DECLARATION OF KELLEY E. MOOHR IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT

CASE NO.: 05-CV-02047 (CRB)

DATE: June 16, 2006
TIME: 10:00 a.m.
CTRM: 8
JUDGE: Hon. Charles R. Breyer

GEORGIANNA HANRAHAN, IRA, individually and on behalf of all others, similarly situated,

v.

HEWLETT PACKARD COMPANY and CARLETON FIORINA,

Defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
I, Kelley E. Moohr, declare:

1. I am an attorney duly licensed to practice law in the State of California and before this Court. I am an associate with the law firm of Wilson Sonsini Goodrich & Rosati, counsel of record for defendants Hewlett-Packard Company and Carleton Fiorina in the above-captioned action. I submit this Declaration in Support of Defendants’ Motion to Dismiss Amended Class Action Complaint. I submit this declaration based on personal knowledge and, if called as a witness, could and would competently testify to the matters set forth herein.

2. Attached hereto as Exhibit A is a true and correct copy of a historical stock from Yahoo Finance.

3. Attached hereto as Exhibit B is a true and correct copy of the March 24, 2006 hearing transcript concerning Plaintiff’s Second Renewed Motion for Appointment as Lead Plaintiff, Approval of her Selection of Lead Counsel and Consolidations of Subsequently Filed Related Cases.

4. Attached hereto as Exhibit C are true and correct copies of excerpts from Peter Burrows, *Backfire* (2003).


6. Attached hereto as Exhibit E is a true and correct copy of *In re Autodesk, Inc. Sec. Litig.*, No. C-00-1285 PJH, slip op. (N.D. Cal. Nov. 21, 2001).

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 28th day of April, 2006, at Palo Alto, California.

/s/ Kelley E. Moohr
Kelley E. Moohr

I, Steven M. Schatz, am the ECF User whose identification and password are being used to file this Declaration of Kelley E. Moohr in Support of Defendants’ Motion to Dismiss Amended Class Action Complaint.

I hereby attest that Kelley E. Moohr has concurred in this filing.
Dated: April 28, 2006

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/Steven M. Schatz
Steven M. Schatz

Attorneys for Defendants HEWLETT-PACKARD
CO. and CARLETON FIORINA
EXHIBIT A
**Hewlett-Packard Co. (HPQ)**

**Historical Prices**

**SET DATE RANGE**

- **Start Date:** Sep 1 2001
- **End Date:** May 30 2002

**PRICES**

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Quotes delayed, except where indicated otherwise.
Delay times are 15 mins for NASDAQ, 20 mins for NYSE and Amex. See also delay times for other exchanges.

Historical chart data and daily updates provided by Commodity Systems, Inc. (CSI). International historical chart data and daily updates provided by Hemscott Americas. Fundamental company data provided by Capital IQ. Quotes and other information supplied by independent providers identified on the Yahoo! Finance partner page. All information provided "as is" for informational purposes only, not intended for trading purposes or advice. Neither Yahoo! nor any of independent providers is liable for any informational errors, incompleteness, or delays, or for any actions taken in reliance on information contained herein. By accessing the Yahoo! site, you agree not to redistribute the information found therein.
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**Historical Prices**

**SET DATE RANGE**

- **Start Date:** Sep 01, 2001
- **End Date:** May 30, 2002

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* Close price adjusted for dividends and splits.
**Hewlett-Packard Co. (HPQ)**

At 1:27PM ET: 32.69 ↓

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* Close price adjusted for dividends and splits.

First | Prev | Next | Last

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Add to Portfolio  Set Alert  Email to a Friend

Get Historical Prices for Another Symbol:  GO  Symbol Lookup

EXHIBIT B
United States District Court
Northern District of California

Before The Honorable Charles R. Breyer, Judge

Georgianna Hanrahan,
et al.,
Plaintiff,

vs.

Hewlett-Packard Company,
et al.,
Defendant.

No. C05-2047 CRB

San Francisco, California
Thursday, March 24, 2006

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: Shapiro Haber & Urmly
53 State Street, 37th Floor
Boston, MA 02109
By: Edward F. Haber, Esquire

Chitwood Harley Harnes.
1230 Peachtree NE
Promenade II, Suite 2300
Atlanta, Georgia 30309
By: Martin D. Chitwood, Esquire

(Appearances continued on next page.)

Reported By: Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)
Appearances, (continued):

For Plaintiff: Schubert & Reed
Three Embarcadero Center
Suite 1650
San Francisco, California 94111

By: Robert C. Schubert, Esquire

For Defendant: Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

By: Steven M. Schatz, Esquire

---00o---
Thursday, March 2, 2006

PROCEEDINGS

THE CLERK: Calling case C05-2047, Georgianna Hanrahan versus Hewlett-Packard.

Appearances, counsel.

MR. HABER: Good morning, Your Honor.

Edward Haber for the plaintiff, Hanrahan IRA.

MR. SCHATZ: Good morning, Your Honor.

Steven Schatz and John Stigi, Wilson, Sonsini, Goodrich & Rosati --

THE COURT: Goodrich and?

MR. SCHATZ: Rosati, on behalf of Carleton Fiorina and Hewlett-Packard.

MR. SCHUBERT: Good morning, Your Honor.

Robert Schubert also for plaintiff.

MR. CHITWOOD: Martin Chitwood for the plaintiffs.

THE COURT: Good morning.

Let me make sure I understand this case. This is a case in which the basic claim is that the company failed to disclose that chairman of the board -- well, who was it, that somebody opposed this merger. Mr. --

MR. HABER: Mr. Hewlett.

THE COURT: Mr. Hewlett. And the company had a duty to disclose that.

MR. HABER: Putting it more specific, Your Honor,
The claim is that when the defendants announced the proposed merger with Compaq on September 3rd, 2001, they said in that announcement that the merger had been unanimously approved by the board of directors of Hewlett-Packard.

What we demonstrate in great detail, both in the complaint, but even in greater detail in the amended complaint we propose to file, is that Walter Hewlett, who is the son of the founder and had control of hundreds of millions of shares of Hewlett-Packard stock which we detail in terms of how he controlled that, had since May of that year repeatedly and emphatically expressed his opposition to the merger through the very day that the merger was voted on at the board of directors meeting on September 3rd.

What we say, Your Honor, is that by depriving the marketplace of the knowledge that he was opposed to the merger, it rendered the statement that they made that the merger had been unanimously approved by the board of directors demonstrably and materially misleading.

THE COURT: He was on the board?

MR. HABER: Oh, yes, he was director of Hewlett-Packard. And many of the detailed statements that we detail in the complaint are things he said --

THE COURT: Well, I mean, I think everybody is aware who reads the paper that he had problems with this merger, at least -- I mean, I don't know --
MR. HABER: Your Honor --

THE COURT: At some point --

MR. HABER: Yes, but that was later. That was later.

THE COURT: That was later. I said at some point.

MR. HABER: Yes.

THE COURT: And your argument is that at the time that the announcement was made of that merger it was represented to the public that it was a unanimous approval of the board, and, in fact, Mr. Packard --

MR. HABER: No, Hewlett.

THE COURT: What happened to Mr. Packard? Is he not with us?

MR. SCHATZ: I believe that's correct.

THE COURT: Okay, Mr. Hewlett.

MR. HABER: Walter -- we are talking about Walter Hewlett, who is the son of the founder.

THE COURT: Okay. That he had opposed it, even though my guess is that when he was on the board he voted for it; is that what happened?

MR. HABER: Your Honor, we quote in the complaint what he said at the very last meeting, September 3rd, 2001 meeting. What we detail in the complaint is that he was told on August 30th, and we've got this information --

THE COURT: All right, go ahead. I am just trying
to get the lawsuit, what the lawsuit is about.

I assume everything you say they may take issue with or not. It doesn't make any difference at this point.

**MR. HABER:** I'll try to crystallize it this way, sir, all right: The class period that we articulate in the complaint is a two-month class period from September 3rd, 2001 till November 6, 2001. It is during that period of time that the public did not know that Walter Hewlett was opposed to the merger.

It is during that period of time that the defendants' statements regarding the merger, and in particular, their statements that it had been unanimously approved by the board of directors of Hewlett-Packard were misleading because they did not disclose his opposition and his continued opposition to the merger and his consistent opposition to the merger from the time it was first raised at board of directors' meetings.

