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INTERMUNE, INC.  
8

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION  
12

13 In re INTERMUNE SECURITIES  
LITIGATION

Case No. C-03-2954-SI

**DEFENDANTS' REPLY MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS**

CLASS ACTION

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16  
17 This Document Relates to:  
ALL ACTIONS

Date: July 30, 2004  
Time: 9:00 a.m.  
Judge: Honorable Susan Illston  
18 Trial Date: Not yet set.

1 **I. INTRODUCTION**

2 Plaintiffs’ lengthy opposition memorandum (“Opp.”) succeeds only in reiterating, and  
3 thereby highlighting, the logical flaws embedded in the FAC.<sup>1</sup> Conclusory allegations, colorful  
4 rhetoric and misquoted statements, however, are no substitute for the detailed facts required under  
5 the PSLRA.

6 Perhaps sensing this, Plaintiff concludes his brief by requesting leave to amend, which  
7 would result in the filing of a third complaint in this case. Leave to amend should be denied  
8 because the laundry list of Plaintiff’s proposed amendments promises only more of the same:  
9 generalized, vague, elliptical accusations that will once again prove legally insufficient.

10 **II. ARGUMENT**

11 **A. Plaintiff’s Failure to Provide Any Identifying Details Concerning His**  
12 **“Confidential Source” Is Fatal to the Allegations Based on the Source.**

13 Despite the fact that the most critical allegations of the FAC are based on a single  
14 unidentified “confidential source,” Plaintiff does not attempt to defend the use of this pleading  
15 technique until near the end of his brief, and then cites only three cases, each of which is readily  
16 distinguishable. A review of these cases, together with those previously cited by Defendants,  
17 proves that the allegations based on Plaintiff’s “confidential source” are insufficient as a matter of  
18 law.

19 The parties appear to be in agreement on the legal standard applicable to allegations based  
20 on unnamed persons, and differ only in the application of that standard to the allegations of the  
21 FAC. Thus, Plaintiff is technically correct that his “failure to name sources” will not, by itself,  
22 “doom” a complaint that is “otherwise well-plead” (Opp. at 25:23-24; case citation omitted); but  
23 Defendants never argued to the contrary, and Plaintiff is merely knocking down a “straw man”  
24 argument. More importantly, Plaintiff has not even attempted to refute — because he cannot —  
25 that he must allege, with particularity, facts establishing that the confidential witness is likely to  
26 possess the information attributed to him. *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp.

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28 <sup>1</sup> Unless otherwise indicated, capitalized terms will have the same meanings as in Defendants’  
opening memorandum in support of this motion (“Opening Memo”).

1 2d 1248, 1271 (N.D. Cal. 2000); *Berger v. Ludwick*, C-97-0728-CAL, C-97-2347-CAL, 2000 WL  
2 1262646, at \*5 (N.D. Cal. Aug. 17, 2000), *aff'd mem.*, 2001 WL 868355 (9th Cir. 2001). And,  
3 because he relies upon a confidential witness to support his allegations of falsity, he must allege  
4 “enough particularized detail to support a reasonable conviction in the informant’s basis of  
5 knowledge.” *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1112 (N.D. Cal. 2003)  
6 (quoting *In re Northpoint Comm. Group, Inc., Sec. Litig.*, 221 F. Supp. 2d 1090, 1097 (N.D. Cal.  
7 2002)).

8 There are no such “particularized details” in the FAC. The entire description of the single  
9 “confidential source” is contained in ¶ 16, where it is alleged only that he or she was “employed  
10 as a sales representative from December 2001 through June 2003.” That’s it — nothing more.  
11 Elsewhere in the FAC, it is alleged that InterMune employed at least 80 such persons as of early  
12 2003. (¶¶ 55, 79.) In other words, the “confidential source” was not even a manager of any kind;  
13 he or she was one of 80 low-level sales representatives.

14 But it gets even worse. According to ¶ 77 of the FAC, before December 2002, the sales  
15 force “was divided in two parts” — “immunology specialists” who “called on pulmonologists”  
16 (and presumably were involved with sales related to treatment of IPF), and “infectious  
17 disease/oncology specialists” who “did not call on pulmonologists” (and were presumably  
18 involved with sales related to FDA-approved indications (*see* ¶ 36)). Plaintiff does not even  
19 allege which part of the sales force the “confidential source” came from, even though this would  
20 be extremely important to know in evaluating his or her basis of knowledge of how Actimmune  
21 was marketed for IPF.

22 In the absence of this critical information, the Court is asked to accept this unidentified  
23 person as an authority on what “every sales representative” did on a weekly basis (¶ 57); what the  
24 national sales manager discussed with regional sales directors (¶ 58); the information InterMune  
25 “required each prescribing doctor” to send to a distributor, Priority Health Care (¶ 62); the  
26 contents of reports provided by Priority to InterMune (*id.*) and to its sales representatives (¶ 63);  
27 and what all sales representatives “could and did” do to fulfill their “duty” to follow up on that  
28 information (¶ 64).

1           These are hardly trivial matters, because critical allegations of the FAC depend *entirely*  
2 on a logical chain that is supported *solely* by the supposed knowledge of the unnamed source.  
3 For example, Plaintiff alleges that all Defendants “knew, or were deliberately reckless in not  
4 knowing” that InterMune’s patient estimates were false because they had access to certain  
5 documents: prescriptions (¶ 62), “weekly reports” (*id.*); email notices of new prescriptions (¶ 63),  
6 and “Patient Referral/Medication Request Forms” (¶ 64). (*See also*, Opp. at 10:12-14.) The  
7 unnamed source is the *sole* basis for *all* allegations concerning (1) what information all of these  
8 documents contained, (2) who produced each of them, (3) how promptly they were produced, (4)  
9 how regularly they were produced, (5) who received them and (6) when they were received.

