EXHIBIT EE
PART 3
Vulcan defendants" knew the terms of the "covert" GSA as early as June 28, 1999. *Id.*

FN23. The Form 8-K was signed by Dreisbach. The Preferred Stock Purchase Agreement, a copy of which was attached to the Form 8-K, was signed by Dreisbach, for Metricom; John W. Sidgmore, for WorldCom; and Savoy, for Vulcan.

*27 Again, plaintiffs' claim of falsity with regard to the July 9, 1999 8-K is premised on defendants' alleged failure to disclose the "third part" of the "strategic relationship." As with the June 21, 1999, press release, plaintiffs fail to state a claim because the documents attached to the SAC contradict the claim that the GSA was in effect at the time plaintiffs released the information about the Preferred Stock Purchase Agreement and the Reseller Agreement.

On September 14, 1999, Metricom filed a proxy statement pursuant to § 14(a) of the 1934 Securities Act, seeking shareholder approval for the issuance and sale of 60 million shares of Preferred Stock to WorldCom and Vulcan, pursuant to the Preferred Stock Purchase Agreement, to be voted on at a shareholder's meeting on October 15, 1999. Appended to the proxy statement was a copy of a letter from J.P. Morgan Securities, Inc., stating, based on its review of Metricom's financial statements and other information provided by the company, that the proposed issuance and sale of stock to WorldCom and Vulcan was fair, from a financial point of view, to the company's shareholders. Plaintiffs allege that the statements made to solicit shareholder approval were false and misleading because shareholders were not told to consider that WorldCom's $300 million investment "was secured (or protected) by the third part of the "strategic relationship," which provided that WorldCom would receive approximately $350 million if Metricom defaulted under the GSA." SAC ¶ 133. Plaintiffs assert that, having chosen to extol the positive aspects of the Preferred Stock Purchase Agreement, defendants were obligated to disclose its "material negatives" as well. [FN24] *Id.*

FN24. Claims of false or misleading statements in proxy statements are generally brought under § 14(a) of the 1934 Act, not § 10(a). However, the SAC does not allege a claim under § 14(a).

Apart from the vague reference to the J.P. Morgan fairness opinion, plaintiffs have not identified any statements in the proxy statement, let alone identified any that were false or misleading. The proxy statement clearly indicated that Metricom would be unable to continue with the development and build-out of the high-speed network without the substantial financial boost it was to receive from the $600 million investment by WorldCom and Vulcan. Plaintiffs have not alleged any facts supporting their claim that defendants omitted to state some "material negatives" in the proxy statement. As discussed above, neither the Preferred Stock Purchase Agreement nor the GSA contains any provision purporting to create a security interest for the benefit of WorldCom.

Moreover, plaintiffs' claim that WorldCom would receive $350 million if Metricom defaulted under the GSA is not supported by the documents. The GSA did not become effective until more than a year after the shareholders voted to approve the Preferred Stock Purchase Agreement. Under the final, executed version of the GSA, Metricom's total "guaranteed" obligation over the five-year term was $175 million, not $350 million, and Metricom's first possible annual minimum payment was due only in July 2002, one year and nine months after the October 3, 2000, effective date of the GSA, and almost three years after WorldCom's original $300 million investment.

*28 Equally deficient are the allegations with regard to the three amendments to Metricom's July 9, 1999, Form 8-K. Amendment No. 1, Form 8-K/A, was filed on November 5, 1999. Plaintiffs assert that Amendment No. 1 was false and misleading because, in disclosing that, pursuant to the Reseller Agreement, "Metricom would enter into a 'separate agreement' with WorldCom for the
provision of services to be supplied by the [GSA], Dreisbach and the Vulcan defendants omitted to disclose the actual, expected, and potential consequences of that arrangement." [FN25] SAC ¶ 134. In other words, plaintiffs claim that the statement that Metricom and WorldCom would, in the future, enter into an agreement regarding the provision of telecommunications services, was misleading because it did not also state that this speculative future agreement would include a termination liability provision.

FN25. The reference is to ¶ 6.2 of the Reseller Agreement, which states, MCI WorldCom will lease to Metricom, at MCI WorldCom's competitive wholesale rates appropriate to Metricom's volume of use and length of commitment, communications capacity for data traffic generated by Subscribers other than MCI WorldCom Subscribers in connection with the [high-speed] Service. The Parties will execute a separate agreement for the provision of such services by MCI WorldCom.

Amendment No. 2, Form 8-K/A, was filed on November 24, 1999. This 8-K/A included the November 12, 1999, Amendment to the Ricochet2 Reseller Agreement. Plaintiffs allege that Amendment No. 2 was false and misleading because "it omitted to disclose that the $350 million in cash payments Metricom had to make to WorldCom under the third part of the strategic relationship the draft of the Global Services Agreement then extent." SAC ¶ 135. In other words, the 8-K/A was misleading because it did not disclose an unexecuted draft of an agreement—the GSA—the terms of which were still being negotiated. Plaintiffs assert that "[t]his substantially would dilute the expected $388 million revenue stream from the Reseller Agreement." Id.

Amendment No. 3, Form 8-K/A, was filed on December 21, 1999. Plaintiffs allege that Amendment No. 3 was false and misleading because it omitted to disclose "the third part of the strategic relationship that Metricom had begun its performance of the Global Services Agreement by ordering Channelized DS-3 Circuits for the Ricochet2 Network, that the pricing of the Circuits and related telecommunications services covered by the Global Services Agreement had become fixed and determinable, and that drafts to memorialize the Agreement had been exchanged." SAC ¶ 136. Plaintiffs assert that these "omitted facts" of contract performance and materially adverse potential liability would have significantly altered the total mix of information available to investors concerning the Reseller Agreement and the GSA.

Each of these statements is alleged to have been misleading because defendants did not disclose the existence of the GSA and/or the asserted "performance" of the GSA by Metricom and WorldCom. For the reasons stated above with regard to the other pre-offering statements, and those stated in the section discussing the GSA, the court finds that the SAC does not plead any material omissions by defendants with regard to the amended 8-K/A.

ii. statements issued after the public offering

Plaintiffs allege that defendants made misleading statements in a press release issued on February 20, 2000; in the September 2000 "Letter to Stakeholders;" in press releases issued on October 3 and 19, 2000; and in the December 2000 "Letter to Stakeholders." Plaintiffs claim that the statements were misleading because plaintiffs did not disclose the GSA, and did not disclose that deployment of the high-speed network was behind schedule.

*29 In the FAC, plaintiffs alleged the same false and misleading statements, with the exception of the October 3, 2000, press release. In the February 20, 2000, press release, according to plaintiffs, "Dreisbach and the Vulcan defendants" reported that Metricom had signed numerous deployment contracts with various providers and suppliers during the fourth quarter of 1999, adding that Metricom had begun "ordering the circuits needed in the underlying backbone." Plaintiffs claim that this press release was false and misleading because it omitted to disclose that Metricom had
commenced performance of the GSA as early as November 1999.

Neither of the statements in the February 20, 2000, press release—that Metricom had signed certain contracts for the deployment of its network and that Metricom had begun ordering circuits—was misleading for failing to disclose the GSA as "the third part of the strategic relationship," as there was no third part of the strategic relationship to disclose. Plaintiffs allege no facts supporting their claim that the press release created a materially false impression of Metricom's business.

In the September 2000 "Letter to Stakeholders," Dreisbach stated that Metricom had launched the first Ricochet2 markets "ahead of schedule." Plaintiffs allege that this statement was false and misleading because this launch pertained solely to resellers other than WorldCom, resellers that did not require achievement of the same performance standards. Plaintiffs claim that defendants also omitted to disclose that service in some markets was available only in limited areas, and that some areas had not been certified as "commercially-ready," and omitted to disclose that deployment was behind schedule and that Metricom's failure to comply with the deployment schedule could put Metricom in material breach of the Reseller Agreement and the GSA.

In the October 3, 2000, press release, Metricom announced that "contracts with four companies for the physical deployment of key components for its Ricochet 128 Kbps mobile access network in markets now scheduled for construction." Plaintiffs claim that this statement was false and misleading because it omitted to disclose the "contract" with WorldCom representing a total guaranteed revenue commitment of $350 million from Metricom to WorldCom, which Metricom had been performing since November 1999. Plaintiffs also assert that the press release was misleading because it failed to disclose that Metricom was significantly behind in the "installation of Circuits." Plaintiffs claim that Metricom's internal "Circuit Provisioning Summaries" showed that Metricom was behind schedule and could not possibly complete deployment in the 11 specified "Phase I Cities" before mid-February 2001.

In the October 19, 2000, press release, Metricom discussed its results for the third quarter of 2000. The press release quotes Dreisbach as stating:

Our rapid deployment of Ricochet across multiple markets simultaneously was very successful, and conducted in a relatively short time frame. We plan to continue this aggressive pace until service is delivered to all major markets in our target footprint.

*30 Plaintiffs claim that this statement was false and misleading because as of October 19, Metricom had not satisfied the "Quality of Service" criteria set out in the Reseller Agreement and had not been certified by WorldCom as "commercially ready in a single city.

In December 2000, Dreisbach issued another "Letter to Stakeholders," stating, We have launched the Ricochet network at a tremendous pace, opening 14 markets that cover over 400 individual towns and municipalities. Millions of people now live and work under the Ricochet network, and it continues to expand every week. Our roll-out plan is unmatched and represents a major success both for Metricom and its partners.

Plaintiffs claim that the above-described statements were false and misleading because Metricom had not then met the "Quality of Service" criteria set out in the Reseller Agreement and had not been certified as "commercially ready" in a single city. Plaintiffs claim that defendants were aware of these problems. Plaintiffs also claim that defendants failed to disclose that Metricom had installed only 46% of the Circuits ordered under the GSA for the "Phase I Cities" and 30% of the Circuits ordered for the "Phase II Cities."

In the order dismissing the FAC, the court found that the statements made in the September "Letter to Stakeholders," the October 19 press release, the December "Letter to Stakeholders," and a December 18, 2000, statement by Metricom's Chief Operating Officer (not mentioned in the SAC) could not provide a basis for a claim of securities fraud because the SAC did not plead with particularity any facts supporting the claim that the statements
indicating that defendants made false or misleading statements during the post-offering period, and does not eliminate the problems that the court identified in the FAC. The court finds that the September 2000 Letter to Stakeholders, the two October 2000 press releases, and the December 2000 Letter to Stakeholders were not misleading for the reasons alleged by plaintiffs in the SAC (failing to disclose that the build-out was behind schedule, and failing to indicate that Metricom could not comply with the terms of the Reseller Agreement). The SAC does not state when or where the applicable timetables were published, does not explain what state of development and/or deployment Metricom was in as of the date of each of the challenged public statements, and does not articulate how the challenged public statements were misleading.

FN26. Plaintiffs claim that three internal Metricom reports known as "Circuit Provisioning Summaries," prepared on September 5, 2000, on October 3, 2000, and in December 2000, establish that only a small percentage of the "Circuits" required for the build-out had been installed. Plaintiffs assert that defendants misled shareholders by failing to disclose that Metricom was "significantly behind" in the "installation of Circuits" throughout this period. As previously noted, however, Metricom was not required to disclose every fact, including the exact number of circuits ordered, related to the build-out, simply because the company provided on-going disclosures regarding the status of the build-out. For an omission to be misleading, "it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." Brody, 280 F.3d at 1006. Plaintiffs have not identified any statement that affirmatively created such a materially misleading impression.

Indeed, it appears that the SAC relies on the original deployment schedule filed as an exhibit to the Amended Reseller Agreement in November 1999, and that plaintiffs have ignored the various published changes to that schedule, detailed by the court in the order dismissing the FAC. Plaintiffs have also ignored the court's finding in the order