**THE COURT:** So he never approved it.

**MR. HABER:** He never approved it, all right? He voted in favor of it.

**THE COURT:** Ah, therein lies the rub.

**MR. HABER:** Well, it is the rub.

**THE COURT:** Usually when people, I don't care what they say, isn't it the vote that counts?

**MR. HABER:** The securities laws, as I'm sure Your
Honor knows, is if something -- we do not allege in the
complaint that the statement that the merger had been approved
by all of the directors of the Hewlett-Packard was false. What
we do say is that it omitted facts necessary to make that
statement not misleading, classic 10(b)(5) terminology. And a
classic --

THE COURT: I'm sure the terminology is classic, I'm
not sure this case is a classic case.

MR. HABER: Well, and, Your Honor --

THE COURT: I mean, if you go into one of these in
your heart of hearts how do you really feel about it --

MR. HABER: No, it's not that, Your Honor.

THE COURT: Well, you'll have your chance because
it's going to be a big motion --

MR. HABER: I have no question --

THE COURT: -- to dismiss.

And one thing I'm not so inclined to do is to have
three sets of lawyers appointed to have -- there is going to be
one set of lawyers in this case. I don't care who it is.

You guys are going to go out in the hall and choose
one law firm to represent the plaintiff in this case through
the motion to dismiss. After that, if it survives a motion to
dismiss I'll reexamine the issue as to whether you need 30
lawyers, 100 lawyers, 200 lawyers, 1000 lawyers, anything --
you deal with Wilson Sonsini, a million lawyers, they have --
all of whom are extremely well paid. So we'll go back and look at that issue later, but I'm not doing it today. And you guys are going to take one set of lawyers.

MR. HABER: Your Honor, in light of the position the defendants took on that issue, we have already talked about that. If Your Honor is disposed to only appointing one firm, it should be me.

THE COURT: Who?

MR. HABER: Me.

THE COURT: You?

MR. HABER: Yes.

THE COURT: Everybody agree to that?

MR. SCHUBERT: Yes, Your Honor.

THE COURT: Okay, you're in. Consider yourself appointed.

Mr. Schatz, you are standing there in splendid silence, I assume you agree with basically everything the plaintiff has said.

MR. SCHATZ: Not precisely, Your Honor.

THE COURT: Oh, you take issue --

MR. SCHATZ: First of all, I'll address the merits. And I understand that --

THE COURT: It's called a little bit of addressing the merits, just to balance the -- just to balance the table, right?
MR. SCHATZ: You wouldn't want my client to think that I came here and didn't at least --

THE COURT: That would be --

MR. SCHATZ: -- set forth the accurate picture. First, let's --

THE COURT: Well, he set forth a picture, I'll make a judgment as to whether that's accurate.

MR. SCHATZ: First, make no mistake about it, Mr. Hewlett voted for the merger, that's number one. Second, this is their claim: Their claim is that sellers of HP stock sold at -- at an erroneous price, because had the market known that Mr. Hewlett had qualms about it and ultimately as a shareholder would have voted against it, that the price would have been higher under the mistaken erroneous false assumption that the merger would have been defeated.

So putting aside whether boards of directors, when they vote, every time they have to say, gee, we voted for it but we have qualms, we have qualms about it and we have to calibrate it, putting aside that legal issue, which I gather the Court will ultimately determine on a motion to dismiss, it's based on the erroneous premise that the merger would have been defeated. That is number one.

Number two, I understand that the Court has indicated that it's going to let the matter proceed, but I do think it's -- it bears emphasis here because -- to put this
case in context, because this Court has a continuing
obligation, as you know, to determine whether the lead
plaintiff is going to adequately represent the interest of the
class. And sometimes history tells us something here.

It is not as if Mr. Haber's firm is not a
sophisticated law firm, but what is clear that they made a
continuous effort to first file in a remote jurisdiction. When
we presented that, they balked. When we raised the issue of
inadequate notice, they balked. When the judge in Connecticut
raised the issue of inadequate notice, they balked.

And when you layer on that the theory which -- here
there is -- there is a -- there is a substantial question
whether this lead plaintiff is going to be adequately
protecting the interest.

THE COURT: Well, I don't know why. I mean, I hear
what you're saying, and maybe there are better plaintiffs out
there, but for the purposes of what you have raised, what
you're discussing, what I have to deal with in my motion to
dismiss, why do I care, really, who is the plaintiff?

MR. SCHATZ: Can I -- may I --

THE COURT: Well, that's why I asked the question,
hopefully looking for an answer, right?

MR. SCHATZ: Because, I think the Reform Act
basically says not all cases are appropriate for class actions.

We cited the Cavanaugh case, which I think it was Footnote 7,
that left open the question whether all cases are appropriate
to proceed as class actions.

    It's not as if Hewlett-Packard is a lightly-traded
stock. It has numerous, numerous shareholders. The two
notices, one shareholder with 255 -- 255 shares, less than
$1000 of damage, has come up with a theory which we think is
demonstrably noncognizable. I think at some point the expense
associated with that, given the pattern here, has to raise
substantial doubt as to whether this is an adequate plaintiff.

    THE COURT: If it's the only one around that wants
to come forward, and I assume it is, right?

    MR. HABER: To our knowledge, Your Honor, no one
else --

    THE COURT: Yeah. After all these notices, that's
the way it is. I think you should just welcome Ms. Hanrahan.
I don't know male or female.

    MR. HABER: Ms.

    THE COURT: Okay, just welcome her. If later on if
it becomes an issue, really, a real issue, a real issue, I'll
address it then.

    I can always change, change. I can decide that she
is not adequate for certain purposes or not, I don't know. But
I want to get this thing over with or get it going, one way or
the other. You know, and I think in a sense I don't -- I think
the plaintiff has had sort of a rough go of it in Connecticut
insofar as the matter was held in submission, without
plaintiff's fault, for a considerable period of time.

So putting that aside, I'm not saying it was the
Court's fault, I have no idea what the Court -- other
requirements and other obligations, but I'm saying it wasn't
the plaintiff's fault. I did find what I found about the
notice, and so forth, but be that as it may, we are going to
let bygones be bygones. We are going to appoint one lawyer,
appoint Ms. Hanrahan as the representative, as the lead
plaintiff here, and now I'm going to set the date for a motion
to dismiss.

So since it will be your -- on your nickel,
Mr. Schatz, why don't you set a date.

MR. HABER: So -- so if I can remind the Court, we
are going to be then filing, which we can as of right now, the
amended complaint that we had attached, and we'll do that this
week.

THE COURT: Yeah. Amended complaint is fine.
Okay. That's granted. The motion -- amended
complaint and filed now subject to a motion to dismiss.
Yes?

MR. SCHATZ: I'm assuming that we can file in 30
days. One thing we can do is I can work out with Mr. Haber
over the next day or so a schedule and then get it submitted to
the Court.
THE COURT: That's fine. But I would -- however, I
would like you to suggest a day for a hearing that I can --
maybe that's a better way of doing it, because I don't like you
to leave here totally in control of the situation, thereby
simply --

MR. HABER: The end of March -- if the defendants
have until towards the end of April to file their motion. If
we could have 30 days to respond, that would be the --

THE COURT: Motion to dismiss will be heard

June 16th at 10:00 a.m.

Any days you want to work out, when you file, when
you reply, when you oppose, work it all out. The only day I'm
giving you is 10:00 o'clock, June 16th, okay?

MR. SCHATZ: Fine.

THE COURT: Great.

MR. HABER: We have one more order of business.

THE COURT: Now, that discovery, I don't -- I
understand that there are preservation --

MR. HABER: Yes, Your Honor.

THE COURT: Yeah, but I don't think you really made
showing that in the next 90 days documents are going to be
destroyed that otherwise wouldn't have been destroyed in the
last two years of this litigation.

MR. HABER: Well, Your Honor, I don't make a showing
as to that, but the point is they still could be, especially
dealing with the authors of those books, who are nonlawyers.

THE COURT: I'm not going to cause people to do a lot of things at this point. I'm going to deny your motion without prejudice.

If you come in and make a showing that these documents are going to -- are being destroyed, fine, then I'll consider that. So I don't believe an adequate showing has been made.

MR. HABER: I'm not asking anybody to do anything. I want to just serve the subpoena.

THE COURT: No, but you are asking to preserve documents, and that is going to cause them to go through and change systems and spend a lot of time and a lot of money. I don't know -- I think you have to make more of a showing than I presently see, so I'm going to deny it without prejudice.