10           Under the cases cited above, Plaintiff’s burden of pleading both falsity and a strong  
11 inference of scienter in great detail simply cannot be sustained when so much of the complaint is  
12 based on matters supposedly within the knowledge of a single unidentified, low-level employee.  
13 As the court observed in *In re McKesson HBOC, Inc.*, 126 F. Supp. 2d at 1271, where a plaintiff  
14 relies on an unnamed source(s) as the “only basis” for his allegations of fraud, “it may be proper  
15 to require plaintiff to identify the source by name.” (citation omitted).<sup>2</sup> Even if the source were  
16 not identified by name, however, there can be no question that before a complaint based on such  
17 allegations could stand, “more particularized detail” must be provided “to support a reasonable  
18 conviction in the informant’s basis of knowledge.” *Wietschner*, 294 F. Supp. 2d at 1112.

19           A review of the cases relied on by Plaintiff for the use of an unnamed source readily  
20 confirms the insufficiency of the “confidential source” allegations of the FAC. In *In re Adaptive*  
21 *Broadband Sec. Litig.*, No. C 01-1092 SC, 2002 WL 989748 (N.D. Cal. April 2, 2002), Judge

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22           <sup>2</sup> Plaintiff (Opp. at 26 n.20) attempts to distinguish *McKesson HBOC* on two bases, neither of  
23 which is persuasive. Plaintiff claims this case is different because the unnamed witness’s  
24 information is “confirmed by documents.” The problem here is that the contents of the  
25 “documents” are described exclusively by the witness, so in effect he or she is “confirming” his  
26 or her own information. This is hardly *independent* corroboration. Second, plaintiff claims that  
27 the “allegations of falsity are based on Defendants’ own admissions.” Even if one assumed that  
28 the 3,300-patient estimate was later acknowledged to have been *mistaken*, the key inquiry for  
purposes of a § 10(b) violation, as the *McKesson HBOC* court observed, is *allegations of fraud* —  
i.e., whether the estimates were *knowingly false*. Where *scienter* hinges on the claims of an  
unnamed witness, as it does here, Plaintiff is clearly required to provide far more information  
about his source than what is provided in the FAC.

1 Conti upheld “confidential witness” allegations attributed to four “long-term employees whose  
2 positions [were] described in detail.” One was a 15-year employee who was “a manager in  
3 charge of Adaptive’s order fulfillment department”; another worked in the finance division,  
4 “reported directly to [the CFO]” and was responsible for generating a regular report “detailing  
5 billings, bookings and backlog”; another was a 10-year employee who was a “department head-  
6 level information officer” in “the hub of Adaptive’s sales and order administration department”  
7 who reported to the CIO; and the fourth was an administrative assistant to the former CEO and  
8 former CFO. *Id.* at \*11.

9 Similarly, in *In re Seebeyond Techs. Corp. Sec. Litig.*, 266 F. Supp. 2d 1150 (C.D. Cal.  
10 2003), the allegations regarding confidential sources had been bolstered by a detailed declaration  
11 submitted by the plaintiff containing information that would be contained in a proposed amended  
12 complaint. The declaration set forth information indicating that two witnesses were manager-  
13 level employees and one was an executive, and each had specific job responsibilities that  
14 supported the notion that they could have the knowledge attributed to them. *See* 266 F. Supp. 2d  
15 at 1157-58, 1159. There can be no question that the unnamed witnesses alleged in that case were  
16 more numerous, far more seasoned, and, based on the descriptions provided by the plaintiff there,  
17 far more likely to have access to the information attributed to them than the single unnamed  
18 source here.

19 Finally, in *Broudo v. Dura Pharmaceuticals*, 339 F.3d 933 (9th Cir. 2003), *cert. granted*,  
20 ---S. Ct.---, 2004 WL 414107 (June 28, 2004), the Court of Appeals was of the view that the  
21 plaintiff should have been granted leave to amend to allege, “*inter alia*, statements by a  
22 confidential witness who has direct knowledge that at least two of the defendants discussed how  
23 they could make stock analysts ‘perceive’ that [the company] was doing better than it actually  
24 was and that one of the defendant’s oft-stated catch phrase to employees who questioned his  
25 tactics was ‘let ‘em catch us.’” 339 F.3d at 941. By contrast, the lone unnamed source in the  
26 FAC does not claim to have any knowledge of specific actions by, let alone quotations from, any  
27 Defendant.

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1           **B.     The Alleged Misrepresentations Claimed by Plaintiff Are Not Actionable.**

2           Plaintiff asserts (Opp. at 8-25) that InterMune made knowing misrepresentations  
3 concerning the numbers of patients receiving Actimmune; promotion of Actimmune for “off-  
4 label” use; doctors’ responses to the drug; sales force “disarray”; and revenues. The allegations  
5 concerning each subject matter are legally insufficient for multiple reasons.

6                   **1.     Allegations Relating to Patient Numbers are Not Actionable.**

7           Plaintiff takes issue with a single statement, made on April 29, 2003 and corrected six  
8 weeks later on June 11, 2003, that as of the end of the first quarter of 2003, an estimated 3,300  
9 patients were on Actimmune.<sup>3</sup> Plaintiff’s argument, however, is based on flagrant misreadings of  
10 the cited documents and reliance on inapposite authorities. Because Plaintiff can only make  
11 strained inferences by taking Defendants’ plain language out of context, the inferences drawn by  
12 Plaintiff can and should be disregarded by the Court. *Gompper v. VISX, Inc.*, 298 F.3d 893, 897  
13 (9th Cir. 2002).

