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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 In re VERSANT OBJECT TECHNOLOGY
SECURITIES LITIGATION

Master File No. C-98-0299-CW

CLASS ACTION

15
16
17 This Document Relates To:
18 ALL ACTIONS

**REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' THIRD
AMENDED CONSOLIDATED
COMPLAINT**

Date: September 21, 2001
Time: 10:00 a.m.
Judge: Hon. Claudia Wilken

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1 **INTRODUCTION**

2 Some cases and some arguments improve with age. Not this case, and not these plaintiffs’
3 arguments. This case should be dismissed without leave to amend.¹

4 **ARGUMENT**

5 **I. PLAINTIFFS FAIL TO PLEAD SCIENTER OR FALSITY.**

6 **A. Defendants’ Stock Retention Rebutts Any Inference Of Scienter.**

7 Plaintiffs again do not directly address Defendants’ showing that their now even more
8 minimal (and, for all speakers, nonexistent) stock sales rebut any inference of scienter. Rather, in
9 a footnote (Opp. at 16:24-28), they cite *In re Wells Fargo Sec. Litig.*, 12 F.3d 922 (9th Cir. 1993),
10 and *Hanon v. Dataproducts*, 976 F.2d 497 (9th Cir. 1992), for the proposition that insider trading
11 is not required to demonstrate scienter. Neither of these cases supports Plaintiffs. *Wells Fargo*, a
12 pre-Reform Act case, held that insider trading allegations were not required because the
13 plaintiffs’ motive and opportunity allegations created “a basis for inferring” scienter (12 F.3d at
14 931) — a pleading standard overruled by the Reform Act. *See In re Silicon Graphics, Inc. Sec.*
15 *Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (“SGP”). *Hanon* does not even facially support
16 Plaintiffs’ proposition, ruling on review of a pre-Reform Act summary judgment that evidence of
17 the defendants’ knowledge of the falsity of statements created a genuine issue of material fact.
18 *Hanon*, 976 F.2d at 509.² Defendants again cited — but Plaintiffs again ignored — *In re Worlds*
19 *of Wonder Sec. Litig.*, 35 F.3d 1407 (9th Cir. 1994) (“WOW”), which directly addressed the issue.
20 There, even under the more lenient summary judgment standard (*see n.2 below*), the Ninth Circuit
21 held that “minimal” stock sales “negate[d] an inference of scienter.” *Id.* at 1425, 1427-28.

22 ¹ Plaintiffs’ discussion of the standard of review (Opp. at 2) relies on outdated, out-of-
23 circuit, and non-securities cases. As the Ninth Circuit has held twice in the last year, the
24 “heightened pleading requirements of the Private Securities Litigation Reform Act are an unusual
25 deviation from the usually lenient requirements of federal rules pleading.” *Ronconi v. Larkin*,
253 F.3d 423, 437 (9th Cir. 2001); *see also Desai goudar v. Meyercord*, 223 F.3d 1020, 1021 (9th
25 Cir. 2000).

26 ² Plaintiffs suggest that *Howard v. Everex*, 228 F.3d 1057 (9th Cir. 2000), is a “Post-
27 PSLRA decision.” (Opp. at 21:5.) It is a “post-PSLRA” decision only in that it was issued after
28 December 22, 1995. It did not apply the Reform Act and could not apply it, since it involved a
case filed in 1992. *Howard* specifically distinguishes its summary judgment ruling from the law
governing pleading standards under the Reform Act. *See Howard*, 228 F.3d at 1064.

1 Plaintiffs likewise ignore Defendants’ Reform Act authorities holding that scienter is rebutted
2 where the CEO and CFO sold no shares, the speakers did not sell, the sellers did not speak, and
3 the defendants incurred the same losses as the plaintiffs. *See* Defendants’ Opening Memorandum
4 (“Def. Mem.”) at 4-5. Indeed, Plaintiffs go so far as to argue that “unlike *SGI*,” they do not
5 “depend on insider selling.” (Opp. Mem. at 16.) *SGI* affirmed dismissal *even though* the
6 plaintiffs there alleged millions of dollars of sales by insiders, which supplied a specific motive
7 for the alleged fraud. Plaintiffs’ failure here to come up with any motive makes their claim
8 weaker, not stronger. Here, multiple factors — the negligible insider trading; the lack of trading
9 by the alleged mis-speakers, CEO, and CFO; the substantial losses by all Defendants, and the
10 absence of *any* motive — *negate* an inference of scienter, and cannot be disregarded as
11 “irrelevant,” as Plaintiffs suggest. (Opp. at 16:26.) Rather, these factors rebutting scienter should
12 be considered as part of the complaint “in its entirety.” (Opp. at 16); *SGI*, 183 F.3d at 985.