MR. SCHATZ: Thank you.

MR. HABER: June 16th.

THE COURT: See you then, or at least some of you.

(Proceedings adjourned at 2:30 p.m.)

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

Sahar McVickar, RPR, CSR No. 12963

April 6, 2006
EXHIBIT C
BACKFIRE

Carly Fiorina's High-Stakes Battle for the Soul of Hewlett-Packard

PETER BURROWS

John Wiley & Sons, Inc.
huge restricted stock grant issued that day, per her employment contract. Hewlett says that’s no excuse. “It may be legal, but it’s not ethical. Being an insider can be inconvenient.”

All this led up to one penultimate board meeting at Wilson Sonsini’s offices on August 30. That was when Hewlett says Larry Sonsini told him he had a duty to vote with the board—even if he wanted to vote his shares against the deal later.

After that meeting, Hewlett and his wife made the three-hour drive to their mountain cabin. That weekend, he struggled over what to do. He says he did not want to vote for the deal, but he feared that if he opposed it, Compaq would demand a higher purchase price. Then he briefly settled on a third course: to resign. It didn’t last. “I’ve been involved one way or another with this company for 50 years,” he says. “For me to pick up my marbles at this critical juncture just didn’t seem right. Out of respect for the employees, I decided to stick with it.”

That Monday, the board met to take its final vote. Hewlett decided to okay the deal, to maintain the board’s unanimity—but he says he made it clear that he did not like the deal. “We’re still very early in this process, and there’s a lot that we don’t know,” he claims to have said. “But knowing what I know now, I’d vote my shares against this merger if the vote were today.”

His colleagues insist he did not say that he planned to vote his shares against the deal. They say Hewlett did not give the appearance of being a few months from waging a proxy war against them. “I really believe Walter didn’t know at the time that he was going to lead an opposition fight,” says Sonsini, who thinks Hewlett later succumbed to the falling stock price, pressure from friends and relatives, and concern for HP’s future. “I’m not sure it wasn’t just fear of change.”

While Walter Hewlett was obsessing deep in the Sierras, an army of executives, bankers, handlers, and lawyers were in New York pulling together final preparations for the biggest computer merger in history. Hewlett may have thought the only remaining detail to be negotiated was price, but there was still tons to be
IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:
SALESFORCE.COM SECURITIES LITIGATION

No. C 04-03009 JSW

ORDER GRANTING MOTION TO DISMISS

Now before the Court is the motion filed by Defendants salesforce.com, inc. (the "Company"), Marc R. Benioff and Steve Cakebread (collectively, "Defendants") to dismiss the Corrected and Superseding First Amended Class Action Complaint (the "Complaint"). Having carefully reviewed the parties' papers and considered their arguments and the relevant legal authority, and good cause appearing, the Court hereby GRANTS Defendants' motion to dismiss without leave to amend.

BACKGROUND

In this federal securities class action, Plaintiff Chuo Zhu, representing a purported class of purchasers of the common stock of the Company between June 23, 2004 and July 21, 2004, alleges that the Company's failure to disclose an internal earnings forecast for fiscal year 2005 (ending January 31, 2005), developed prior to the start of the fiscal year and predicting diluted earnings per share ("EPS") of breakeven 3 cents, constitutes a violation of the Securities Exchange Act of 1934.
Founded in 1999, the Company provides on-demand, web-based information management, or customer relationship management ("CRM") solutions, to companies of all sizes on a subscription basis. (Complaint at ¶ 2, 35.) The Company went public in a highly publicized initial public offering ("IPO") on June 23, 2004. (Id. at ¶ 6, 57.)

In advance of the IPO, the Company filed with the SEC a Form S-1 Registration Statement and amendments which disclosed the estimated diluted earnings per share by fiscal year. (See Complaint at ¶ 60; Main Decl., Ex. A at 23, F-4, F-12.) The Registration Statement also disclosed that fiscal year 2004 earnings benefitted from an extraordinary, non-recurring item, the abandonment of office lease space in San Francisco. (See Declaration of Claudia N. Main ("Main Decl."), Ex. A at 27.) When that non-recurring item is excluded from the calculation, fiscal year 2004 earnings would have been 1 cent.

The IPO price of the Company’s stock was $11.00. (See Complaint at ¶ 57.) After the passage of nearly one month, on July 20, 2004, the stock price was $16.06. (See id. at ¶ 15.) On July 21, 2004, Defendant Cakebread provided securities analysts with internal guidance of the fiscal years 2005 for the first time. The internal guidance indicated that the Company had predicted a fiscal 2005 net income of breakeven to 3 cents a share and revenue of $160 to $165 million. (See id. at ¶¶ 10, 78, 80, 81.) Cakebread also indicated that the Company had been using the guidance internally since February 1, 2004. (See id. at ¶¶ 10, 79, 81.) The next day, the Company’s stock price closed at $11.42, reflecting a 29% decline from the previous days’ closing price of $16.06. (See id. at ¶¶ 15, 83.)

On February 17, 2005, the Company announced its actual results for fiscal year 2005. The revenues for the year were $176 million, 84% higher than fiscal year 2004 revenues. (See Main Decl., Exs. B, C at 19, 51.) Diluted earnings per share were 7 cents, or 75% higher than the fiscal year 2004 diluted earnings. (See id.)

The Court will address other specific facts relevant to this motion as they are pertinent to the analysis.
ANALYSIS

Rule 10b-5 makes it unlawful for any person to use interstate commerce:
(a) To employ any device, scheme, or artifice to defraud;
(b) To make any untrue statement of 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 that operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

To plead a claim under section 10(b) and Rule 10b-5, a plaintiff must allege (1) a misrepresentation or omission, (2) of material fact, (3) made with scienter, (4) on which the plaintiff justifiably relied, (5) that proximately caused the alleged loss. *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999). Additionally, as in all actions alleging fraud, Plaintiff must state with particularity the circumstances constituting fraud. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 193 (9th Cir. 1999); Fed. R. Civ. P. 9(b).

Plaintiff also claims that individual defendants, Chief Executive Officer Marc R. Benioff and Chief Financial Officer Steve Cakebread, are liable pursuant to Section 20(a) of the Securities Exchange Act, which provides for derivative liability for those who control others found to be primarily liable under the provisions of that act. *In re Ramp Networks, Inc. Sec. Lit.*, 201 F. Supp. 2d 1051, 1063 (N.D. Cal. 2002). Where a plaintiff asserts a Section 20(a) claim based on an underlying violation of section 10(b), the pleading requirements for both violations are the same. *Id.*

A. Applicable Pleading Standards.

1. Rule 12(b)(6).

A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss should not be granted unless it appears beyond a doubt that a plaintiff can show no set of facts supporting his or her claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).
2. Private Securities Litigation Reform Act.

In order to limit the number of frivolous private securities lawsuits, Congress enacted the Private Securities Litigation Reform Act ("PSLRA") in December of 1995, and created heightened pleading standards for such lawsuits. 15 U.S.C. § 78u-4(b). The PSLRA requires that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1)(B). Furthermore, the PSLRA requires that the plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

The heightened standard set by the PSLRA was intended to put an end to securities fraud lawsuits that plead "fraud by hindsight." In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 988 (9th Cir. 1999). "The PSLRA significantly altered pleading requirements in private securities fraud litigation by requiring that a complaint plead with particularity both falsity and scienter." In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1084 (9th Cir. 2002) (citing Ronconi v. Larkin, 253 F.3d 423, 429 (9th Cir. 2001)) (emphasis added). "Thus the complaint must allege that the defendant made false or misleading statements either intentionally or with deliberate recklessness or, if the challenged representation is a forward looking statement, with "actual knowledge . . . that the statement was false or misleading." Id. at 1085 (citing 15 U.S.C. § 78u-5(c)(1)(B)(I)). This is often accomplished "by pointing to inconsistent contemporaneous statements or information (such as internal reports) made by or available to the defendants." Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999) (quoting In re GlenFed Sec. Lit., 42 F.3d 1541, 1549 (9th Cir. 1991) (en banc)); see also id. at 994 (discussing insufficiency of plaintiffs' allegations with regard to the non-disclosure of confidential non-public information).