14                           **a.     The 3,300-patient statement was clearly labeled as an estimate.**

15           Plaintiff’s attempt to claim that the 3,300-patient statement was knowingly false when  
16 made hinges on Plaintiff’s contention that InterMune portrayed the patient number “in precise  
17 terms” (Opp. at 8:25) — in other words, that InterMune claimed pinpoint knowledge of the  
18 patient number when it could not do so. Plaintiff’s assertion is simply absurd.

19           Any reasonable reading of the April 29, 2003 conference call transcript makes clear that  
20 the 3,300 number was an estimate. Indeed, at ¶ 113 of the FAC, Plaintiff accurately quotes CFO  
21 Sharon Surrey-Barbari as saying, “Currently, we estimate 3,300 patients are on Actimmune.”  
22 (*See also*, Seyedin-Noor Decl., Ex. L at 5.) Notwithstanding the CFO’s plain language, however,  
23 Plaintiff argues that InterMune communicated a “precise” number because, when a questioner  
24 later asked, “... did you say 3,300 on Actimmune at the quarter?”, Ms. Surrey-Barbari answered  
25 with one word, “Yes,” without repeating the word “estimate.” Similarly, Plaintiff quotes a  
26 subsequent statement in the same conference call by Keith Katkin, a marketing vice president,

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28 <sup>3</sup> Plaintiff has not disputed any other patient estimates, including the estimate issued in February  
2003 that as of the end of 2002, an estimated 3,000 patients were on Actimmune.

1 that “we did add 300 patients during the quarter,” and ties that statement to a statement by Mr.  
2 Katkin in a February, 2003 conference call months earlier to the effect that “[w]e exited 2002  
3 with 3,000 patients on the drug.” (Opp. at 8:21-25.) To make even this strained inference,  
4 Plaintiff omits the statement made by Ms. Surrey-Barbari at the beginning of the February, 2003  
5 conference call: “Currently . . . an *estimated* 3,000 IPF patients are on the drug.” (Seyedin-Noor  
6 Decl., Ex. K at 9; emphasis added.) In each instance, InterMune carefully used the word  
7 “estimate” in its prepared remarks, but failed to insert it when a speaker answered a question on  
8 the call. It is ludicrous for Plaintiff to contend, on this basis, that Defendants knowingly intended  
9 to deceive the market into believing they had precise knowledge of the patient number; indeed,  
10 the exact opposite inference must be drawn: that the precise number was not knowable. Under  
11 *Gompper*, the inferences Plaintiff attempts to draw can and should be rejected.

12 **b. Allegations based on the “confidential source” are insufficient**  
13 **to establish scienter.**

14 As discussed previously, Plaintiff relies entirely on a “confidential source” for his  
15 allegations that the 3,300-patient estimate was known to be false at the time it was made. For this  
16 reason, the allegations of the FAC are insufficient to establish scienter.

17 **c. The “internal documents” are insufficiently described to**  
18 **establish scienter.**

19 Plaintiff argues, in essence, that the Defendants had access to “internal documents” that, if  
20 interpreted as Plaintiff would interpret them, might have suggested the 3,300-patient estimate was  
21 erroneous. This argument suffers from several defects.

22 First, as explained above, the allegations concerning the content of the internal  
23 documents, the meaning of the data contained therein, and the “duties” of various employees with  
24 respect to the data, are all derived solely from the mysterious “confidential source,” and are  
25 therefore insufficient.

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1 Second, the document Plaintiff has dubbed the “Patient List” (presumably to suggest a  
2 straightforward catalog of all patients) was clearly not known as such by InterMune. Plaintiff  
3 admits as much when he states that he is prepared to amend the FAC to allege “the name used by  
4 InterMune for its Patient Lists.” (Opp. at 29:8-9.)

5 Third, Plaintiff admits he has *withheld* information concerning these allegedly critical  
6 documents when he offers to amend the FAC to “provide . . . additional details regarding their  
7 content.” (*Id.*) This alone is reason to dismiss the FAC, since “when pleading on information  
8 and belief, a plaintiff must plead with ‘particularity’ by ‘provid[ing] *all* facts forming the basis for  
9 [plaintiff’s] belief *in great detail.*” *In re Hi/fn, Inc. Sec. Litig.*, No. C-99-4531 SI, 2000 WL  
10 33775286, at \*8 (N.D. Cal. Aug. 9, 2000) (Illston, J.) (quoting *In re Silicon Graphics, Inc. Sec.*  
11 *Litig.*, 183 F.3d 970, 983 (9th Cir. 1999) (emphasis added)).<sup>4</sup> Here, by claiming he could amend  
12 to provide *additional* facts, Plaintiff concedes he has not yet provided “*all facts*” and has omitted  
13 certain “details.” Defendants submit that under *Silicon Graphics* and *Hi/fn*, the Court cannot  
14 accept this admittedly incomplete description of key documents the Plaintiff claims to have at his  
15 disposal.

16 Plaintiff relies on two cases holding that descriptions of internal documents were  
17 sufficient to support a § 10(b) claim, but both are distinguishable. *In re Globalstar Sec. Litig.*,  
18 No. 01 Civ. 1748 (SHS), 2003 WL 22953163 (S.D.N.Y. Dec. 15, 2003), is a case from the  
19 Second Circuit which followed *Novak v. Kasacs*, 216 F.3d 300 (2d Cir. 2000), in which the  
20 Second Circuit rejected *Silicon Graphics* in favor of a more lenient standard under which scienter  
21 could be based on defendants’ mere “access to information contradicting their public statements.”  
22 216 F.3d at 308. Under *Silicon Graphics*, by contrast, the Ninth Circuit requires evidence that

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<sup>4</sup> As Defendants previously explained (Opening Memo at 13 n.7) the allegations of the FAC are made on information and belief. Plaintiff has not asserted otherwise.

1 defendant's statements were "consciously misleading." 183 F.3d at 985. In addition, the internal  
2 documents described in *Globalstar* offer a far more detailed account of the kind of information  
3 that contradicted the defendants' statements.<sup>5</sup>

4 Plaintiff also relies on *Hi/fn*, but in that case, this Court was presented with a far more  
5 concise collection of information, which the Court described as "details of specific memoranda,  
6 the particular defendants who received them, the date on which defendants received the  
7 memoranda, the format in which the memoranda were conveyed (i.e. electronic mail), and the  
8 information contained in those memoranda." 2000 WL 33775286, at \*8; *see also id.* at \*2. By  
9 contrast, the FAC here provides only sketchy and ambiguous information about the contents of  
10 the documents, *no* information about how, when, or to whom they were conveyed, and *no*  
11 allegation that any individual Defendant ever saw any of them.

12 Remarkably, Plaintiff nowhere even contends that the information provided by Priority  
13 was either accurate or complete. This is a significant omission, because in the absence of such a  
14 contention, there is no basis to argue that InterMune's patient estimates actually contradicted the  
15 information available to them. Plaintiff weakly argues that it was the "duty" of "every sales  
16 representative" to "make sure the information was accurate and complete" (§ 62; Opp. at 10:22-  
17 25); but Plaintiff does not even claim that the "confidential source," purportedly a sales  
18 representative, or anyone else *ever actually did so*. Thus, the FAC actually suggests that if  
19 Priority's information were inaccurate, InterMune's top executives would not be able to  
20 determine this unless all of its 80 sales representatives performed checks that none of them is  
21 alleged to have performed. Compare this with the statement by defendant Harkonen on June 11,  
22 2003:

23 In particular one of the data points we got was the number of active patients from  
24 one of our lead specialty pharmacies, and what we found is that not all of these  
25 active patients is actually receiving Actimmune.

26 <sup>5</sup> In *Globalstar*, the confidential source was a "senior business development manager" and the  
27 documentary evidence contained detailed accounts of the number of Globalstar telephone  
28 subscribers and the amount of minutes sold to each. When combined with information about the  
company's "gateways" described in its Form 10-K, this information suggested that the company  
knew its statements about the rollout of gateways were misleading.

1 (Seyedin-Noor Decl., Ex. M at 5.) This possibility that Priority’s information was incorrect is not  
2 refuted by Plaintiff, and therefore the FAC does not raise a credible inference, let alone a strong  
3 inference, of intent to deceive. *Gompper, supra*.

4 The weak allegation that the Defendants “were able to determine” the number of patients  
5 on Actimmune because information was provided to the Company by one of its distributors and it  
6 was the “duty” of 80 representatives to check it for accuracy pales in comparison to the situations  
7 in the cases relied upon by Plaintiff, in which defendants were directly confronted with evidence  
8 their optimistic statements could not be true. *See, e.g., Hi/fn*, 2000 WL 33775286, at \*2  
9 (defendants received an internal memorandum discussing inventory build-up at a major customer;  
10 sales vice president then went to the customer and “received confirmation” of same from the  
11 customer).

12 Finally, Plaintiff suggests (Opp. at 11:2-17) that the fraudulent intent of Defendants  
13 Harkonen and Surrey-Barbari is established because each of them signed certifications stating  
14 that they had “designed . . . procedures to ensure that material information . . . was made known  
15 to [them].” However, the fact that the Company has designed such procedures hardly establishes  
16 that the procedures actually worked. In fact, many things also would have to be true for these  
17 certifications to suggest even a weak inference of scienter: the documents would have to mean  
18 what Plaintiffs claim they mean; they would have to have contained accurate data; that data  
19 would have to have been correctly interpreted by lower-level employees; and those employees  
20 would have to have reported their analyses to the individual Defendants. Without each of these  
21 events having taken place, Plaintiff could establish, at most, negligence on the part of the  
22 Defendants, not the scienter required to support their claims.

23 **2. Allegations Regarding “Solicitation of Actimmune Sales for Off-Label**  
24 **Use” are Not Actionable.**

25 Plaintiff’s claim that the putative class was damaged by false statements about the  
26 solicitation of Actimmune sales for “off-label” use is similarly unfounded for a number of  
27 reasons.

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**a. Plaintiff does not specifically allege any illegal or improper activity.**

Plaintiff initially makes the unwarranted assumption that any activity *resulting in* a sale of Actimmune for “off-label” use is *per se* improper. Understandably, Plaintiff offers no support for this claim.

InterMune has never made a secret of the fact that the vast majority of its Actimmune revenues were derived from sales for “off-label” use; and that while the FDA prohibits “promotion” of drugs for off-label usage, off-label usage itself is “common” and the FDA does not prevent doctors from receiving information about such uses or prescribing for them. (¶¶ 36-37, 65; Seyedin-Noor Decl., Ex. B (2002 Form 10-K) at 17). As the FAC explicitly recognizes, a sales strategy could properly include providing educational materials to doctors regarding disease awareness even in the absence of a request for the same, and even providing “unapproved use information” if a doctor asked for it. (¶ 65.) It could hardly be a secret, then, that InterMune would develop a strategy to maximize sales of Actimmune for IPF in a manner consistent with regulatory restrictions. Indeed, it could be argued that InterMune had an obligation to its shareholders to do so. In fact, the FAC quotes an article referring to a massive effort by sales representatives “just to educate [doctors] about Actimmune.” (¶ 56.) There is no hint, nor could there be, that such an effort was improper.

Plaintiff, however, ignores this and simply assumes that any strategy designed to enable doctors to obtain Actimmune for IPF was illegal.<sup>6</sup> Plaintiff takes allegations that InterMune had a “sales goal” for its lead drug (¶ 69), or that it ranked its sales representatives on “monthly sales volume” (¶ 68) as evidence that InterMune “required its sales force to actively solicit sales of Actimmune for use in IPF.” (Opp. at 16:1-2.) This conclusory allegation, however, is not

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<sup>6</sup> See, e.g., Opp. at 21:9-12: (“Of course, even [personal contact with pulmonologists] violates FDA regulations; therefore InterMune disguises the marketing as educational outreach.”) Nowhere does Plaintiff either allege what InterMune was supposedly telling doctors, or cite an FDA regulation suggesting any impropriety. Yet this unsupported notion of illegality is at the heart of Plaintiff’s allegations of falsity and scienter.

1 supported by the facts alleged in the FAC, which simply set forth that a publicly traded company  
2 maintained goals for the sales of its lead product and monitored progress toward those goals.<sup>7</sup>

3 **b. An allegation based on an “unsent” letter by an unidentified**  
4 **person is inherently unreliable.**

5 Moreover, a central allegation (¶ 68) is based on an “unsent” letter by an unnamed  
6 “regional sales director,” which for reasons discussed previously, is inherently unreliable. (Why  
7 was this letter “unsent”? Who was it originally destined for?) To make matters even more  
8 obscure, the “letter” refers to conduct alleged to have taken place in July 2001, fully 18 months  
9 before the commencement of the purported “class period.” Finally, the Plaintiff’s conclusion that  
10 this “unsent letter” is indicative of improper activity is undercut by the fact that the unknown  
11 author placed the key word “selling” in quotation marks, suggesting that the author knew  
12 InterMune was not “selling” Actimmune for IPF in any strict sense of the word.

13 **c. Plaintiff fails to allege loss caused by the alleged improper**  
14 **marketing.**

15 In response to Defendants’ observation that Plaintiff had not pled loss causation in  
16 connection with his allegations of improper marketing, Plaintiff cites *Broudo v. Dura*  
17 *Pharmaceuticals, Inc., supra*. *Certiorari* has been granted in that case, however (---S. Ct.---,  
18 2004 WL 414107 (June 28, 2004)), which casts doubt upon its precedential value. *Johnson v. City*  
19 *of Oakland*, No. C-97-283 JSB, 1997 WL 776368, at \*3 n.3 (N.D. Cal. Dec. 3, 1997). Indeed, the  
20 court in *Broudo* acknowledged that its relaxed view of loss causation was at odds with the law of  
21 the Third and Eleventh Circuits. 359 F.3d at 938 n.4 (citing *Semerenko v. Cendant Corp.*, 223  
22 F.3d 165, 185 (3d Cir. 2000); *Robbins v. Kroger Properties, Inc.* 116 F.3d 1441, 1448 (11th Cir.  
23 1997)).

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27 <sup>7</sup> Presumably if InterMune had not done so, shareholders would accuse the company’s  
28 management of malfeasance by failing to design and implement procedures to enable the  
company to attain its business goals.

1                   **3. Allegations Regarding “Doctors’ Responses to Actimmune” are Not**  
2                   **Actionable.**

3                   Here again, Plaintiff strains to create inferences based on taking snippets of statements out  
4 of context. The inferences suggested by Plaintiff can and should be rejected.

5                   **a. Keith Katkin’s statement about the Chest Conference is**  
6                   **misrepresented by Plaintiff.**

7                   Plaintiff’s claim that the Defendants willfully misled investors about “doctors’  
8 receptivity” to Actimmune is largely predicated on a single phrase uttered by InterMune’s  
9 marketing vice president, Keith Katkin, in response to a question during a February, 2003  
10 conference call. (Opp. at 17:6-20:2.) Plaintiff asserts that Mr. Katkin, referring to the November  
11 2002 annual meeting of the American College of Chest Physicians, stated, “Everything that came  
12 out of Chest was very positive for [InterMune].” (¶ 97; Opp. at 17:19-20.) When this statement  
13 is read in context, it is evident that Plaintiff has seriously distorted the record.

14                   There is no dispute fact that the fourth quarter of 2002 produced encouraging financial  
15 and operational results for InterMune. During the February 19, 2003 conference call discussing  
16 those results, Ms. Surrey-Barbari estimated that 3,000 patients were now on Actimmune, up from  
17 an estimated 2,500 during the third quarter of 2002. (Seyedin-Noor Decl., Ex. K at 9, 26-27.)  
18 Actimmune revenues were \$37 million in the fourth quarter of 2002, compared to \$13.8 million  
19 in the fourth quarter of 2001. (*Id.* at 8.) Neither the financial results nor the patient estimates for  
20 that quarter have ever been challenged by Plaintiff.

21                   During the same call, however, InterMune candidly reported that the clinical trial results  
22 for Actimmune, as reported at the Chest conference, had not been successful. During prepared  
23 comments at the commencement of the call, Defendant Harkonen stated:

24                   Regarding Actimmune and IPF, in November 2002, at the annual meeting of the  
25 American College of Chest Physicians in San Diego, InterMune reported on data  
26 from randomized, controlled Phase III clinical trials, evaluating Actimmune for  
27 the treatment of idiopathic [sic], pulmonary fibrosis, or IPF, a fatal lung disease.  
28 *These data show that Actimmune did not demonstrate a statistically significant efficacy with respect to the primary or secondary endpoints; however, the overall analysis of survival of secondary endpoint in this trial suggested that Actimmune provides a survival benefit for patients with mild to moderate impairment in lung function.*

1 (*Id.* at 4 (emphasis added).) In other words, while the clinical trials had failed to establish  
2 efficacy along any of the designed “endpoints” of the trial, there was a suggestion that the drug  
3 might still help some people live longer. Obviously, this was not a successful trial, and  
4 InterMune said so.

5 Later in the conference call, Mr. Katkin, who is not a scientist, was asked the following question:

6 Jennifer Chao: Yes. Hi, everyone. Congratulations on a nice quarter. Just in  
7 trying to understand the dynamics for Actimmune a little bit better, can you tell  
8 us if you saw a stronger pickup in Actimmune sales post-chest; and according to  
9 your market intel. [intelligence], have you seen a significant increase in the  
physician base, or does it appear that it’s the same physicians writing more scrips  
[prescriptions]?

10 (*Id.* at 25.) Mr. Katkin responded:

11 Jennifer, the first part of the question – reactions post-chest – I think you can see  
12 represented in the number for the fourth quarter, which had a number of weeks  
13 post-chest in there, obviously, our run rate was very strong in the fourth quarter.  
So, everything that came out of chest was very positive for the organization. ...

14 (*Id.* at 26.)

15 Clearly, Mr. Katkin’s comment was directed at “the first part of the question,” which  
16 was, “Can you tell us if you saw a stronger pickup in Actimmune sales post-Chest?” His  
17 response simply was that the sales “run rate” was “very strong” in the fourth quarter, which  
18 suggested that sales were not negatively impacted by the news that was announced at the  
19 conference. In fact, the estimated patient numbers and the revenue numbers for the fourth  
20 quarter were encouraging, and have never been questioned.

21 To suggest, as Plaintiff does, that Mr. Katkin, a marketing executive, was trying to  
22 deceive the market by saying “everything” that occurred at the Chest conference, including the  
23 clinical trial results announced there and candidly discussed by Dr. Harkonen earlier in the  
24 conference call, was “positive” is simply ludicrous and speaks volumes of Plaintiff’s desperation  
25 to concoct a story of deception where none exists.

1                   **b. Dr. Harkonen’s statement that “whenever you can show an**  
2                   **apparent survival benefit ... doctors say they’re happy” is not**  
3                   **actionable.**

4                   Plaintiffs next attack a single sentence in Dr. Harkonen’s January 7, 2003 Bloomberg  
5                   News interview. The day before, InterMune had issued a press release disclosing data from a  
6                   follow-up clinical study of Actimmune for IPF. (Seyedin-Noor Decl., Ex. F.) While the data  
7                   suggested some survival benefit, it was apparently not as much as the market had hoped for, and  
8                   the stock dropped. Commenting on the market’s negative reaction, Dr. Harkonen candidly  
9                   acknowledged: “The market was hoping the survival numbers would improve, and there’s  
10                  disappointment they didn’t.” (¶ 85.) He continued: “Still, whenever you can show an apparent  
11                  survival benefit for patients who have an inevitably fatal disease, doctors say they’re happy.”

12                  Plaintiff’s extreme reaction to this mild bit of puffery defies logic. Plaintiff reacts as  
13                  though Dr. Harkonen were reporting on specific conversations with specific doctors;<sup>8</sup> quite  
14                  obviously he was not. Indeed, Dr. Harkonen was only reflecting the fact, still never disputed, that  
15                  despite the disappointing results announced two months earlier at the Chest conference, the  
16                  number of patients on Actimmune had continued to rise in the fourth quarter of 2002. As of  
17                  January 7, 2003, he could not be expected to have any more recent data.

18                   **c. InterMune never claimed to be reporting on specific views of**  
19                   **specific doctors.**

20                  Plaintiff’s claim about “doctors’ receptiveness” to Actimmune is predicated on the  
21                  misguided impression that the Company ever represented what any doctor was thinking. In fact,  
22                  all the Company was saying was that it had insight into “physician prescribing attitudes”  
23                  (Seyedin-Noor Decl., Ex. J at 12, quoted in Opp. at 19:3.) Clearly, what is meant by this is that  
24                  the general reaction of pulmonologists to Actimmune could be gauged by prescription trends, and  
25                  as of the end of 2002, the patient population was still increasing.<sup>9</sup>

26                  <sup>8</sup> *E.g.*, “Harkonen would have known by December, i.e., prior to his January 7 statement, that  
27                  doctors were *not* saying they were happy.” (Opp. at 20:19-20 (emphasis original).)

28                  <sup>9</sup> Plaintiff quotes “a company representative” stating, in November 2002, as to “physician  
                  prescribing attitudes,” that “that is something we can better comment on in December.” (*Id.*,  
                  quoted in Opp. at 19:4). From this Plaintiff concludes that by December, “people at InterMune  
                  must have known” that doctors’ attitudes were not positive. This is patently illogical, since at the

1 Plaintiff claims, nonetheless, that Dr. Harkonen's June 12, 2003 statement that "we  
2 believe that many physicians questioned the meaningfulness of the survival benefit" is essentially  
3 an admission that he had misled the market earlier about doctors' receptiveness to the drug. The  
4 entire quotation, however, makes it clear that because InterMune's direct interaction with doctors  
5 was limited by FDA marketing restrictions, InterMune could only present data at scientific  
6 conferences and gauge physician reaction by tracking prescription trends. (Seyedin-Noor Decl.,  
7 Ex. M at 4, quoted at length at Opp. at 17:11-16.) Because the patient numbers had continued to  
8 climb through the end of 2002, there is no basis to conclude that Dr. Harkonen or anyone else  
9 believed, in early 2003, that physicians were cutting back on their prescriptions of Actimmune.<sup>10</sup>

10 In sum, Plaintiff's claims that Defendants misrepresented doctors' attitudes towards  
11 Actimmune are based on strained and illogical inferences, which are overcome by far more  
12 powerful inferences that Defendants were not acting with intent to deceive. Plaintiff's claims are  
13 therefore not actionable. *Gompper*, 298 F.3d at 897.

14 **4. Allegations Regarding "Sales Force Disintegration" are Not**  
15 **Actionable.**

16 Plaintiff does not dispute Defendants' argument that "puffery" and statements of  
17 optimism are not actionable under the securities laws. (Opening Memo at 14-15.)  
18 Notwithstanding, Plaintiff illogically asserts that on January 30, 2003, when Dr. Harkonen  
19 announced the departure of the senior vice president of sales and extolled the virtues of the  
20 remaining team, he had an obligation to release detailed data concerning employee departures and  
21 reduced SG & A spending, and even to denigrate the "morale" of the sales force. (Opp. at 23:3-  
22 20.) Not surprisingly, Plaintiff cites no case authority to support this remarkable proposition, and  
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26 end of 2002, the estimated number of patients on Actimmune was still increasing.

27 <sup>10</sup> Plaintiff also claim that Defendants misled the market because "Defendants first claim[ed] that  
28 "doctors love the data" and then later admit[ted] that . . . doctors' responses had, in fact, been  
negative." (Opp. at 18 n.15.) No defendant ever stated that "doctors love the data"; this quote  
was lifted from an article written by an analyst in June 2003. (¶ 124.)

1 the cases he does cite are inapposite, since they all concern far more specific statements  
2 concerning past financial results or projected future events.<sup>11</sup> Were the law as Plaintiff contends,  
3 the “puffery” doctrine would be obliterated, and executives could never make enthusiastic  
4 statements about their products or people without also launching into an extended *apologia* about  
5 any negative events.

6 Plaintiff also complains that InterMune’s SEC filings misleadingly anticipated increased  
7 marketing expenditures for 2003 but failed to mention that SG&A spending during the first  
8 quarter of 2003 was lower than in the first quarter of 2002. (Opp. at 23:21-25:2.) The answer to  
9 this is simple. InterMune never forecasted SG&A spending by quarter, and was under no  
10 obligation to do so. Moreover, even after disclosing the reduced marketing expenditures during  
11 the first quarter of 2003, InterMune continued to forecast increased expenses on an annualized  
12 basis, just as it previously had (Seyedin-Noor Decl., Ex. C at 15.) Plaintiff has never alleged that  
13 this full-year projection was misleading at any time; rather, Plaintiff seems to be arguing that  
14 Defendants had a duty to make *quarterly* expense projections, which it had not previously done,  
15 due to first-quarter developments. Defendants are unaware of any authorities imposing such a  
16 duty.

### 17 5. Allegations Regarding Revenues are Not Actionable.

18 Plaintiff concedes (Opp. at 25:13-21) that his allegations concerning InterMune’s revenue  
19 projections are entirely dependent on his allegations concerning the 3,300-patient estimate  
20 disclosed on April 29, 2003. That is to say, Plaintiff alleges that the Individual Defendants

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21 <sup>11</sup> In *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1064 (9th Cir. 2000), the court held that an  
22 officer could be liable for *signing financial statements* “in the face of potentially alarming  
23 information concerning Everex’s financial condition.” In *Helwig v. Vencor, Inc.*, 251 F.3d 540,  
24 561 (6th Cir. 2001) it was held that a health care company could be liable because it affirmatively  
25 undertook to provide an assessment of the impact of the Balanced Budget Act on its future  
26 earnings, but omitted to state material information, such that its statements constituted “half-  
27 truths.” Here, by contrast, the statement in issue was merely puffery, and not a projection of  
28 future events or financial results. In *In re Sepracor, Inc. Sec. Litig.*, 308 F. Supp. 2d 20, 34 (D.  
Mass. 2004), at issue were statements that the company was “confident” that the FDA would  
approve its drug for sale, that it could “attack any of the current [competitive products on the  
market] and win,” and projecting future revenues for the product. This is a far cry from Dr.  
Harkonen’s puffing statement that InterMune had “an extraordinary sales force and a team of  
seasoned marketing professionals.” (¶ 89.)

1 defrauded the market by re-affirming InterMune’s 2003 revenue projections on that date solely on  
2 the basis that “they knew or were deliberately reckless in not knowing on April 29 that the patient  
3 numbers announced on April 29 were false.” ((Opp. at 25:15-16.) Because, as discussed above,  
4 Plaintiff has not sufficiently alleged that the patient estimates were false, and cannot do so, this  
5 allegation likewise fails.

6 **C. Plaintiff’s Scienter Allegations are Deficient.**

7 Plaintiff barely responds to Defendants’ observations that his pleading of scienter is  
8 insufficient. While it is true that stock sales are not indispensable to establishing scienter, it is  
9 uncontested that the total absence of such sales tends to negate scienter. *Lipton v. Pathogenesis*  
10 *Corp.*, 284 F.3d 1027, 1037-38 (9th Cir. 2002); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407,  
11 1424-25 (9th Cir. 1994.) The other cases on which Plaintiff relies are easily distinguished.<sup>12</sup> *See*  
12 *also, Ronconi v. Larkin*, 253 F.3d 423, 434-36 (9th Cir. 2001) (even where eleven insiders sold  
13 stock during alleged class period, sales were insufficient to support inference of scienter because  
14 insiders “miss[ed] the boat.”) Here, the Individual Defendants didn’t merely “miss the boat” with  
15 respect to stock sales; they never even walked down to the pier to look for the boat.

16 **D. Plaintiff’s Allegations “In Their Totality” Are Still Insufficient.**

17 Plaintiff predictably relies on the statement in *America West* to the effect that scienter  
18 allegations “in their totality” may be sufficient even where some allegations are “individually  
19 lacking.” 320 F.3d at 945. The *America West* rationale, however, cannot possibly apply where  
20 none of Plaintiff’s allegations of falsity or scienter are even vaguely compelling. In *America*

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21 <sup>12</sup> In *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding*  
22 *Corp.*, 320 F.3d 920, 944 (9th Cir. 2003) (Opp. at 27 n.21), certain defendants did not sell stock,  
23 but were awarded performance-based stock options based on allegedly inflated financial results,  
24 and the Compensation Committee was controlled by other defendants who sold massive amounts  
25 of stock. Interestingly, the court declined to draw an inference of scienter based on plaintiff’s  
26 “too generalized” claim that the defendants were motivated to inflate America West’s financial  
27 picture so they could sell the airline and reap the benefits of “change in control” provisions in  
28 their contracts. *Id.* at 944-45. This claim is analogous to Plaintiff’s claim here that Defendant  
Harkonen was motivated to inflate InterMune’s financial picture so as to boost the stock price to a  
point at which his “underwater” options would have value. (¶ 14.) In *Seebeyond Tech.*, while it  
was true that not all defendants had sold stock during the class period, one defendant had sold \$18  
million in shares at a time allegedly calculated to take advantage of misrepresentations  
concerning the company’s financial results. 266 F. Supp at 1168-69.

1 *West*, the court concluded that the plaintiffs had presented persuasive evidence that the  
2 company's senior executives had to be aware of serious aircraft maintenance problems that were  
3 concealed from the public. The evidence of defendants' knowledge offered by the plaintiffs  
4 included "(1) internal reports (including the identity of the person who directed the preparation of  
5 the reports); meetings with the FAA (including the dates, content, and participants); (3) FAA  
6 letters to America West regarding the ongoing maintenance problems and the agency's increasing  
7 frustration with the company (including the dates, case numbers of the investigations, content,  
8 and who they were sent to); and (4) the [FAA] settlement agreement." 320 F.3d at 942.  
9 Additional evidence that "the problem was severe enough that Defendants must have been aware  
10 of it" included detailed FAA reports, letters describing penalties and referring to specific  
11 incidents, and charts documenting maintenance difficulties and comparing the company's  
12 performance to that of other carriers. *Id.* The only possibly "lacking" allegations concerned the  
13 fact that while some defendants had sold stock, not all individual defendants had a clearly defined  
14 personal financial motivation. *Id.* at 944-45.

15 The contrast between *America West* and this case is stark. Here, there are virtually no  
16 specifics, and the allegations of falsity and scienter are supported only by a thin film of  
17 speculation, misinformation and guesswork. While *America West* suggests that a complaint with  
18 numerous strong allegations will not be rendered insufficient by a few less compelling ones. It  
19 certainly does not stand for the proposition that a number of weak claims can somehow combine  
20 to lift a complaint over the PSLRA's high pleading bar.

21 **E. Leave to Amend Should Be Denied.**

22 Plaintiff acknowledges that the granting of leave to amend depends upon his  
23 demonstrating "a reasonable chance of successfully stating a claim if given another opportunity"  
24 (Opp. at 28:21-22), but the descriptions of his proffered amendments make it painfully clear that  
25 any amendments would be just as vague and conclusory as the existing pleading. Each of  
26 Plaintiff's eight bulleted proposed amendments fails for the following reasons:

1 (1) Naming the “confidential source” does not cure the source’s vague allegations or  
2 the fact that the source, already described as a low-level salesperson, would not be in a position to  
3 know what he or she is alleged to have known.

4 (2) The “name” of the “Patient Lists” and the promise of “additional detail” about their  
5 contents only highlights the insufficiency of the current complaint but does nothing to suggest  
6 what factual detail would in fact be added. This is just more boilerplate pleading.

7 (3) Allegations that InterMune has been sued for wrongful discharge are hardly specific  
8 facts, particularly where Plaintiff does not even hint at what the allegations are, or their level of  
9 detail.

10 (4) Generalized allegations that a number of sales representatives “resigned” because  
11 they objected to “the illegal marketing scheme” are every bit as conclusory as the existing  
12 allegations of illegality.

13 (5) “Plaintiff will more clearly alleged any allegations that the Court finds insufficiently  
14 clear” is nothing more than a self-serving, non-specific place holder.

15 (6) Allegations that an “unsent letter” and a “chronology” come from a former  
16 employee’s work computer hardly establish significant detail enhancing the creditworthiness of  
17 the information.

18 (7) A triple-hearsay statement attributed to a former sales executive is somewhat less  
19 than strong evidence of the alleged content.

20 (8) The resignations of multiple employees from a company cannot be accepted as even  
21 weak evidence that “the company considered that some or all of them are culpable of . . .  
22 wrongful conduct.”

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**III. CONCLUSION**

For all of the foregoing reasons, together with the reasons stated in Defendants' Opening Memorandum, Defendants respectfully submit that the FAC should be dismissed with prejudice.

Dated: July 14, 2004

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\_\_\_\_\_/s/  
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**PROOF OF SERVICE**  
**(FRCP 5)**

I am a citizen of the United States and a resident of the State of California. I am employed in Santa Clara County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward LLP, Five Palo Alto Square, 3000 El Camino Real, Palo Alto, California 94306-2155. On the date set forth below I served the documents described below in the manner described below:

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Cooley Godward LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Palo Alto, California.
- (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
- (BY FACSIMILE) I am personally and readily familiar with the business practice of Cooley Godward LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Cooley Godward LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
- (BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley Godward LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the undersigned.

on the following part(ies) in this action:

Peter A. Binkow, Esq.  
Glancy & Binkow LLP  
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Los Angeles, CA 90067

Executed on July 14, 2004, at Palo Alto, California.

\_\_\_\_\_  
/s/  
Catherine R. Galan