13
14 **B. Plaintiffs’ E-mail And Document Allegations Fail To Show
Scienter Or Falsity.**

15 Contrary to Plaintiffs’ assertion, Plaintiffs’ e-mail and document allegations do not
16 establish scienter or falsity. As a matter of pleading, the e-mail allegations:

- 17
- 18 • fail to identify the author’s position (*see* TAC ¶ 28(b) (Lin); ¶ 28(c) (Beniflah); ¶ 46(c) (Yung)),
 - 19 • fail to identify who received the messages (*see* TAC ¶46(c) (Yung) and ¶ 46(c) (Grieger)); and
 - 20 • fail to identify the message’s actual content (*see* TAC ¶ 28(b) (Lin e-mail “indicated”); ¶ 46(c) (Yung e-mail “revealed”); ¶ 46(c) (Grieger e-mail “revealed”).
- 21

22 Thus, these allegations defy the Court’s order. *Versant II* at 14 (e-mail allegations insufficient
23 where they “provide no facts regarding [the author’s] role or relationship to Defendants, who the
24 e-mail was sent to, or *exactly* what it said.”) (emphasis added).

25 More importantly, as a matter of substance, all of the e-mail allegations are meaningless,
26 as they fail to demonstrate the supposed falsity of any statement, let alone any Defendant’s

1 scienter.³ See *Splash I*, 2000 U.S. Dist LEXIS 15369, at *42 (contemporaneous inconsistent
2 information necessary to show falsity). For example, Plaintiffs allege that a June 10, 1997 Lin e-
3 mail indicated that Mr. Lin “was only aware of two sales of Versant Web or Versant VIA,” and a
4 “June 10, 1997 Beniflah e-mail stated that Versant had ‘bet the farm on Versant Web and Versant
5 VIA’” (TAC ¶ 28(b) & (c).) Yet Plaintiffs still make no connection between these e-mails
6 and any supposedly contrary public statement. Similarly, Plaintiffs allege that an October 30,
7 1997 Yung e-mail “revealed that Versant’s Java back-end general execution engine was not
8 working,” that an October 14, 1997 Grieger e-mail “revealed that Versant’s database was not
9 ODMG C++ compliant,” and that a December 15, 1997 Sheehan e-mail inquired about when a
10 meeting would take place. (TAC ¶¶ 46(c), 60.) Again, Plaintiffs fail to identify any
11 contemporaneous statements that these e-mails supposedly contradict.⁴

12 The internal documents upon which Plaintiffs so heavily rely to show Defendants’
13 knowledge of the falsity of analyst statements that Versant was “on track” actually show just the
14 opposite.⁵ The document titled “October and Q4 Forecast” expressly concludes that Versant
15 expected to meet its plan despite October performance:

16 Based on the sales forecasts, the business opportunities exist to
17 meet the license sales plan late in the quarter. . . . The forecast from
18 services indicates that Q4 revenue plan will be met.

19 (See TAC, Ex. F.) Indeed, the “Consolidated Statements of Operations” (TAC, Ex. G) shows that
20 this expectation was reasonable and likely, as Versant recorded 76% of its quarterly revenues in

21 ³ Plaintiffs incorrectly suggest that “group pleading” concepts apply to scienter. (Opp. at
22 25.) On the contrary, each actor’s intent must be pled individually as to each alleged act or
23 misstatement. *In re Hall, Kinion & Assoc., Inc. Sec. Litig.*, No. C-99-02943 WHA, slip op. at 11
(N.D. Cal. Apr. 25, 2000). In addition, if Plaintiffs do not plead falsity, they necessarily also fail
24 to plead scienter. See *In re Splash Tech. Holdings, Inc.*, No. C-99-00109 SBA, 2000 U.S. Dist
25 LEXIS 15369, at *65 (N.D. Cal. Sept. 29, 2000) (“*Splash I*”).

26 ⁴ Although Plaintiffs allege an October 23, 1997 press release in which Defendants stated
27 that a ODMG compliant Java language interface was being “shipped to beta customers,” the
28 October 14 Grieger e-mail (to unknown recipients) does not suggest that the press release was
false at the time it was issued, let alone any Defendant’s knowledge of its falsity. (TAC ¶ 45.)

⁵ As discussed in detail below, the TAC fails to link any analyst statement to Defendants
under the conduit theory. In addition, Plaintiffs fail to identify the person who prepared the
documents, or which officers received or reviewed them. *Heliotrope Gen., Inc. v. Ford Motor
Co.*, 189 F.3d 971, 979 (9th Cir. 1999).

1 December of the prior year's fourth quarter. Plaintiffs' attempt to dismiss the optimism in the
2 "Q4 Forecast" as a "red herring" (Opp. at 7:7) is unsurprising, but incorrect. Indeed, the
3 document's optimism precisely and completely refutes Plaintiffs' premise that Defendants knew
4 at the time of the analysts' statements that Versant was not "on track" to make its quarter.⁶

5 Plaintiffs' e-mail and internal document allegations are random and meaningless. None
6 contradicts Defendants' statements, disputes Defendants' accounting, or indicates what Versant's
7 analysts' forecast should have been. They neither establish the falsity of any alleged
8 misstatement nor create a strong inference that any Defendant acted with scienter.

9
10 **C. Plaintiffs' Direct Communication Allegations Fail To Show
Scienter Or Falsity.**

11 Plaintiffs next defend their scienter and falsity allegations by pointing to two "detailed
12 allegations of direct communications." (Opp. at 18.) The first alleged communication is one
13 from Buzzeo reporting glitches. (Opp. at 18, citing TAC ¶ 33(f).) Nothing about this
14 communication, however, indicates the falsity of any alleged statement or an error in revenue
15 recognition, let alone any Defendant's scienter. Notably, Plaintiffs do not allege that Defendants
16 knew that Versant's technology was incompatible with Buzzeo's. Nor do Plaintiffs respond to
17 Defendants' showing that, during the quarter in which Versant recognized revenue on the Buzzeo
18 transaction (and again six quarters later), Buzzeo made payments and unequivocally and
19 expressly affirmed its further payment obligations. Moreover, Plaintiffs cannot identify any
20 alleged significant vendor obligation in the Buzzeo license agreement that remained unfulfilled.
21 At most, the complaint alleges that, during the quarter when Versant recognized revenue, Buzzeo
22 reported glitches in Versant's product, but confirmed that it had received value under the license
23 agreement and would complete its payments. Nothing about those allegations indicates the falsity
24 of any statement, or Defendants' scienter in recognizing revenue on the Buzzeo transaction.⁷

25
26 ⁶ Plaintiffs do not even address Defendants' showing that the Consolidated Statements of
Operations (TAC, Ex. G) confirms that, as of whatever date it was written, Versant itself expected
substantially more revenue for the quarter and was surprised by the Q4 result. (Def. Mem. at 11.)

27 ⁷ In *Angres v. Smallworldwide PLC*, 94 F. Supp. 2d 1167 (D. Colo. 2000), cited by
28 Plaintiffs (Opp. at 18), the defendants *acknowledged* that they knew that products represented to

Footnote continues on next page

1 The other direct communication allegedly evidencing scienter is an August 1997 meeting
2 at which “the sales force informed management that . . . Banks’ optimistic projection of 50%
3 growth and the Plan sales projections were unrealistic and could not be met.” (Opp. at 19 (citing
4 SAC ¶¶ 59(e).)⁸ Plaintiffs do not respond to Defendants’ showing that Versant actually saw 60%
5 revenue growth (both in the fourth quarter and 1997 as a whole) — even higher than Banks’
6 “optimistic projection.” (Katzin Decl., Exs. K, Q.) Thus, this direct communication neither
7 establishes the falsity of any statement nor creates a strong inference that any Defendant acted
8 with scienter in connection with any alleged act.

9 Contrary to Plaintiffs’ assertion (Opp. at 19), this case is the exact opposite of *In re*
10 *PeopleSoft, Inc. Sec. Litig.*, No. C-99-00472 WHA, 2000 U.S. Dist. LEXIS 10953 (N.D. Cal.
11 May 26, 2000). In *PeopleSoft*, senior management (which collectively sold \$158 million in
12 stock) affirmatively had touted its “high visibility” to make reliable forecasts (and actually made
13 forecasts), bolstering allegations that those defendants knew about upcoming financial results.
14 2000 U.S. Dist. LEXIS 10953, at *8. Here, Defendants repeatedly warned in SEC filings that
15 Versant’s results were “impossible to predict” because of its reliance on end-of-quarter
16 transactions, and Defendants never made any forecasts. (*See* Def. Mem. at 16-18.)

17 Likewise, this case is distinguishable from *Hi/fn*, where the plaintiffs had alleged a
18 specific meeting (June 1999), who attended (Franham, Farnow, Monsour, Whiting, Walker —
19 who collectively had sold \$10.6 million in stock), who spoke (Lucent sales representative John
20 Peebles), and what information was conveyed (50% decrease in Lucent’s demand for product), as
21 well as a specific e-mail (July 26, 1999), who received it (Farnham, Farnow, Walker), and what
22 information it contained (comparison of number of Quantum’s DLT/4000 and DLT/7000 tape
23 drives to number of Hi/fn parts already sold to Quantum, concluding that Quantum had excess
24

25 be fully operational were still in testing and having significant problems. *Id.* at 1175. Also, the
26 defendants’ substantial stock sales (40%-50% of their holdings) were suspicious in timing. *Id.*
There are no comparable allegations in the TAC.

27 ⁸ Plaintiffs tacitly admit that Banks never made any such projection to the public. Rather,
28 the only public forecasts alleged were by third party analysts that are not attributable to
Defendants (as discussed below).

1 inventory) — and how that knowledge of decreased product demand from Lucent and Quantum
2 (which represented 85% of Hi/fn’s customer base) contradicted the defendants’ contemporaneous
3 public forecasts of increased product demand. *In re Hi/fn, Inc. Sec. Litig.*, No. C-99-4531 SI,
4 2000 U.S. Dist. LEXIS 11631, at *3-7 (N.D. Cal. Aug. 9, 2000). Here, Plaintiffs never allege
5 such particulars, fail to allege any forecast made by Defendants, and never even allege what a
6 reasonable forecast would have been. *See Kane v. Madge Networks, N.V.*, No. C-96-20652-
7 RMW, 2000 U.S. Dist. LEXIS 19984, at *26-27 (N.D. Cal. May 26, 2000) (forecast allegations
8 fail because complaint did not allege what good-faith earning projections would have been).

9
10 **D. Plaintiffs’ Circumstantial Evidence Allegations Fail To Show
Scienter Or Falsity.**

11 Plaintiffs next resort to supposed circumstantial evidence of fraud — the absurd
12 allegations that Defendants had regular meetings, offices in close proximity, and received regular
13 reports relating to the Company’s products and customers. (Opp. at 22, citing TAC ¶¶ 75-80.)
14 From these wholly generic allegations (which would apply to every company in Silicon Valley),
15 Plaintiffs again contend that Defendants *must have known* of Versant’s alleged “problems.”
16 (Opp. at 22.) Plaintiffs do not respond to Defendants’ cited Ninth Circuit and Northern District
17 cases holding that such “must have known” pleadings do not meet the scienter threshold. *See*
18 *Heliotrope*, 189 F.3d at 979 (must have known allegations “too speculative” to establish scienter);
19 *In re Read-Rite Corp. Sec. Litig.*, C-98-20434 JF, slip op. at 2-3 (N.D. Cal. Mar. 1, 2000). Nor do
20 Plaintiffs respond to Defendants’ citation to *Ronconi*, 253 F.3d at 430, in which the Ninth Circuit
21 found that “[m]uch of any business consists of having problems and dealing with them.”⁹

22 Instead, Plaintiffs again rely on the Eastern District of Washington’s “must have known”
23 discussion in *Epstein v. Itron, Inc.*, 993 F. Supp. 1314 (E.D. Wash. 1998). Not only is *Epstein*
24 pre-*SGI*, but in *SGI*, the Ninth Circuit expressly cited *Epstein* as a case applying too low a
25 scienter standard. *SGI*, 183 F.3d at 974. *See In re Splash Tech. Holdings, Inc. Sec. Litig.*, No. C-
26

27 ⁹ Although cited nine times in Defendants’ brief, Plaintiffs altogether ignore *Ronconi*, the
28 Ninth Circuit’s most current holding on the Reform Act’s pleading standards.

1 99-00109-SBA, 2000 U.S. Dist LEXIS 15370, at *30 (N.D. Cal. Sept. 29, 2000) (“*Splash II*”)
2 (“Such an approach, however, is not likely viable in the aftermath of [*SGL*] ...”).¹⁰ *PeopleSoft*
3 applied the “must have known” presumption (with certain provisos) only in a case with egregious
4 facts — insider trading of \$158 million, and admissions by the company that it released products
5 with too many bugs and mismanaged its business — and where the company had touted its ability
6 to make reliable forecasts. *PeopleSoft*, 2000 U.S. Dist. LEXIS 10953, at *7-9.

7 This Court specifically ruled that “[a]bsent more specific allegations regarding the internal
8 meetings and discussions, the occurrence of such meetings raises no strong inference of deliberate
9 recklessness.” *Versant II* at 21. Plaintiffs’ continued reliance on unchanged allegations of
10 generic, unspecified “negative internal meetings” ignores this Court’s order.¹¹

11
12 **E. Plaintiffs’ Financial Statement Allegations Fail To Establish
Accounting Fraud Or Scierter.**

13 Plaintiffs never dispute that to allege fraud in connection with accounting practices, they
14 must plead facts showing that “defendants knew of the accounting errors, or that their regular
15 practices should have alerted them to the errors sooner than they did.” *In re CBT Group PLC*
16 *Sec. Litig.*, No. C-98-21014 RMW, slip op. at 5 (N.D. Cal. July 21, 1999). Plaintiffs nevertheless
17 fail to identify any place in the TAC where they have made such allegations. Instead, Plaintiffs
18 again simply point to their allegations that, as to certain Versant clients, “significant vendor
19 obligations remained,” assert that recognizing revenue on those transactions was erroneous, and
20 conclude that such errors must have been fraud. (Opp. at 14-16.)

21 As discussed above, Plaintiffs do not adequately respond to Defendants’ showing that
22 Buzzeo now has abandoned its argument that Versant was not entitled to collect its revenue, and
23 has stipulated to a judgment in Versant’s favor for every penny of its payment obligations,

24
25 ¹⁰ Plaintiffs’ out-of-circuit cases are not controlling. See *Cohen v. Koenig*, 25 F.3d 1168
(2d Cir. 1994) (pre-Reform Act); *In re Providian Fin. Corp. Sec. Litig.*, No. 00-1467, 2001 U.S.
Dist. LEXIS 9084, at *3 (E.D. Pa. July 28, 2001).

26
27 ¹¹ The Court already has rejected Plaintiffs’ argument that their scierter allegations are
28 rescued by the proximity between an analyst’s forecast of “good news” and Defendants’
subsequent announcement of “bad news.” See *Versant I* at 31 (“While the timing might suggest
‘simple’ recklessness, it does not imply that Defendants’ conduct was deliberately reckless.”).

1 including all back interest. Plaintiffs argue that the Buzzeo judgment merely reflects that Versant
2 was entitled to collect its revenue “at some time.” (Opp. at 15:21.) Plaintiffs ignore that
3 Buzzeo’s abandoned arguments are Plaintiffs’ sole basis for alleging that the Buzzeo revenue
4 should not have been recognized in the third quarter — leaving a void that Plaintiffs cannot fill.

5 In any event, Plaintiffs’ Buzzeo allegations do nothing to establish either the falsity of
6 Versant’s financial statements, or any conscious misconduct. Plaintiffs still cannot identify any
7 allegation of an unfulfilled significant vendor obligation in the Buzzeo contract, the heart of their
8 accounting fraud allegations.¹² Indeed, during the quarter in which Versant recognized revenue
9 on the Buzzeo transaction (and again six quarters later), Buzzeo made payments and
10 unequivocally affirmed its further payment obligations under the parties’ license agreement —
11 which contradicts any inference that Defendants acted with scienter in recognizing such revenue.
12 At most, the Buzzeo allegations show that, during the quarter when Versant recognized revenue,
13 Buzzeo reported glitches in Versant’s product.

14 Plaintiffs’ other accounting allegations are similarly defective and rely on wholly
15 unsupported information and belief. With regard to the Department of Defense allegations,
16 Plaintiffs’ superficial attempt to show a basis for their information and belief falls short, as they
17 still fail to provide the source’s name, title or position, or any facts to suggest why this source
18 might have actual knowledge of the allegations. There still is no allegation that the revenues from
19 this contract were challenged or uncollected.

20 Plaintiffs make the monumental leap from alleged software bugs (a routine occurrence) to
21 erroneous financial statements, and then on to deliberate recklessness in issuing financial
22 statements. Even where companies admit false financial statements, courts in the Ninth Circuit
23 require plaintiffs to plead specific facts evidencing scienter. *See, e.g., Levine v. Safeguard Health*
24 *Enter., Inc.*, No. SA CV 99-1575 DOC, 2000 U.S. Dist. LEXIS 16039, at *16 (C.D. Cal. Sept. 12,
25 2000); *see also In re Cylink Sec. Litig.*, No. C-98-4292 VRW, slip op. at 9 (N.D. Cal. Nov. 6,
26

27 ¹² Even Plaintiffs do not characterize Versant’s promise to provide 30 days of free
28 consulting as a *significant* vendor obligation. (Opp. at 16:3-9.)

1 2000) (no scienter despite restating two quarters; accounting principles may have been misapplied
2 through mistake, inadvertence or negligence). Here, the allegations are far weaker because,
3 despite Plaintiffs' claims of accounting irregularities, Versant has never restated its financials,
4 and Plaintiffs do not allege that any auditor or analyst ever has questioned them. This Court
5 previously held that "it is at least as likely that any false or misleading financial reports were the
6 result of gross negligence or some lesser form of negligence rather than deliberate recklessness."
7 *Versant I* at 30:14-17. The TAC adds nothing to strengthen Plaintiffs' case.

8
9 **II. PLAINTIFFS DO NOT MEET THIS COURT'S REQUIREMENTS
FOR PLEADING ON INFORMATION AND BELIEF.**

10 Plaintiffs have no real response to Defendants' showing that the TAC still fails to include
11 sufficient particularity in its information and belief allegations. Contrary to Plaintiffs' assertion
12 (Opp. at 24), they have revealed their source's position only in connection with allegations that
13 AT&T, Fleet Service Corporation, and Sprint experienced technical glitches, and that Versant's
14 CEO and CFO scheduled calls with analysts. (TAC ¶¶ 37(d), 37(e), 39, 59(g).) All remaining
15 information and belief allegations are attributed to unnamed sources for whom no title or position
16 — or any other facts indicating knowledge or reliability — is disclosed. (*See, e.g.*, TAC ¶¶ 28,
17 31, 33, 37, 43, 51, 57, 59.) Plaintiffs merely state that certain allegations are confirmed by "an
18 employee in Versant's Corporate Marketing Department" or "an employee in Versant's Finance
19 Department." Contrary to Plaintiffs' assertion (Opp. at 24), this vague boilerplate does not cure
20 the Court's legitimate concern regarding the uncertainty of the source. *See* Dec. 22, 2000
21 Transcript at 6:6-7. This source still could be any employee in those departments with absolutely
22 no connection to any relevant information, and no personal knowledge of the facts that she/he
23 espouses. Although almost the entire complaint is attributed to the ubiquitous Marketing
24 Department employee, Plaintiffs allege only a single meeting and no conversations or business
25 deals in which that employee actually participated.¹³

26
27 ¹³ For reasons discussed above in the Falsity and Scienter section, Plaintiffs' e-mail
28 allegations also continue to fail to meet the Court's information and belief requirements.

Footnote continues on next page

1 This Court repeatedly and expressly has held that the information and belief allegations
2 underlying Plaintiffs’ Microsoft Wolfpack and Versant Java Interface falsity allegations were
3 inadequate (*Versant I* at 17; *Versant II* at 14) — and Plaintiffs have no adequate response to
4 Defendants’ showing that nothing has changed. Plaintiffs point to the TAC’s added references to
5 internal documents, news articles, and information obtained from former Versant customers and
6 Versant employees. (Opp. at 8, citing TAC Exhs. A, F, G, and H and ¶¶ 33 and 59.) However,
7 the added Buzzeo Declaration (Ex. A) and financial documents (Exs. F, G, H) have no relevance
8 whatsoever to Plaintiffs’ assertion that Defendants had contemporaneous knowledge of the
9 allegedly false product compatibility statements. The repeated allegations of e-mails (with no
10 alleged recipients) and complaining customers likewise provide no support for the proposition
11 that Defendants had contemporaneous knowledge of the alleged falsity of those statements. The
12 only addition to the TAC that even relates to those allegations is the superficial addition of
13 “Marketing” as the department in which Plaintiffs’ source worked in some unknown capacity and
14 unknown location with no allegations regarding the basis for his or her supposed knowledge.
15 Under the Reform Act and this Court’s Orders, Plaintiffs’ pleading of this source is insufficient.

16 Plaintiffs likewise have no adequate response to Defendants’ showing that the TAC still
17 fails to meet this Court’s clear instructions on identifying specifically which allegations are pled
18 on information and belief. *See Versant II* at 12. Although Plaintiffs insist that they have
19 complied, they still cite only to the ambiguous statement in the TAC that certain categories of
20 allegations are based on actual knowledge and that unless “otherwise indicated, the remaining
21 allegations are made on information and belief.” (Opp. at 23, citing TAC ¶ 2.) In fact, the cited
22 paragraph of the TAC is virtually identical to the corresponding paragraph of the SAC.

23 **III. PLAINTIFFS FAIL TO PLEAD DEFENDANTS’ LIABILITY FOR**
24 **STATEMENTS TO OR FROM ANALYSTS.**

25 Plaintiffs’ assertion that they have remedied the deficiencies of their pleading of analyst
26 statements is false, because no new material allegations have been added. There still are no

27 Plaintiffs fail to identify *how* the author is related to Versant or its officers, *what* the e-mails
28 actually said, and often *who* received the e-mails. *See Versant II* at 14.

1 particular allegations regarding the content of Defendants’ supposed statements to the analysts,
2 when or where the communications occurred, the context in which the information was provided,
3 or which Defendant supposedly provided the information.¹⁴

4 In defending the TAC, Plaintiffs painstakingly ignore this Court’s holding that quoting
5 statements that appear on the face of the analyst reports such as “meeting with management
6 confirms,” “Management believes,” and “Management indicated” is not adequate because “these
7 are not direct statements by Defendants and must still somehow be linked to them.” *Versant II* at
8 16. Likewise, Plaintiffs completely disregard this Court’s holding that generic allegations that the
9 CEO and CFO regularly spoke with analysts “does not meet the standard for pleading on
10 information and belief.” *Versant II* at 17. Plaintiffs cannot state a claim based on their
11 allegations of false analyst statements. (*See, e.g.*, TAC ¶¶ 38, 44, 50, 55 (“on track,” “business
12 trends healthy,” “healthy pipeline,” “diversified revenue stream”).)

13 Plaintiffs’ citation to inapposite, pre-Reform Act, and non-Ninth Circuit authorities does
14 not help their case. *Bourjaily v. United States*, 483 U.S. 171 (1987), dealt only with the
15 admissibility of hearsay evidence in a criminal (cocaine) trial. *Alfus v. Pyramid Tech. Corp.*, 764
16 F. Supp. 598 (N.D. Cal. 1991), *Kas v. Caterpillar, Inc.*, 815 F. Supp. 1158 (C.D. Ill. 1992), and
17 *Simon v. Am. Power Conversion Corp.*, 945 F. Supp. 416 (D.R.I. 1996), were all decided under a
18 pre-Reform Act standard that applied a less stringent information and belief requirement. *See*
19 *Versant I* at 11. *Helwig v. Vencor, Inc.*, 251 F.3d 540 (6th Cir. 2001), is distinguishable because,
20 in that case (and unlike here), the plaintiffs apparently alleged the timing and contents of the
21 defendants’ discussions with the analysts.

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26 ¹⁴ Compare *In re Secure Computing Corp. Sec. Litig.*, C-99-01927 CW, slip op. at 17
27 (N.D. Cal. Aug. 21, 2001) (“*Secure Computing IF*”), (finding sufficient allegations that identify
28 dates, locations, speakers, and content — both of the defendants’ statements to analysts and of the
analysts’ statements to the public). A copy of that opinion is attached hereto as Exhibit A.

1 **IV. PLAINTIFFS’ NON-ACCOUNTING ALLEGATIONS FAIL FOR**
2 **ADDITIONAL REASONS.**

3 **A. Versant’s Accurate Statements Of Fact Are Not Actionable.**

4 Plaintiffs do not even address — much less refute — that their claims based on Versant’s
5 accurate statements of fact fail as a matter of law. Plaintiffs do not dispute, for example, that
6 Versant’s announcement that it was relocating its corporate headquarters (TAC ¶ 30) or that it
7 had hired a new CEO (TAC ¶ 58) are non-actionable accurate statements of fact. Likewise,
8 Plaintiffs do not dispute that Defendants’ statements regarding the introduction of Versant
9 Multimedia Access was not misleading in any manner. (TAC ¶ 42.) Nor do Plaintiffs dispute
10 that Versant’s release of “Versant Java Direct Interface” in May 1997 was distinct from its release
11 of “Versant Java Interface” in December 1997. (*See* SAC ¶ 37(b).) As the Court already has
12 held, such statements are not actionable. *Versant II* at 15; *Versant I* at 15.

13 **B. Versant’s Vague Statements Of Optimism Are Not Actionable.**

14 Without addressing or distinguishing Defendants’ authorities (Def. Mem. at 15-16),
15 Plaintiffs continue to insist that Defendants’ vague statements of optimism are actionable. (Opp.
16 at 8-9.) Plaintiffs are wrong on the law. “General statements of optimism and ‘puffing’ about a
17 company or product are not actionable” (*Versant I* at 14:4-5), and “[n]o matter how untrue a
18 statement may be, it is not actionable if it is not the type of statement that would significantly
19 alter the total mix of information available to investors.” *Versant I* at 14, *Versant II* at 15. *See*
20 *Kane*, 2000 U.S. Dist. LEXIS 19984, at *8-9.

21 *Warshaw v. Xoma Corp.*, 74 F.3d 955 (9th Cir. 1996), and *Hanon*, upon which
22 Plaintiffs rely, discussed whether the plaintiffs had pled that the defendants’ statements were false
23 when made, and *Kaplan v. Rose*, 49 F.3d 1363 (9th Cir. 1994), considered whether the plaintiffs
24 could prove reliance and scienter. These cases never mention, much less reject, the vagueness
25 doctrine. And courts (including this Court on earlier motions to dismiss here) have routinely
26 rejected the exact argument that Plaintiffs make here based on these same authorities. *See*
27 *Versant II* at 15-16; *Versant I* at 14-15; *Stack v. Lobo*, 903 F. Supp. 1361, 1371 (N.D. Cal. 1995)
28 (“Plaintiffs’ reliance on *Kaplan v. Rose* . . . for the proposition that an optimistic statement such

1 as this can be actionable is misplaced. . . . The only statements in *Kaplan* that the Ninth Circuit
2 found to be material were far more specific than those at issue here.”); *In re OPTi Sec. Litig.*,
3 No. C-95-3434 SBA, slip op. at 17-18 (N.D. Cal. Mar. 31, 1997) (plaintiffs’ citation to
4 *Warshaw v. Xoma Corp.* “does not sustain plaintiffs’ claim. . . . [T]he statements attributed to
5 defendants are ‘soft’ statements which no reasonable investor would rely on in making
6 investment decisions.”).

7 As to individual statements, Plaintiffs recite Defendants’ alleged statement that
8 “Versant was well positioned to be the next big database company” (Opp. at 6:18, citing TAC
9 ¶ 56), which this Court already has ruled is inactionable (*Versant II* at 15-16), and vague
10 statements of optimism by analysts that Versant was “on track.” (Opp. at 6, 7, 9.)¹⁵ Even if the
11 analysts’ “on track” statements could be attributed to Defendants (which they cannot), they are
12 not actionable. *See Copperstone v. TCSI Corp.*, No. C-97-3495 SBA, 1999 U.S. Dist. LEXIS
13 20978, at *26 (N.D. Cal. June 19, 1999) (analyst report that “business was ‘on track’” was an
14 “inactionable, amorphous statement of corporate optimism”). In *In re Secure Computing Corp.*
15 *Sec. Litig.*, 120 F. Supp. 2d 810, 818 (N.D. Cal. 2000), this Court found potentially actionable the
16 defendants’ specific statements that “Secure was on track to meet analysts’ earnings expectations
17 for the first quarter of 1999.” There is no similar specific adoption of analysts’ forecasts here.

18 C. Versant Specifically Warned Of Risks To Its Business.

19 Plaintiffs erroneously argue that the bespeaks caution doctrine does not apply because
20 Defendants’ statements were not forward-looking. (Opp. at 13.) The Reform Act defines
21 “forward-looking statements” to include “any statement of the assumptions underlying or relating

22
23 ¹⁵ Plaintiffs assert (Opp. at 9) that anything an executive says and anything an analyst
24 writes down is actionable because the SEC supposedly requires conference calls to be open to the
25 public. Plaintiffs’ citation to newspaper reports on Regulation FD have nothing to do with this
26 case. *See Pludo v. Morgan Stanley Dean Witter & Co.*, 01 Civ. 7072 (MP) 2001 U.S. Dist.
27 LEXIS 12666, at *1 (S.D.N.Y. Aug. 21, 2001) (dismissing securities complaint, stating “[a]
28 complaint is not a vehicle in which to air and put in issue the views of newspapers, magazines,
and social engineers, and their conclusions.”) In any event, Regulation FD does not require *all*
conference calls to be open to the public, but only requires public disclosure when any “*material*
non public information” is being disclosed. 17 C.F.R. § 243.100(a) (2001) (emphasis added).
Under Plaintiffs’ view, corporate executives could *never* talk to analysts privately, no matter how
immaterial the information discussed.

1 to any statement” concerning projections, plans, and objectives of management or statements of
2 economic future performance. 15 U.S.C. § 78u-5(i)(1)(A)-(D). Defendants’ alleged statements
3 that concerned the future performance of Versant (actually made only by analysts) meet this
4 definition. Indeed, the Ninth Circuit specifically held that statements regarding business being
5 ‘on track’ are “optimistic predictions” and “forward looking.” *See Ronconi*, 253 F.3d at 430.¹⁶

6 Defendants quoted and attached numerous examples of Versant’s specific cautionary
7 statements addressing the success of its products, market acceptance of specific products, its
8 inability to assure profitability, and its dependence on certain customers that previously made up
9 45% of its revenues, all of which speak to the allegedly misleading statements. (Def. Mem at 17;
10 Katzin Decl. Exs. N, O, P.) Plaintiffs responded with citations to inapposite authority. In *Hi/fn*,
11 the court rejected the bespeaks caution defense where the cautions were issued months before
12 (and never after) the allegedly misleading statement. *See Hi/fn*, 2000 U.S. Dist. LEXIS 11631, at
13 *14-17. Here, Versant issued cautionary statements shortly before and soon after the allegedly
14 misleading statements. (*See* Def. Mem. at 17-18.) Additionally, *In re Convergent Techs. Sec.*
15 *Litig.*, 948 F.2d 507 (9th Cir. 1991), upon which Plaintiffs rely, actually held that the disclosures
16 were sufficient to protect the allegedly misleading statements. *See id.* at 515-16.

17 Likewise, Plaintiffs’ contention (Opp. at 13-14) that the “bespeaks caution” doctrine is
18 limited to cautionary statements in the same document as the alleged misrepresentation is
19 unsupported by both logic and precedent. “Courts have not required that the cautionary language
20 be in the same document as the allegedly false or misleading forward-looking statement.”
21 *Splash I*, 2000 U.S. Dist. LEXIS 15369, at *30-31. Indeed, the analysis Plaintiffs suggest “would
22 appear to contravene the precise principle underlying the bespeaks caution doctrine, that the
23 alleged misstatements be analyzed *in context*.” *OPTi*, slip op. at 24 (emphasis in original). The
24 relevant context in securities cases is not each discrete document allegedly containing a
25 misstatement, but the “‘total mix’ of information made available” to the investor. *Id.*; *see also In*
26 *re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1408 (9th Cir. 1996); *WOW*, 35 F.3d at 1413 n.2;

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28 ¹⁶ *Secure Computing II* did not address *Ronconi*.

1 *Versant I* at 14.¹⁷

2 The fact that Versant included its cautionary statements in its SEC filings is a crucial
3 factor in this “total mix” of information. Courts place special emphasis on the nature of the
4 document containing the cautionary statements. *See Grossman v. Novell, Inc.*, 120 F.3d 1112,
5 1122-23 (10th Cir. 1997). When cautionary statements are contained in “formal documents of
6 considerable legal weight” — such as SEC filings — they limit alleged misstatements in
7 subsequent press releases and interviews. *Id.*; *Splash I*, 2000 U.S. Dist. LEXIS 15369, at *31-32
8 (adopting the reasoning in *Grossman* and emphasizing the “considerable legal weight” of SEC
9 filings). Versant’s repeated and detailed cautions preclude liability for allegedly misleading
10 statements about the company’s prospects. (*See* Def. Mem. at 17-18.)

11 CONCLUSION

12 For the reasons stated above, Defendants respectfully request that the Court dismiss the
13 Third Amended Complaint without leave to amend, as allowing Plaintiffs a fifth opportunity to
14 plead would be futile.

15
16 Dated: August 31, 2001

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26 ¹⁷ Once again, the cases cited by Plaintiffs are inapposite. In these cases, the courts ruled
27 upon and rejected the merits of the “bespeaks caution” claims, but did not reject them on the
28 ground that the cautions and allegedly misleading statements were in different documents. *See*
Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir. 1995) (pre-Reform Act); *Provenz v. Miller*, 102
F.3d 1478, 1493 (9th Cir. 1996) (pre-Reform Act); *Hi/fn*, 2000 U.S. Dist. LEXIS 11631, at *16;
Copperstone, 1999 U.S. Dist. LEXIS 20978, at *44-45.