Under the PSLRA, a complaint is still construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. Silicon Graphics, 183 F.3d at 983. To determine whether Plaintiff has pled a strong inference of
scienter, however, "the court must consider all reasonable inferences to be drawn from the 
allegations, including inferences unfavorable to the plaintiffs." *Gompper v. VISX, Inc.*, 298
F.3d 893, 897 (9th Cir. 2002). The Court "should consider all the allegations in their entirety, 
together with any reasonable inferences therefrom, in concluding whether, on balance, the 
plaintiffs' complaint gives rise to the requisite inference of scienter." *Id.* "Conclusory 
allegations of law and unwarranted inferences, however, are insufficient to defeat a motion to 
dismiss." *In re Northpoint Communications Group, Inc. Sec. Litig.*, 221 F. Supp. 2d 1090, 1094 
(N.D. Cal. 2002).

Finally, the Court may consider the facts alleged in the complaint, documents attached 
to the complaint, documents relied upon but not attached to the complaint when the authenticity 
of those documents is not questioned, and other matters for which the Court can take judicial 
notice. *Id.; see also Silicon Graphics, 183 F.3d at 986.*


Both Plaintiff and Defendants request that the Court take judicial notice of documents 
that the Company filed with the SEC, news articles and press releases, and analysts' reports, all 
of which are either publicly filed documents, or are referenced in the Complaint or are integral 
to the allegations contained in the complaint. Neither party disputes the accuracy of the 
documents attached to the other's request, and the requested documents are the types of 
documents of which this Court properly may take judicial notice. *See, e.g., In re Silicon 
Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 758 (N.D. Cal. 1997); aff'd, 183 F.3d 970 (9th Cir. 
1990) (taking judicial notice of publicly available documents filed with the SEC); *see also In re 
Calpine Corp. Sec. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003) (court "may properly 
take judicial notice of SEC filings and documents expressly referenced" in a complaint); *see 
also Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998) (granting judicial notice of 
documents whose authenticity is not contested and which are crucial to the claims although not 
explicitly incorporated in the complaint). Accordingly, the Court GRANTS both Plaintiff's and 
Defendants' requests for judicial notice of the attached documents.
B. Alleged Nondisclosure of Internal Forecast is Not Actionable.

1. Alleged Omission of Internal Forecast Was Not Misleading.

To plead a claim under section 10(b) and Rule 10b-5, a plaintiff must allege (1) a misrepresentation or omission, (2) of material fact, (3) made with scienter, (4) on which the plaintiff justifiably relied, (5) that proximately caused the alleged loss. Binder, 184 F.3d at 1063. Here, Plaintiff alleges that the Company's failure to disclose an internal earnings forecast for fiscal year 2005 prior to the IPO was a material omission that caused Plaintiff to purchase stock at an artificially inflated price. To be actionable under Section 10(b) and Rule 10b-5, however, an alleged omission must render some affirmative public statement misleading. In order 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." See Brody v. Transitional Hospitals Corp., 280 F.3d 997, 1006 (9th Cir. 2002) (citing McCormick v. The Fund American Cos., 26 F.3d 869, 880 (9th Cir. 1994)). In order for Plaintiff to survive a motion to dismiss under the pleading standards of the PSLRA, the complaint must specify the reasons why the statements or omissions made by Defendants "were misleading or untrue, not simply why the statements were incomplete." Id. (citing 15 U.S.C. § 78u-4(b)(1); Ronconi, 253 F.3d at 429).

Plaintiff alleges that the earnings per share figures "led investors to believe that the Company was poised to continue the trend of increasing earnings into [fiscal year 2005], ending January 31, 2005." (Opp. at 4.) In addition, Plaintiff alleges that analysts and reporters were forecasting a rise in earnings per share in the fiscal year 2005 based primarily on the Company's past performance. (Id., citing Complaint at ¶¶ 75, 49.) The core allegation in the Complaint is the Company's omission of the internal forecast gave investors the impression that future earnings would rise in a manner consistent with the Company's historical upward trend in earnings. (Complaint at ¶¶ 9, 58, 59, 62, 63.) However, as Defendants point out, the Company's actual fiscal year 2005 results demonstrated just that -- a continuation of the upward trend in earnings. On February 17, 2005, the Company announced its actual results for fiscal year 2005 which indicated that revenues were $176 million, 84% higher than fiscal year 2004.
This growth in revenues is comparable to the previous year’s increase of 88% in revenues. Because the actual, existing state of affairs turned out to be an upward trend in earnings, the nondisclosure of the internal forecast portending a decline in revenues, did not affirmatively create an impression of a state of affairs that differed in a material way from the one that actually existed. Therefore, Plaintiff has failed to set forth a legal theory that is actionable based on the nondisclosure of the internal forecast.

2. Defendants Owe No Legal Duty to Disclose the Internal Forecast.

Further, even if the fiscal 2005 forecast announced on July 21, 2004 did reflect a downward departure from an upward trend, Plaintiff could still not state a claim for alleged failure to disclose the forecast. The law imposes no duty to disclose internal forecasts in the context of an initial public offering. See, e.g., In re VeriFone Sec. Litig., 11 F.3d 865, 869 (9th Cir. 1993) (holding that, absent allegations that the Company withheld financial information from which forecasts are typically derived, the alleged omissions did not render other statement misleading); see also Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir. 1980) (holding that the SEC does not require a company to disclose financial projections). The nondisclosure of the internal forecast does not render the Company’s disclosure of historical results for the fiscal year 2002 through fiscal year 2004 in the Registration Statement filed before the SEC in preparation for the initial public offering misleading. See In re Convergent Tech. Sec. Litig., 948 F.2d 507, 513 (9th Cir. 1991) (rejecting claim that historical reports of past growth implied future growth); see also In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1406 (9th Cir. 1996) (holding that “a company is not required to forecast future events or to caution ‘that future prospects [may not be] as bright as past performance.’”)

1 The Court finds the analogy of an IPO to insider trading by the company employed by the First Circuit in Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1203-04 (1st Cir. 1996), to be unhelpful. Here, Plaintiff has not alleged a claim for insider trading, and in any event, if the abstain or disclose rule applied in the context of such a claim, Plaintiff would still bear the burden of pleading and proving that the alleged omission rendered a statement misleading. See, e.g., McCormick, 26 F.3d at 880.

Regulation S-K provides that IPO prospectuses and registration statements must contain a section on management's discussion and analysis of financial condition and results of operations in a section called "Management Discussion." See generally 17 C.F.R. § 229.10, et seq. Item 303 addresses what must be included in the Management Discussion and requires, in part, that the section "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii).

Until its revision in 2003, Instruction 7 to Regulation S-K clearly indicated that registrants were not required to disclose forecasts in their registration statements. See 17 C.F.R. § 229.303(a), inst. 7, 7 Fed. Sec. L. Rep. (CCH) ¶ 71,033, at 61,867-3 (2003) ("Registrants are encouraged, but not required, to supply forward-looking information"); see also VeriFone, 11 F.3d at 870 (holding that the "known trends or uncertainties" language of Item 303 did not include forecasts). In its revisions to the instructions in February 2003, Congress eliminated the sentence regarding the lack of obligation to supply forward-looking information, in order, at least in part, to be consistent with other revisions to the regulations requiring that companies disclose forward-looking information regarding the valuation of assets held in off-balance sheet entities. See Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Rel. Nos. 33-8182, 34-47264, 68 Fed. Reg. 5982, 5992-93 (February 5, 2003).

Plaintiffs cite a post-revision unpublished case from the Southern District of California in which the court found that "because Section 11 [of the Securities Act] imposes liability if a registrant 'omits to state a material fact required to be stated' in the registration statement, 'any omission of facts required to be stated' under Item 303 will produce liability under Section 11." In re Surebeam Corp. Sec. Litig., 2004 U.S. Dist. LEXIS 26951, *40 (S.D. Cal. December 30, 2004). The Surebeam court analyzed the issue of omission of information required to be disclosed under Item 303 only with respect to the claim under Section 11. Id. The separate analysis of the 10b-5 claim in that case provides no indication whether the court even
considered if a violation of Item 303, standing alone, could support a claim under Rule 10b-5. In any event, the Surebeam court conclusively found that, under their 10b-5 claim, plaintiffs had adequately pleaded with particularity that the prospectus contained "misleading statements and omissions." Id. at *51. Because this Court has found that the omissions alleged were not misleading, the Court does not need to address whether the unpublished interpretation of the applicability of Item 303 to Section 11 claims should apply to Plaintiff's Rule 10b-5 claim. Also, the Court notes that "demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5. Such a duty to disclose must be separately shown." See Alfus v. Pyramid Tech., 764 F. Supp. 598, 608 (N.D. Cal. 1991); see also In re Caere Corporate Sec. Litig., 837 F. Supp. 1054, 1061 n.4 (N.D. Cal. 1993) ("The fact that Defendants may or may not have violated Item 303 is irrelevant to Plaintiffs' Rule 10b-5 claims.")

C. Control Person Liability

Section 20(a) of the Securities and Exchange Act provides derivative liability for those who control others found to be primarily liable under the Act. In re Ramp Networks, 201 F. Supp. 2d at 1063. Here, Plaintiff asserts that Benioff and Cakebread are liable under this section because of an underlying violation of Section 10b. Because Plaintiff has not adequately alleged facts to support the underlying 10b-5 violation, the Section 20(a) claim must be dismissed as well. Id.; America West Holding Corp., 320 F.3d at 945.

D. Leave to Amend.

Motions to dismiss are viewed with disfavor and rarely should be granted, and Federal Rule of Civil Procedure 15(a) provides that leave to amend is to be freely given when justice requires. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." Id. (citing Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)). The Ninth Circuit has admonished that because the standards in the PSLRA are high, "[a]dherence to these principles is especially important in the
context of the PSLRA.” Id. Ultimately, however, it is within the Court's discretion to
determine whether to grant a plaintiff leave to amend. Vantive, 283 F.3d at 1097-98.

Here, because the basic facts are alleged and fail to state an actionable claim, the Court
concludes that Plaintiff cannot cure the flaws in its pleading. See Lipton v. Pathogenesis Corp.
284 F.3d 1027, 1039 (9th Cir. 2002). Because any amendment would be futile, there is no need
to prolong the litigation by permitting further amendment. See Klamath-Lake Pharmaceutical
Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (futile amendments
should not be permitted); Silicon Graphics, 183 F.3d at 991 (denying leave to amend because
defects in pleadings could not be cured by amendment).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED without leave
to amend. Plaintiff has failed to state a claim upon which relief can be granted under Sections
10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and the
rules and regulations promulgated thereunder. The Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: December 22, 2005

[Signature]
JEFFREYS S. WHITE
UNITED STATES DISTRICT JUDGE
EXHIBIT E (pp. 1-25)
Now before the court is defendants' motion to dismiss the second amended complaint. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby grants the motion for the following reasons.

INTRODUCTION

This is a proposed class action alleging violation of the federal securities laws.

Plaintiffs are individuals who purchased stock of defendant Autodesk, Inc. ("Autodesk") during the period between September 14, 1998, and May 4, 1999 ("the class period").

Defendants are Autodesk, and three Autodesk officers -- Carol A. Bartz ("Bartz"), the Chief Executive Officer and Chairman of the Board of Autodesk; Eric B. Herr ("Herr"), the President and Chief Operations Officer; and Christine Tsingos ("Tsingos"), who served as Treasurer.

Plaintiffs allege securities fraud in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and also allege control person liability, in violation of section 20(a) of the 1934 Act. On November 14, 2000, the
court dismissed the consolidated first amended complaint with leave to amend. See In re
second amended complaint on December 20, 2000,¹ and defendants now move to dismiss
for failure to state a claim.

A. Background

Autodesk creates and sells personal computer software for design drafting,
visualization applications, and multimedia content creation. Autodesk's computer-aided
design ("CAD") software is used by architects, civil and mechanical engineers, mapping
and geographic information systems designers, educators, and students. Autodesk's
principal product is the AutoCAD. Sales of AutoCAD and AutoCAD upgrades provided
approximately 80% of Autodesk's revenues in its fiscal year 1996 (FY96), and
approximately 70% in FY97 and FY98.

Plaintiffs allege that during the 1990s, the price of Autodesk's stock rose in
response to the introduction of upgraded versions of AutoCAD, and declined as revenue
from the upgraded products slowed. Plaintiffs claim that fluctuations in the stock price --
referred to as the "upgrade cycle" -- were particularly erratic during calendar years 1995
through 1997 because the R13/AutoCAD upgrade, introduced in 1995, was bug-ridden
and technically flawed. Although the price of the stock during the period 1995-1997
ranged from a high of $50 7/8 to a low of $21 3/8, the price of the stock on January 3,
1995, closed at $37 3/8, while the price on December 31, 1997, closed at $37.² Plaintiffs
claim that Autodesk achieved no real growth in earnings per share during that three-year
period.

¹ The consolidated first amended complaint also alleged claims against U.S. Bancorp
Piper Jaffray, which served as Autodesk's financial advisor and underwriter of the March 1999
secondary offering. The court dismissed those claims in the November 20, 2000, order, and
plaintiffs do not name Piper Jaffray in the second amended complaint.

² The court may consider any matter that is subject to judicial notice, such as public
records that are "capable of accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned." F.R.E. 201(b); see also MGIC Indem. Corp. v.
Weisman, 803 F.2d 500, 504 (9th Cir. 1986) (public records); Ravens v. Iftikar, 174 F.R.D.
Plaintiffs allege that Autodesk’s top management team -- defendants Bartz, Herr, and Tsingos -- came under increasing pressure from Autodesk’s Board of Directors and large investors to lessen Autodesk’s dependence on the AutoCAD product line by diversifying the company’s business and revenue sources, thereby eliminating the AutoCAD upgrade “boom or bust” cycle and enabling Autodesk to achieve consistent revenue and growth. Plaintiffs claim that despite Autodesk’s acquisition of several small companies and software technologies in the mid-1990s, defendants remained under pressure to make more significant acquisitions to lessen Autodesk’s dependence on AutoCAD.

Plaintiffs allege that Bartz, Herr, and Tsingos knew that any significant acquisition could be made only by using Autodesk’s common stock as currency, as a cash purchase of that size would be beyond Autodesk’s means. Plaintiffs claim that defendants believed that in order to limit the dilutive impact of such a large acquisition, they had to keep Autodesk’s stock trading at a price sufficiently high to limit the number of Autodesk shares actually issued in the transaction.

Autodesk’s management began negotiating in the summer of 1997 for the acquisition of Discreet Logic, Inc., a Canadian company that developed and marketed software used to create animation characters for movies. By February 1998, Autodesk and Discreet Logic had signed a nondisclosure and confidentiality agreement, and were sharing information with a view toward a possible business combination. The price of Autodesk’s stock rose to $42 11/16 on February 5, 1998, and remained in the $40s until the third week of June 1998, when it dropped back into the $30s.

On August 20, 1998, Autodesk and Discreet Logic issued a joint press release announcing the acquisition, in which Autodesk would issue .525 shares of Autodesk stock for each of the 31 million shares of Discreet Logic stock outstanding, or 16.3 million shares of Autodesk stock. Autodesk also announced that it would issue 19 million new shares of stock in connection with the acquisition. The price of Autodesk’s stock, which had closed at $32 1/2 on August 19, 1998, dropped to $27 7/16 on August 21, 1998, and remained at
a range between $23 and $27 during the following two months.

Plaintiffs allege that Autodesk's top officers were determined to ensure that the company reported revenue and earnings growth, in an effort to halt the decline in the value of Autodesk's stock and to push it higher. Plaintiffs claim that, to this end, defendants embarked on a scheme in September 1998, which involved artificially reviving flagging sales of the R14/AutoCAD (the then-existing version of the AutoCAD) to make it appear that Autodesk's business was growing, and misrepresenting the status of the R15/AutoCAD 2000 upgrade (the AutoCAD release that was in development during 1998 and early 1999).

Plaintiffs allege that throughout the class period, Bartz, Herr, and Tsingos made a number of positive, but false, statements -- specifically, that there was strong continuing demand for the existing R14 product line; that Autodesk had diversified its business, and that strong sales of Autodesk's "vertical product" line had resulted in lessened dependence on the AutoCAD product line, thereby enabling Autodesk to achieve more consistent revenue and earnings; that Autodesk was successfully developing and testing the R15/AutoCAD 2000; and that Autodesk was forecasting revenues of $1+ billion and earnings per share of $2.45-$2.55 for FY00 (2/1/99-1/31/00), in addition yearly earnings growth of 20%-25% over the next three to five years.

Plaintiffs claim that defendants made these statements throughout the class period, starting September 15, 1998, continuing through the completion of the acquisition of Discreet Logic and the associated public offering in March 1999, and on into April 1999. Plaintiffs assert that defendants made such statements during meetings or conferences with financial analysts and large investors, and in various Autodesk press releases.

Plaintiffs claim that defendants falsely represented that sales of the R14 were

Footnote:

Autodesk operated on a fiscal year running from February 1 through January 31. Thus, for example, the first quarter of fiscal year 2000 (1Q FY00) ran from February 1, 1999, through April 30, 1999; 2Q FY00 ran from May 1, 1999, through July 31, 1999; 3Q FY00 ran from August 1, 1999, through October 31, 1999; and 4Q FY00 ran from November 1, 1999, through January 31, 2000.
strong, in that they did not disclose that the reason sales were strong was that Autodesk
had implemented a customer incentive program which encouraged retailers to order more
of the R14 product than they could reasonably expect to sell. Plaintiffs claim that
defendants used two methods to achieve this goal — the "VIP Upgrade" program and the
"product over quota/extra earn-back credits" program.

The "VIP Upgrade" program involved a subscription sold as part of the R14
package, which allowed the end user to upgrade to the R15 when it became available.
According to plaintiffs, the VIP Upgrade subscription regularly sold for $295 retail, but if
sold with the R14, its price was discounted to $100. End users who purchased the R14
with the VIP Upgrade subscription were thus able to purchase the R15 at an extreme
discount. Plaintiffs claim that by the 4Q FY99, the reseller's price for the R14 had dropped
to cost, or $2200 to $2400. The suggested retail price for the R15 was $3750.
Purchasers of the VIP Upgrade subscription therefore received a $500 to $1000 discount
on obtaining the R15 upgrade.

The second method was the "product over quota/extra earn back credits" program.
Autodesk's authorized dealer agreements provided for incentives in the form of quota
discounts when a reseller reached quota. Under the agreement, failure to purchase the
required amount of software could result in termination of the agreement by Autodesk.
Plaintiffs claim that in order to persuade resellers to purchase additional R14 product
during 3Q FY99 and 4Q FY99, Autodesk gave them additional credits if they met quota,
and that large orders in excess of quota and in excess of resellers' credit limits were
pushed through, thereby artificially inflating Autodesk's sales for those two quarters.

Plaintiffs also allege that defendants falsely stated that the release of the R15
upgrade would have a positive impact on Autodesk's revenue and earnings per share in
FY00, despite having knowledge that there was no demand for the R15. Plaintiffs claim
that when Autodesk announced on May 4, 1999, that its 1Q FY00 results would be
significantly lower than defendants had forecast, the price of the stock "collapsed."
B. Chronology of Events During the Class Period

Plaintiffs allege that during a period of approximately seven months, from September 1998 through April 1999, defendants made false statements concerning sales and development of Autodesk products, and concerning projected financial performance. Plaintiffs claim that the false statements, made in analysts' meetings, conference calls, interviews, and press releases during the seven-month period, consisted of representations regarding both present fact and future predictions.

The representations regarding present fact include statements (made prior to the release of the R15)\(^4\) that there was strong continuing demand for the R14 because customers were buying vertical products based on the R14, that the reorganization into vertical product lines was enabling Autodesk to smooth out revenue and earnings growth, and that the development (including the testing) of the R15 was proceeding successfully. The future predictions include statements (made both prior to and immediately following the release of the R15) that the reorganization into vertical product lines would enable Autodesk to achieve more consistent revenue and earnings growth in the future, and that the R15 was likely to be commercially successful, plus forecasts of revenues and earnings for the coming fiscal year (FY00, or the period February 1, 1999, through April 30, 1999) and beyond.

1. September 1998

On September 14, 1998, Autodesk filed its Form 10-Q for 2Q FY99\(^5\) with the SEC. The Form 10-Q stated that it contained trend analysis and other forward-looking statements relative to markets for Autodesk products and trends in revenue, and that Autodesk's actual results could differ materially from those set forth in the forward-looking statements. The 10-Q included a lengthy section headed, "Certain Risk Factors Which May Impact Future Operating Results," which identified potential future risks such as

\(^4\) The R15 was released during the week of March 29, 1999.

\(^5\) This was the quarter ending July 31, 1998. See n.3 above.
increased competition ("could result in price reductions, reduced revenues and profit margins, and loss of market share"); fluctuations in quarterly operating results ("result of periodic release cycles, competitive factors, and general economic conditions" as well as "fluctuations in operating results in interim periods in certain geographic locations"); product concentration ("any factor adversely affecting sales of AutoCAD and AutoCAD upgrades, including such factors as product life cycle, market acceptance, product performance and reliability, reputation, price competition, and the availability of third-party applications" could have materially adverse effect on the company's business); and product development and introduction (software products offered by Autodesk are complex and "may contain errors or defects (‘bugs’) especially when first introduced . . . such defects or errors could result in corrective releases to the Company’s software products, damage to Autodesk’s reputation, loss of revenues, an increase in product returns, or lack of market acceptance of its products"). In addition, the 10-Q stated that Autodesk expected that revenues derived from both developed and in-process technologies could decline over the next several fiscal years.

Also on September 14, 1998, Autodesk held a conference for securities analysts during its "Design World Conference" in Philadelphia. Plaintiffs claim that Bartz and Tsingos told the analysts that

-- because of "Autodesk's reorganization into vertical product, more of its customers were willing to purchase vertical products based on the R14/AutoCAD technology, rather than wait for the . . . R15/AutoCAD 2000;"

-- because of the reorganization into vertical product, "Autodesk was seeing unusually strong continuing demand for its R14/AutoCAD product, even though that product was entering the later part of its lifecycle;"

-- the reorganization into vertical product lines was enabling Autodesk to "smooth out its revenue and EPS growth;"

-- "with the initiation of the R15/AutoCAD 2000 product cycle," the reorganization into vertical product lines "would allow Autodesk to achieve more consistent revenue and EPS growth going forward than had historically been the case;"

-- Autodesk was "successfully completing the development and testing of the R15/AutoCAD 2000 product;"
-- R15/AutoCAD 2000 was "now in alpha-testing at thousands of
customers' 'seats' and was performing exceedingly well;"

-- the progress of the testing "indicated that there would be strong
demand for the product upon its commercial release;"

-- because of the "successful development" of the R15/AutoCAD 2000,
including the "enthusiastic response it was receiving in alpha-testing,"
Autodesk was "likely going to be able to advance the commercial release
date of this product to earlier in C[alendar] Y[ear] 99 than originally planned;"
and

-- "as a result of the foregoing," Autodesk was forecasting 20%-25%
EPS growth over the next three to five years and FY00 EPS of $2.45 - $2.55.

Cplt ¶ 51. 6

Plaintiffs allege that the statements made at the Philadelphia conference were
published in a report issued the following day, September 15, 1998, by Piper Jaffray. The
Piper Jaffray report allegedly stated that

-- Autodesk's current business "appears strong, with Autodesk's
product mix shift driving an increase in sales visibility;"

-- "AutoCAD cycles are becoming less pronounced;"

-- the AutoCAD R15 was expected "Early CY99;"

-- the acquisition of Discreet Logic "would be at most 3% dilutive;"

-- factors such as "a stronger more diversified business model,
appealing new product shipment schedule, upcoming new market
opportunities from the Discreet merger, lean channel inventories, favorable
upside given the R15 upgrade is expected to ship early FY00, and cost
saving opportunities" could generate substantial revenue gains during the
succeeding four quarters;

-- Autodesk continued to "benefit from the longevity in the AutoCAD
R14 upgrade;"

-- "given the feedback from some of the early Alpha R15 users, the
program is solid with a substantial number of new features and better
performance;" and

-- "with only one-third of the installed base upgrading to R14, we
believe that R12 and R13 users will flock to R15."

Cplt ¶ 52.

Plaintiffs allege that the statement that Autodesk was seeing strong continuing
demand for the R14 as a result of Autodesk's reorganization into vertical product was false because the continued demand for the R14 was not due to the company's move to vertical product lines, but rather, was based on the VIP Upgrade program, which offered deep discounts on the purchase of the R15 to end users who purchased the R14 during the end of calendar year 1998. Plaintiffs claim that the VIP Upgrade program "effectively cannibalized" Autodesk sales of the R15 when it was finally released in 1999 because many of Autodesk's customers had already purchased use of the R15 when they had acquired the VIP Upgrade program.

Plaintiffs also claim that sales and revenues during the latter half of calendar year 1998 appeared larger than they actually were because of a "duplication problem" in the software used to record sales. Plaintiffs allege that beginning in early 1998, Autodesk began combining different products and selling the combination as one package, and each associated product division recorded the same sale as part of its division's total revenue for a given quarter.

Plaintiffs allege that the statement that Autodesk was "successfully completing the development and testing" of the R15 and was "likely going to be able to advance the commercial release date" of the R15 was false because the R15 had serious glitches and software bugs, which would result in the product release being delayed.

Plaintiffs also claim that Autodesk's forecast of 20%-25% earnings-per-share growth over the next three to five years, and FY00 earnings per share of $2.45-$2.55 was false because Autodesk was "incapable" of achieving such results. Plaintiffs assert that Bartz and Tsingos made the financial forecasts based on the representation that Autodesk had smoothed out its revenue and earnings cycles due to reorganization into vertical product lines, and that the R15 was testing successfully, but that the cause of Autodesk's success during the latter half of 1998 was the VIP Upgrade program, which had made sales of the R14 at the expense of future sales of the R15.
2. November 1998

On November 19, 1998, in conjunction with its release of 3Q FY99 results, Autodesk held a conference call for analysts, money and portfolio managers, institutional investors, and large Autodesk shareholders. Plaintiffs allege that during the conference call, and in follow-up-one on one conversations with analysts, Bartz, Herr, and Tsingos stated that

-- because of "Autodesk's reorganization into vertical product, more of its customers were willing to purchase vertical products based on the R14/AutoCAD technology, rather than wait for the . . . R15/AutoCAD 2000;"

-- because of the reorganization into vertical product, "Autodesk was seeing unusually strong continuing demand for its R14/AutoCAD product, even though that product was entering the later part of its lifecycle;"

-- the reorganization into vertical product lines was enabling Autodesk to "smooth out its revenue and EPS growth;"

-- "with the initiation of the R15/AutoCAD 2000 product cycle," the reorganization into vertical product lines "would allow Autodesk to achieve more consistent revenue and EPS growth going forward than had historically been the case;"

-- Autodesk was "successfully completing the final development and testing of the R15/AutoCAD 2000 product;"

-- the R15/AutoCAD 2000 was "now in 'alpha-gold' phase, wherein key customers were using the product in production;"

-- the current testing phase would be followed by a brief "beta" phase, "setting the stage for a successful formal release;" and

-- because of the "successful development" of the R15/AutoCAD 2000, including the "enthusiastic response it was receiving in beta-testing," Autodesk "had been able to advance the final release date of this product to early 99."

Cplt ¶54.

Plaintiffs also allege that during "a follow-up one-on-one conversation" with Piper Jaffray analyst Nada, Bartz, Herr, and Tsingos stated that "as a result of the favorable factors benefitting Autodesk's business," Autodesk was forecasting 20%-25% EPS growth over the next three to five years and FY00 revenues and earnings per share of $1+ billion

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This was the quarter ending October 31, 1998.
These allegations are substantially identical to the allegations regarding statements made to the analysts at the Philadelphia conference on September 14, 1998, with the exception of the statements regarding the testing phase and anticipated release date of the R15.

As with the September 14th statements, plaintiffs claim that the November 19th statement that Autodesk was seeing strong continuing demand for the R14 as a result of Autodesk’s reorganization into vertical product was false because the continued demand for the R14 was not due to the company’s move to vertical product lines, but rather, was based on the VIP Upgrade program, which offered deep discounts on the purchase of the R15 to end users who purchased the R14 during the end of calendar year 1998. Plaintiffs also allege that the R14 sales were lower than reported because of the duplication of sales revenues described above with reference to the September 14th statements.

In addition, as with the September 14th statements, plaintiffs claim that the statement that Autodesk was successfully completing the development and testing of the R15 was false because the R15 had serious glitches and software bugs that would result in the product release date being delayed. Plaintiffs also claim that the financial forecasts were false because Autodesk was incapable of seeing such results during FY00 and the coming three-five years.

Also on November 19, 1998, Autodesk issued a press release, in which Bartz was quoted as stating that Autodesk had “overcome many obstacles this quarter such as seasonality and uncertain economic conditions,” and that “we are extremely satisfied with our performance. . . . Customers are continuing to validate our strategy by integrating vertical products in their business.” Cplt ¶ 55. Plaintiffs claim that the “statement” is false because the continued demand for the R14 through September 1998 was not due to the company’s move to vertical product lines but rather due to the deep discounts offered through the VIP Upgrade program. Plaintiffs contend that Herr and Tsingos are also liable for any false statements in the press release, under the “group-published” doctrine.
Plaintiffs allege that "these false statements" (presumably referring to some or all of the statements in the November 19, 1998, conference call and press release) were published in a report issued on November 20, 1998 by Piper Jaffray. The Piper Jaffray report forecast $886.1 million in revenues and $2.50 in earnings per share for FY00, and stated that the "growth in non-AutoCAD business is testimony that Autodesk's vertical product strategy is working, adding greater revenue growth opportunities." Cplt ¶ 56.

3. December 1998

On December 15, 1998, Autodesk filed its Form 10-Q for 3Q FY99* with the SEC. As did the Form 10-Q for 2Q FY99, the 3Q Form 10-Q stated that it contained trend analysis and other forward-looking statements relative to markets for Autodesk products and trends in revenue, and that Autodesk's actual results could differ materially from those set forth in the forward-looking statements. The 3Q Form 10-Q included a section headed "Certain Risk Factors Which May Impact Future Operating Results," which identified potential future risks such as increased competition, fluctuations in quarterly operating results, product concentration, and product development and introduction.

On December 28, 1998, Piper Jaffray issued a report on Autodesk, authored by its analyst Hani Nada after he allegedly had discussions with either Bartz, Herr, or Tsingos. As alleged with regard to the September 14, 1998, Philadelphia conference, the November 19, 1998, conference call, and the November 20, 1998, Piper Jaffray report, plaintiffs claim that this report forecast FY00 earnings per share of $2.50 and a 20%-25% three- to five-year growth rate for Autodesk. Cplt ¶ 58

The report also stated that

-- the R14 "continues to sell well . . . despite the aging R14 cycle;"

-- in calendar 1998 "Autodesk moderated the boom and bust AutoCAD cycles;"

-- in calendar 1999 "Autodesk is well positioned to successfully diversify its business, and break the boom and bust AutoCAD earnings cycle;"

* This was the quarter ending October 31, 1998.
for the first time in five years, [Piper Jaffray is] modeling for sequential earnings improvement in each of the quarters in calendar 1999; the result of the growth of Autodesk's non-AutoCAD business, in combination with the addition of the Discreet business, will be "smooth sequential earnings growth and more predictable share price growth;" and based in part on Autodesk's "increased vertical product strength," Piper Jaffray believed that "normalized revenue growth of 20% is conservative."

Cplt ¶58. Plaintiffs claim that these statements were false because Autodesk had not broken the upgrade cycle through a move to vertical product lines, and because the evenness of Autodesk's revenues during the latter half of calendar year 1998 was because of the VIP Upgrade program, which sacrificed future sales in order to "raise cash now."

On January 5, 1999, an article in Bloomberg quoted Tsingos as stating, "On our last conference call, we affirmed the marketplace consensus and we still do that today." Cplt ¶59. Plaintiffs allege that at the time of this statement, the "marketplace consensus" was FY00 revenues of $900 million - $1 billion and FY00 earnings per share of $2.45-$2.55, with 20%-25% earnings-per-share growth over the next three to five years. Plaintiffs claim that the statement attributed to Tsingos was false because Autodesk was "incapable" of achieving $2.45-$2.55 earnings per share in FY00 and 20%-25% growth over the next three years.

Plaintiffs assert that Tsingos made these forecasts based on the representation that Autodesk had smoothed out its revenue and earnings cycle, and had effectively broken the upgrade cycle during the end of calendar year 1998 because of its reorganization into vertical product lines. Plaintiffs claim, as with reference to the September 14, 1998, analysts meeting, and the November 19, 1998, conference call, that it was the VIP Upgrade program, not the reorganization into vertical product lines, that was the cause of Autodesk's success during the latter half of calendar year 1998. Plaintiffs also allege that the poor results that the R15 had received during testing also "assured" that revenue
Plaintiffs allege that because of "these favorable comments and forecasts," the price of Autodesk's stock continued to move higher, and reached over $45 by early January 1999. Plaintiffs claim that this "upsurge" in the stock price was engineered by defendants, and that it put the value of the Autodesk shares to be issued in the Discreet Logic acquisition at over $630 million and enabled Autodesk to cut the number of shares it had to issue to acquire Discreet Logic, as well as to complete the three-million-share public offering of Autodesk stock at a higher per-share price. Cplt. ¶ 60.

On January 19, 1999, the high bid on Autodesk's stock, which had closed at $45 1/16 on the previous trading day, was $49 7/16. The stock closed that day at $48 1/2. Autodesk announced that it was cutting the number of shares it would issue to acquire Discreet Logic to .33 shares of Autodesk stock for each share of Discreet Logic, reducing the number of Autodesk shares to be issued to 10 million, compared with the 16.3 million to have been issued under the original acquisition terms.

5. February 1999

On February 4, 1999, Autodesk filed an amended Form 10-K for FY98, and amended Form 10-Qs for 1Q FY99, 2Q FY99, and 3Q FY99, each of which contained a "forward-looking statements - risk factors" discussion similar to those described above with reference to the originally filed 10-Qs for 2Q FY99 and 3Q FY99.

On February 24, 1999, subsequent to its release of its 4Q FY99 results, Autodesk held another conference call for analysts, money and portfolio managers, institutional investors, and large Autodesk shareholders. Plaintiffs allege that during the conference call, and in follow-up one-on-one conversations with analysts, Bartz, Herr, and Tsingos stated that

-- because of "Autodesk's reorganization into vertical product, more of its customers were willing to purchase vertical products based on the R14/AutoCAD technology, rather than wait for the . . . R15/AutoCAD 2000;"

-- because of the reorganization into vertical product, "Autodesk was seeing unusually strong continuing demand for its R14/AutoCAD product, even though that product was entering the later part of its lifecycle;"
-- the reorganization into vertical product lines was enabling Autodesk to "smooth out its revenue and EPS growth;"

-- "with the initiation of the R15/AutoCAD 2000 product cycle," the reorganization into vertical product lines "would allow Autodesk to achieve more consistent revenue and EPS growth going forward than had historically been the case;"

-- Autodesk was "successfully completing the final development and testing of the R15/AutoCAD 2000 product;"

-- the R15/AutoCAD 2000 was "now in beta-testing and performing exceedingly well;" and

-- "there would be strong demand for this product upon its commercial release."

Cplt ¶ 62.

Plaintiffs allege that in a follow-up one-on-one conversation, either Bartz, Herr, or Tsingos told Nada that Autodesk was forecasting 20%-25% EPS growth over the next three to five years and FY00 revenues and earnings per share of $1+ billion and $2.45 - $2.55, respectively. Cplt ¶ 62.

These allegations are substantially identical to the allegations regarding statements made to the analysts at the Philadelphia conference on September 14, 1998, and during the November 19, 1998, conference call, with the exception of the statements regarding the testing phase and anticipated release date of the R15. As with the September 1998 and November 1998 statements, plaintiffs allege that the statement that Autodesk was seeing unusually high continuing demand for the R14 was false because the strong sales of the R14 were not due to the reorganization into vertical product lines, but rather because of the demand generated by the VIP Upgrade program. Plaintiffs allege that the statement that there would be strong demand for the R15 upon its release was false because defendants knew there was not strong demand for the R15, based on their discussions with unidentified individuals during an Autodesk reseller conference held in Palm Springs, California, in late January or early February 1999. Plaintiffs claim that the financial forecasts were false because Autodesk was "incapable" of achieving such results.

Also on February 24, 1999, Autodesk issued its 4Q FY99 press release, in which
Bartz was quoted as stating, "We are proud to have achieved revenue growth of twenty percent or better for the second consecutive year . . . Our goal was to expand our product line with vertical solutions that satisfy the design needs of our customers. We have achieved that goal." Cplt ¶ 63. Plaintiffs contend that Herr and Tsingos are also liable for making this statement under the "group published" doctrine. Plaintiffs allege that this statement was false because the continued demand for the R14 and the evenness of the revenues were based on the sales of the VIP Upgrade, not on the reorganization into vertical product lines. Plaintiffs also allege that the R14 sales were lower than reported because of the duplication of sales revenues described above with reference to the September 1998 and November 1998 statements.

Plaintiffs allege that on February 25, 1999, the day after the conference call and issuance of the press release, Piper Jaffray issued a report based on "the false statements by Bartz, Herr, and Tsingos" (presumably referring to the previous day's conference call and press release), stating that Autodesk had just reported a "solid" quarter, and that results were "particularly impressive given the quarter was the final quarter before the AutoCAD 2000 upgrade, and pre-AutoCAD upgrade quarter typically experiences a dramatic sales drop off." Cplt ¶ 64.

Plaintiffs assert that these statements were false because Autodesk was not transforming from a one-product company with an arsenal of products, but was still heavily dependent upon the AutoCAD for the majority of its sales revenue. Plaintiffs claim that the evenness of Autodesk's revenues and earnings during the latter half of 1998 were due to sales of the VIP Upgrade program and not to the reorganization into vertical product lines. Also on February 25, 1999, Bartz was interviewed on the Bloomberg Forum, where she stated that "we're pretty excited" about Autodesk's "business outlook," and about "new product cycles." She added that "things look great" and that "this fiscal year will be our first billion-dollar year and hey, that's pretty exciting, a lot of zeros." Cplt ¶ 65. Plaintiffs allege that these statements were false because defendants knew there was not a strong demand for the R15 and that Autodesk was incapable of achieving $1 billion in revenue in
the fiscal year beginning February 1, 1999, as Bartz stated in the interview.

6. March 1999

On March 10, 1999, the shareholders of Autodesk and the shareholders of Discreet Logic voted to approve the acquisition. Autodesk issued 9.9 million shares to acquire Discreet Logic, and also completed a public offering of three million shares at $41 per share. The price of the stock remained in the $37-$43 range until the first week of April 1999.

On March 14, 1999, Dow Jones published an article about Autodesk, in which Tsingos was quoting as stating that the acquisition of Discreet Logic, which had been approved by the shareholders of Autodesk and Discreet Logic on March 10, 1999, would “lower Autodesk’s overall fiscal 2000 revenue growth to the high teens as a percentage,” and that “excluding Discreet, Autodesk’s revenue continues to grow in the low 20% range.”

Cplt ¶ 67.

Plaintiffs allege that this statement was false because Autodesk was “incapable” of achieving 20% growth. Plaintiffs claim that Tsingos made this forecast based on the representation that Autodesk had smoothed out its revenue and earnings cycle, and had effectively broken the upgrade cycle during the end of calendar year 1998 because of its reorganization into vertical product lines. Plaintiffs claim, as with reference to the September 14, 1998, and November 19, 1998, analysts meetings, and the January 5, 1999, Bloomberg article, that it was the VIP Upgrade program, not the reorganization into vertical product lines, that was the cause of Autodesk’s success during the latter half of calendar year 1998, and that the sales of the R14 with the VIP Upgrade were made at the expense of future sales of the R15. Plaintiffs also allege that neither testing of nor demand for the R15 was positive.

7. April 1999

On Thursday, April 1, 1999, Bartz, Herr, and Tsingos appeared at an Autodesk analysts’ meeting in New York City. Plaintiffs allege that the three executives told the assembled analysts, money and portfolio managers, institutional investors, brokers, and
stock traders that the "success of Autodesk's reorganization" was enabling Autodesk to
smooth out its revenue and EPS growth and, with the initiation of the R15/AutoCAD
product cycle, would allow Autodesk to achieve more consistent revenue and EPS growth
going forward than had historically been the case." Cplt ¶ 68. This statement is
substantially identical to statements allegedly made at the September 1998 analysts'
Bartz, Herr, and Tsingos also allegedly stated that Autodesk had completed the
final testing of the R15/AutoCAD 2000 product, that the product was "now released and
selling well," and that the R15 upgrade "would be at least as successful as the R14
upgrade" had been. In addition, "[t]he successful early release date of R15/AutoCAD
would significantly benefit Autodesk's revenue and EPS growth during FY00." As in the
September 1998 analysts conference, the November 1998 conference call, and the
February 1999 conference call, Bartz, Herr, and Tsingos allegedly forecast 20%-25%
growth over the next three to five years, FY00 revenues of $1+ billion, and FY00 earnings
per share of $2.45-$2.55. Cplt ