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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROSENBAUM CAPITAL, LLC, ) Case No. 07-0392 SC  
 )  
Plaintiff, ) ORDER DENYING  
 ) DEFENDANTS' MOTION TO  
v. ) DISMISS  
 )  
JOHN E. McNULTY, TIM STEINKOPF AND )  
SECURE COMPUTING CORPORATION, )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

**I. INTRODUCTION**

This matter comes before the Court on the Motion to Dismiss ("Motion") by the defendants John E. McNulty ("McNulty"), Tim Steinkopf ("Steinkopf") and Secure Computing Corporation ("Secure"), (collectively "Defendants"). See Docket No. 23. The plaintiff Rosenbaum Capital, LLC ("Plaintiff"), filed an Opposition, Defendants submitted a Reply, and Plaintiff, with leave from the Court, filed a Surreply. See Docket Nos. 28, 31, 37. For the following reasons, the Court DENIES Defendants' Motion.

**II. BACKGROUND**

Secure is a software corporation that develops network security for large organizations. Mot. at 4. McNulty is Secure's President, Chairman, and CEO and Steinkopf is Senior Vice

1 President of Operations and CFO. Id. In January 2006, Secure  
2 acquired CyberGuard Corporation ("Cyberguard"), another network  
3 security corporation that offered similar products. Id. at 5. On  
4 May 4, 2006, Secure issued a press release reporting 2006 first  
5 quarter financial results and providing revenue and earnings  
6 guidance for the second quarter of the year. Defendants' Request  
7 for Judicial Notice ("RJN"), Docket No. 24, Ex. C at 1. In the  
8 press release, Secure projected that revenues for the second  
9 quarter of 2006 would be between \$43 million and \$45 million. Id.  
10 at 4. Additionally, the press release contained statements from  
11 Defendants McNulty and Steinkopf regarding the integration of  
12 CyberGuard and Secure. McNulty was quoted as saying, "[w]e closed  
13 the largest acquisition in the company's history, and began the  
14 process of integrating Secure Computing's and CyberGuard's  
15 worldwide operations. I am pleased to report that all phases of  
16 the integration process are either on target or ahead of plan."  
17 Id. at 1. In explaining Secure's results for the first quarter,  
18 Steinkopf was quoted stating: "Our ability to exceed our guidance  
19 is a direct reflection on the speed and good progress we were able  
20 to achieve in integrating CyberGuard into Secure Computing . . .  
21 ." Id. The press release also contained a warning that the  
22 revenue projections are forward-looking statements and, as such,  
23 are made pursuant to the safe harbor provision of the Private  
24 Securities Litigation Reform Act, 15 U.S.C. § 78u-4 ("PSLRA").  
25 Id. at 5.

26 On the same day that Secure issued the press release,  
27 Defendants McNulty and Steinkopf participated in a conference call  
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1 with investors and securities analysts. Id. Ex. B at 2, 3. This  
2 call also began with a warning statement in which Defendants  
3 stated: "During the course of this call . . . , we will make  
4 forward-looking statements . . . . Such forward-looking  
5 statements are subject to the safe harbor provision . . . ." Id.  
6 at 3. During the call Defendants repeated the revenue and  
7 earnings projections for the second quarter and also made the  
8 following statements regarding the integration of Secure and  
9 CyberGuard:

10 -- "We exited Q1 functioning as a well-integrated single  
11 Company in all departments, both process-wise and culturally.  
12 This is ahead of our integration plan. And as a result, I believe  
13 the Company is well positioned for the quarters ahead." Id. at 4.

14 -- "The Secure Computing and CyberGuard teams have done a  
15 remarkable job coming together as one. Every part of the Company  
16 . . . [is] now integrated and under one management team." Id. at  
17 7.

18 On July 11, 2006, Secure issued a press release announcing  
19 that its revenue and earnings were lower than had been projected  
20 on May 4, 2006. Id. Ex. D. at 1. Secure noted that rather than  
21 reaching a revenue range of \$43 million to \$45 million, as  
22 previously anticipated, revenue for the second quarter was in fact  
23 \$38.7 million. Id. Ex. G at 1. In a conference call that same  
24 day, Defendants McNulty and Steinkopf attributed part of the  
25 revenue shortfall to the failure to close two large deals by the  
26 end of the quarter. Id. Ex. F at 2-3. One of these transactions  
27 would have generated \$2.55 million in revenue and the other was to

1 have yielded \$1.3 million. Id. When analysts questioned McNulty  
2 and Steinkopf about whether the merger with CyberGuard had any  
3 detrimental impact on the second quarter results, McNulty  
4 initially said he did not think so while Steinkopf indicated that  
5 it might have had some impact. Id.

6 Plaintiff, an investor in Secure, subsequently filed suit in  
7 this Court, alleging violations of sections 10(b) and 20(a) of the  
8 Securities Exchange Act of 1934. On July 2, 2007, Plaintiff filed  
9 a First Amended Complaint ("FAC"). See Docket No. 22.

10 Plaintiff's claims are based primarily on the allegation that at  
11 the time Defendants represented that the integration between  
12 Secure and Cyberguard was proceeding well, they knew or should  
13 have known that the integration was in fact facing significant  
14 problems and these problems would negatively impact the financial  
15 projections for the second quarter. See FAC ¶¶ 40-42.

16  
17 **III. LEGAL STANDARDS**

18 **A. Motion to Dismiss**

19 A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss  
20 tests the sufficiency of the complaint. Dismissal pursuant to  
21 Rule 12(b)(6) is appropriate if the plaintiff is unable to  
22 articulate "enough facts to state a claim to relief that is  
23 plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S.  
24 Ct. 1955, 1974 (2007). "[F]aced with a Rule 12(b)(6) motion to  
25 dismiss a § 10(b) action, courts must, as with any motion to  
26 dismiss for failure to plead a claim on which relief can be  
27 granted, accept all factual allegations in the complaint as true."

1 Tellabs, Inc. v. Makor Issues & Rights, LTD., 127 S. Ct. 2499,  
2 2509 (2007). All reasonable inferences are to be drawn in favor  
3 of the plaintiff. Everest & Jennings, Inc. v. Am. Motorists Ins.  
4 Co., 23 F.3d 226, 228 (9th Cir. 1994). Unreasonable inferences or  
5 conclusory legal allegations cast in the form of factual  
6 allegations, however, are insufficient to defeat a motion to  
7 dismiss. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.  
8 1981).

9 **B. Private Securities Litigation Reform Act**

10 Section 10(b) of the Securities Exchange  
11 Act of 1934 forbids the "use . . . in  
12 connection with the purchase or sale of  
13 any security . . . , [of] any manipulative  
14 or deceptive device or . . . in  
15 contravention of such rules and  
16 regulations as [SEC] may prescribe as  
17 necessary or appropriate in the public  
18 interest or for the protection of  
19 investors."

20 Tellabs, 127 S. Ct. at 2507 (citing 15 U.S.C. § 78j(b))  
21 (alterations and brackets in original).

22 Securities and Exchange Commission ("SEC") Rule 10b-5,  
23 promulgated under the authority of section 10(b), in turn,  
24 provides:

25 It shall be unlawful for any person . . .  
26 (a) To employ any device, scheme, or  
27 artifice to defraud, (b) To make any  
28 untrue statement of a material fact or to  
omit to state a material fact necessary  
in order to make the statements made, in  
light of the circumstances under which  
they were made, not misleading, or (c) To  
engage in any act, practice, or course of  
business which operates or would operate  
as a fraud or deceit upon any person, in  
connection with the purchase or sale of  
any security.

1  
2 17 C.F.R. § 240.10b-5.

3 The enactment of the PSLRA in 1995 significantly altered  
4 pleading requirements in private securities fraud litigation by  
5 requiring that a complaint plead with particularity both falsity  
6 and scienter. In re Daou Systems, Inc., 411 F.3d 1006, 1014 (9th  
7 Cir. 2005). Thus, under the PSLRA, a complaint alleging that the  
8 defendant made a false or misleading statement must "specify each  
9 statement alleged to have been misleading [and] the reason or  
10 reasons why the statement is misleading." 15 U.S.C. § 78u-  
11 4(b)(1). In addition, the complaint must "state with  
12 particularity facts giving rise to a strong inference that the  
13 defendant acted with the required state of mind." Id. § 78u-  
14 4(b)(2). In the Ninth Circuit this state-of-mind requirement  
15 demands that "the complaint . . . allege that the defendants made  
16 false or misleading statements either intentionally or with  
17 deliberate recklessness." Daou Sys., 411 F.3d at 1015.

18 In addition to the heightened PSLRA pleading standards, "[i]t  
19 is well established that claims brought under Rule 10b-5 and  
20 section 10(b) must meet the particularity requirements of Federal  
21 Rule of Civil Procedure 9(b)." Id. at 1014. Rule 9(b) states  
22 "[i]n alleging fraud or mistake, a party must state with  
23 particularity the circumstances constituting fraud or mistake."  
24 Fed. R. Civ. P. 9(b).

25 The basic elements of a Rule 10b-5 claim include the  
26 following: (1) a material misrepresentation or omission of fact,  
27 (2) scienter, (3) a connection with the purchase or sale of a  
28

1 security, (4) transaction and loss causation, and (5) economic  
2 loss. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341 (2005).

3  
4 **IV. DISCUSSION**

5 Defendants argue that Plaintiff's Complaint should be  
6 dismissed for three reasons: (1) the allegedly false and  
7 misleading statements are statutorily protected by the safe harbor  
8 provision of the PSLRA; (2) Plaintiff has failed to plead scienter  
9 and falsity with the requisite factual particularity; and (3) the  
10 confidential sources upon which Plaintiff bases his factual  
11 allegations are, as a matter of law, insufficient.

12 **A. Request for Judicial Notice**

13 As a threshold matter, the Court addresses Defendants'  
14 request that the Court take judicial notice of various documents.  
15 Federal Rule of Evidence 201 permits a court to take judicial  
16 notice of a fact "not subject to reasonable dispute in that it is  
17 . . . capable of accurate and ready determination by resort to  
18 sources whose accuracy cannot reasonably be questioned." When  
19 ruling on a 12(b)(6) motion to dismiss a § 10(b) action, courts  
20 must consider the complaint in its entirety, including "documents  
21 incorporated into the complaint by reference, and matters of which  
22 a court may take judicial notice." Tellabs, 127 S. Ct. at 2509.  
23 Where a plaintiff fails to attach to the complaint the documents  
24 upon which the complaint is premised, a defendant may attach such  
25 documents in order to show that they do not support the  
26 plaintiff's claim. In Re Pac. Gateway Exch., Inc., 169 F. Supp.  
27 2d 1160, 1164 (N.D. Cal. 2001). In addition, under the

1 incorporation by reference doctrine, a court may, on a Rule  
2 12(b)(6) motion, consider documents whose contents are alleged in  
3 a complaint but which are not physically attached to the pleading.  
4 Tellabs, 127 S. Ct. at 2509. Finally, a court may take judicial  
5 notice of public filings, such as those made with the SEC.  
6 Dreiling v. Am. Exp. Co., 458 F.3d 942, 946 n.2 (9th Cir. 2006).

7 In the present case, all except one of the press releases and  
8 conference-call transcripts that Defendants seek to have  
9 judicially noticed are referenced in the Plaintiff's Amended  
10 Complaint. These documents are therefore appropriate for judicial  
11 notice. The exception is a conference-call transcript of Secure's  
12 August 18, 2005, conference call. This transcript, however, is  
13 publicly available and was disclosed to the market, and therefore  
14 is appropriate for judicial notice. See In re Copper Mountain,  
15 311 F. Supp. 2d 857, 864 (N.D. Cal. 2004). The remaining  
16 documents Defendants seek to have judicially noticed are all SEC  
17 filings. The Court therefore GRANTS Defendants' request and takes  
18 judicial notice of Exhibits A1-8 and B1-5.

19 **B. Safe Harbor Provision of PSLRA**

20 The safe harbor provision of the PSLRA provides that a  
21 defendant shall not be liable with respect to any forward-looking  
22 statement if:

- 23 (A) The forward-looking statement is-
- 24 (i) identified as a forward-looking  
25 statement, and is accompanied  
26 by meaningful cautionary  
27 statements identifying  
28 important factors that could  
cause actual results to differ  
materially from those in the  
forward-looking statement; or

- 1 (ii) immaterial; or  
2 (B) the plaintiff fails to prove that  
3 the forward-looking statement-  
4 (i) if made by a natural person,  
5 was made with actual knowledge  
6 by that person that the  
7 statement was false or  
8 misleading . . . .

9 15 U.S.C. § 78u-5(c)(1). A "forward-looking statement" is  
10 defined, in relevant part, as "a statement containing a projection  
11 of revenues, income (including income loss), earnings . . . or  
12 other financial items" or "a statement of future economic  
13 performance" or "any statement of the assumptions underlying or  
14 relating to any statement described [above]." Id. at § 78u-  
15 5(i)(1).

16 The first issue for the Court is whether the statements at  
17 issue fall within the definition of "forward-looking." Regarding  
18 Defendants' statements about the integration of CyberGuard and  
19 Secure, it is clear that they are not forward looking.  
20 Defendants, for example, stated the following: "We exited Q1  
21 functioning as a well integrated single Company in all  
22 departments, both process wise and culturally. This is ahead of  
23 the integration plan." Compl. ¶ 20. This statement described  
24 events that had already occurred and conditions that were  
25 supposedly already in existence. This statement thus falls  
26 outside of the statutory definitions of "forward-looking." See 15  
27 U.S.C. § 78u-5(i)(1). The statements regarding the condition of  
28 the integration are not protected by the safe harbor provision of  
the PSLRA.

Regarding Defendants' statements detailing revenue and

1 earnings projections, the Court agrees with Defendants that such  
2 statements fall within the statutory definition for "forward-  
3 looking." In addition, it is undisputed that these statements  
4 were made in conjunction with cautionary statements. Plaintiff  
5 does not dispute that Defendants included cautionary statements in  
6 both their conference calls with analysts and their press  
7 releases. See RJN Ex. B. at 3, Ex. C at 5. Furthermore, the  
8 press release cross-referenced risk disclosures included in  
9 Defendants' 2005 Form 10-K and other SEC filings.<sup>1</sup> Id.  
10 Defendants point to language in the 2005 Form 10-K that states:  
11 "We may be unable to integrate our operations successfully and  
12 realize all of the anticipated benefits of the merger with  
13 CyberGuard Corporation." Id. Ex. J at 13.

14 Defendants fail to recognize, however, that the PSLRA  
15 requires "meaningful cautionary statements." 15 U.S.C. § 78u-  
16 5(c)(1)(A)(i) (emphasis added). Another district court in  
17 California has stated the following:

18 If the forward-looking statement is made  
19 with actual knowledge that it is false or  
20 misleading, the accompanying cautionary  
21 language can only be meaningful if it  
22 either states the belief of the speaker  
that it is false or misleading, or, at  
the very least, clearly articulates the  
reasons why it is false or misleading.

23 In re Seebeyond Tech. Corp. Sec. Litig., 266 F. Supp. 2d 1150,

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24  
25 <sup>1</sup> See Employers Teamsters Local Nos. 175 & 505 Pension Trust  
26 Fund v. Clorox Co., 353 F.3d 1125, 1133 (9th Cir. 2004) (holding  
27 that the PSLRA "provides that for forward-looking oral statements .  
28 . . . the safe harbor" applies if cautionary statements are  
"contained in a readily available written document") (citing 15  
U.S.C. § 78u-5(c)(2)(B)(i)).

1 1165 (C.D. Cal. 2003). The Court finds such reasoning persuasive.  
2 Plaintiff has alleged that Defendants' revenue and earning  
3 projections were based, in part, on a characterization of the  
4 integration that Defendants allegedly knew to be false. See  
5 Compl. ¶ 20. Defendants' warning statements lose much, if not  
6 all, of their value if, as Plaintiff has alleged, at the time  
7 Defendants publicly stated that they "exited [the first quarter]  
8 functioning as a well integrated single Company in all  
9 departments," Opp'n at 2, Defendants in fact knew that the  
10 integration was highly problematic. See In re WorldCom, Inc. Sec.  
11 Litig., 294 F. Supp. 2d 392, 427 (S.D.N.Y. 2003) (stating that the  
12 "doctrine of bespeaks caution<sup>2</sup> provides no protection to someone  
13 who warns his hiking companion to walk slowly because there might  
14 be a ditch ahead when he knows with near certainty that the Grand  
15 Canyon lies one foot away") (internal quotation marks omitted).  
16 Thus, the cautionary language used by Defendants is not  
17 "meaningful" and Defendants are not entitled to the safe harbor  
18 protection of 15 U.S.C. § 78u-5(c) (1) (A).

19 For the reasons stated above, the Court finds that  
20 Defendants' statements from the May 4, 2006, conference call and  
21 press release are not protected by the safe harbor provision of  
22 the PSLRA.

23 **C. Factual Particularity and Confidential Sources**

24 Defendants argue that because the only evidence Plaintiff has

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26 <sup>2</sup> "The PSLRA created a statutory version of [the bespeaks  
27 caution] doctrine by providing a safe harbor for forward-looking  
28 statements identified as such, which are accompanied by meaningful  
cautionary statements." Clorox, 353 F.3d at 1132.

1 submitted comes from five unnamed confidential sources, Plaintiff  
2 has failed to present the particularized allegations of fact  
3 required for a Rule 10b-5 claim. Regarding confidential sources,  
4 the Ninth Circuit has stated that "[n]aming sources is unnecessary  
5 so long as the sources are described with sufficient particularity  
6 to support the probability that a person in the position occupied  
7 by the source would possess the information alleged and the  
8 complaint contains adequate corroborating details." Daou Sys.,  
9 411 F.3d at 1015 (internal citations omitted).

10 In the present case, Plaintiff has provided sufficient  
11 particularity regarding the confidential sources. For example,  
12 Plaintiff has stated that Confidential Source # 1 was Director of  
13 Administration as an executive at CyberGuard and Secure. FAC ¶  
14 43. In this capacity, Confidential Source # 1 was responsible for  
15 order processing, forecasting sales for the fiscal quarter,  
16 implementing methods to meet revenue goals, and organizing the  
17 maintenance department in customer support. Id. ¶ 44. In  
18 addition, during at least part of the class period, Confidential  
19 Source # 1 was allegedly working under and reporting to Secure's  
20 Vice President of Production, who was responsible for supervising  
21 aspects of the integration of Secure and CyberGuard.

22 Plaintiff's other four confidential sources are also  
23 described with similar particularity. See, e.g., FAC ¶ 57  
24 (alleging that "Confidential Source No. 2 served as the Global  
25 Original Equipment Manager ("OEM") Account Manager . . . at Secure  
26 from 2001 until 2006. The Account Manager reported to Chris  
27 Peterson, the VP of OEM and Channel Sales for Secure, who reported

1 directly to Defendant McNulty."). In addition, the confidential  
2 sources, when combined with Defendants' statements and press  
3 releases, provide "adequate corroborating details." Daou, 411  
4 F.3d at 1015. Thus, in light of the specificity of Plaintiff's  
5 descriptions of its confidential witnesses, Plaintiff "has  
6 sufficiently met the PSLRA's requirements for confidential  
7 witnesses." Id.

8 Defendants argue that the Daou standard for confidential  
9 sources is no longer valid because of the heightened PSLRA  
10 pleading standard recently articulated by the Supreme Court in  
11 Tellabs. As discussed above, the Court in Tellabs held that in  
12 pleading the "strong inference that the defendant acted with the  
13 required state of mind," 15 U.S.C. § 78u-4(b)(2), a "complaint  
14 will survive . . . only if a reasonable person would deem the  
15 inference of scienter cogent and at least as compelling as any  
16 opposing inference one could draw from the facts alleged."  
17 Tellabs, 127 S. Ct. at 2510. Thus, Defendants argue, confidential  
18 sources, by definition, could not give rise to a cogent and  
19 compelling inference of scienter.

20 Defendants cite a post-Tellabs, Seventh Circuit opinion in  
21 support of their argument. In Higginbotham v. Baxter  
22 International, Inc., 495 F.3d 753 (7th Cir. 2007), the court  
23 stated: "One upshot of the approach that Tellabs announced is  
24 that we must discount allegations that the complaint attributes to  
25 five confidential witnesses . . . . It is hard to see how  
26 information from anonymous sources could be deemed 'compelling' or  
27 how we could take account of plausible opposing inferences." Id.

1 at 756-57.

2 The Ninth Circuit has not yet spoken to the issue of whether  
3 confidential sources, if described with the requisite  
4 particularity, may give rise to the cogent and compelling  
5 inference of scienter required by Tellabs. Without guidance  
6 stating otherwise, this Court is unwilling to abandon the binding  
7 Ninth Circuit precedent of Daou for the reasoning articulated by  
8 the Seventh Circuit in Higginbotham.

9 Such a decision is supported by the only other Circuit  
10 besides the Seventh to address the post-Tellabs treatment of  
11 confidential sources. In Central Laborers' Pension Fund v.  
12 Integrated Electrical Services Inc., 497 F.3d 546 (5th Cir. 2007),  
13 the Fifth Circuit did not read Tellabs to presumptively preclude  
14 confidential sources. See id. at 552 (stating "[c]onfidential  
15 source statements are a permissible basis on which to make an  
16 inference of scienter"). Although the Fifth Circuit did not  
17 discuss Tellabs in its analysis of confidential sources, the court  
18 was clearly aware of the Tellabs decision as evidenced by numerous  
19 citations to Tellabs in its lengthy discussion of the PSLRA  
20 pleading standards. Id. at 551. Thus, Central Laborers' Pension  
21 Fund suggests that, contrary to the Seventh Circuit's conclusion,  
22 Tellabs does not presumptively prohibit confidential sources.

23 In the present action, the Court finds that the information  
24 provided by Plaintiff's confidential sources, in combination with  
25 Defendants' statements and press releases, presents sufficiently  
26 particularized allegations of fact as required for a Rule 10b-5  
27 claim.

1           **D.    Factual Allegations for Scierter and Falsity**

2           Defendants also assert that Plaintiff's factual allegations  
3 regarding the alleged violation are insufficient, as a matter of  
4 law, to establish scierter and falsity. "As set out in §  
5 21D(b) (2) of the PSLRA, plaintiffs must 'state with particularity  
6 facts giving rise to a strong inference that the defendant acted  
7 with the required state of mind.'" Tellabs, 127 S. Ct. at 2504  
8 (citing 15 U.S.C. § 78u-4(b) (2)). In the Ninth Circuit, "the  
9 required state of mind is one of deliberate or conscious  
10 recklessness." No. 84 Employer-Teamster Joint Council Pension  
11 Trust Fund v. Am. W. Holding Corp., 320 F.3d 920, 931 (9th Cir.  
12 2003). The Court in Tellabs defined a "strong inference" as the  
13 following:

14                   [T]o determine whether a complaint's  
15 scierter allegations can survive a  
16 threshold inspection for sufficiency, a  
17 court . . . must engage in a comparative  
18 evaluation: it must consider, not only  
19 inferences urged by the plaintiff . . . ,  
20 but also competing inferences rationally  
21 drawn from the facts alleged. . . . To  
22 qualify as "strong" within the intendment  
23 of § 21D(b) (2), we hold, an inference of  
24 scierter must be more than merely  
25 plausible or reasonable--it must be  
26 cogent and at least as compelling as any  
27 opposing inference of nonfraudulent  
28 intent.

22           Id. at 2504-05. Thus, a "complaint will survive . . . only if a  
23 reasonable person would deem the inference of scierter cogent and  
24 at least as compelling as any opposing inference one could draw  
25 from the facts alleged." Id. at 2510.

26           Defendants argue that Plaintiff's Complaint fails to create  
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1 this compelling inference of scienter and falsity.<sup>3</sup> As discussed  
2 in section B., supra, the Court is satisfied that the information  
3 provided by Plaintiff's confidential sources, in combination with  
4 Defendants' statements and press releases, presents the  
5 sufficiently particularized allegations of fact required for a  
6 Rule 10b-5 claim. Contrary to Defendants' argument that "the  
7 facts alleged in the Complaint compel the conclusion that the  
8 second quarter guidance was reasonable and well-founded when  
9 made," Reply at 8, Plaintiff's allegations are commensurate with  
10 the pleading requirements for the PSLRA and Federal Rule of Civil  
11 Procedure 9(b). In short, Plaintiff has alleged that Defendants  
12 knew of the problems with the integration yet still stated, in the  
13 May 4 press release, that the integration was going well and that  
14 its success would contribute to increased revenue. If these  
15 factual allegations are accepted as true, then Plaintiff has  
16 sufficiently pleaded violations of the Securities Exchange Act.  
17 Plaintiff has presented evidence, in the form of confidential  
18 sources, that indicates that Defendants knew that the integration  
19 was not proceeding smoothly. Defendants' statements in the press  
20 release and during the conference call directly conflict with what  
21 the confidential sources have stated. The totality of this  
22 evidence, combined with the fact that Secure missed its revenue  
23 projections, gives rise to a cogent and compelling inference of  
24 scienter.

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25  
26 <sup>3</sup> The dual pleading requirements of falsity and scienter may  
27 be incorporated "into a single inquiry, because falsity and  
28 scienter are generally inferred from the same set of facts." In re  
Read-Rite Corp., 335 F.3d 843, 846 (9th Cir. 2003).



1 have fallen short of the low end of the projected revenue range.  
2 Thus, something in addition to these deals caused the revenue  
3 shortcomings. Whether problems with the integration was the cause  
4 of the missed earnings is, at this stage, far from clear. What is  
5 clear, however, is that Plaintiff has presented sufficiently  
6 particularized allegations regarding Defendants' knowledge of  
7 Secure's integration and its potential impact on revenue  
8 projections.

9  
10 **V. CONCLUSION**

11 For the reasons stated above, Defendants' Motion to Dismiss  
12 is DENIED.

13  
14  
15 IT IS SO ORDERED.

16  
17 Dated: March 4, 2008



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UNITED STATES DISTRICT JUDGE