less predictability for future results due to our recognition of all of the license fees as revenue at the time we enter into these perpetual license arrangements rather than our recognition over the life of a term license.

Ex. B at 25.

B. Plaintiffs' Stock Sales Allegations Do Not Raise A Strong Inference

Defendants established that their stock sales do not raise a strong inference of scienter. These sales were executed shortly after earnings announcements, during a period where SupportSoft's stock price was declining, and were not in amounts that this Circuit considers unusual or suspicious. Def. Mem. at 22-23. Indeed, plaintiffs' stock sale allegations are unchanged from those this Court found insufficient when it granted Defendants' initial motion to dismiss. July 15, 2005 Order at 2.

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[11] *See Metawave*, 298 F. Supp. 2d at 1074 (confidential source "CW7's statements concerning meetings with Hunsberger do not provide details such as when the meetings took place and what was discussed.…CW7 does not state that he attended the weekly meetings involving accounting personnel at which Fuhlendorf was allegedly briefed on expenses for failed tests and sales problems, or provide any additional details concerning these meetings.").

Plaintiffs offer no excuse for their failure to allege in the Amended Consolidated Complaint the percentage of the individual defendants' stock sales or any information about their trading history. Instead, plaintiffs adopt the percentages asserted in Defendants' opening papers, arguing that courts have found similar percentages suspicious. Yet, the cases plaintiffs cite are easily distinguishable. For instance, in *In re SeeBeyond Technologies Corp. Securities Litigation*, 266 F. Supp. 2d 1150 (C.D. Cal. 2003), the court acknowledged the small percentage of shares sold but found a strong inference of scienter based on the wealth of other significant factors, such as the $18 million generated from one individual's sales, the fact that the sales were atypical of prior sales, and that defendants "admittedly lied to analysts and investors[.]" *Id*. at 1169. Here, defendants' *aggregate* sales totaled $13.5 million, and plaintiffs here have failed to allege atypical sales or any other factors suggesting the individual defendants acted with fraudulent intent.

In *In re Splash Technology Holdings, Inc. Securities Litigation*, 160 F. Supp. 2d 1059, 1083-84 (N.D. Cal. 2001), cited by plaintiffs for the proposition that percentages in the 20s and 30s "did appear somewhat suspicious," (Opp. at 24), the court held that plaintiffs failed to meet the standard for pleading scienter. It found, "[a]s a whole…the stock sales were not sufficient, either by themselves, or in combination with the FAC's generalized pleadings concerning the Splash individual defendants' internal knowledge, to satisfy the pleading requirements for scienter[.]" 160 F. Supp. 2d at 1083-85 (finding inadequate allegations of individual sales of 31.32% and 25.17% and group sales of 39%).

Similarly, in *In re Vantive Corp. Securities Litigation*, 283 F.3d 1079, 1095 (9th Cir. 2002), also cited by plaintiffs, the court did not find sales of 32% of an individual defendant's holdings "suspicious" but found the amount "sufficiently substantial…that we will consider the other circumstances of her trading." Yet, because the sales were "neither dramatically out of line with prior trading practices, nor calculated to maximize the personal benefit from the undisclosed inside information…they do not support a strong inference of scienter." *Id.* (internal quotations omitted). The same result should follow here. Plaintiffs have identified nothing unusual or suspicious about the timing or amount of the individual defendants' sales. Nor have they

identified any other particularized facts supporting any inference of scienter, let alone a strong one.

CONCLUSION

After two attempts and the absence of any additional proffer, it is clear that plaintiffs are unable to meet the Reform Act's pleading requirements. Any further attempts at amendment would be futile. Accordingly, for each of the foregoing reasons, defendants respectfully request that plaintiffs' Complaint be dismissed with prejudice.

Dated: November 3, 2005

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I, Peri Nielsen, am the ECF User whose identification and password are being used to file this Notice of Motion and Motion to Dismiss the Amended Consolidated Class Action Complaint; Memo in Support Thereof. In compliance with General Order 45.X.B, I hereby attest that Boris Feldman has concurred in this filing.

Dated: November 3, 2005

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Peri Nielsen
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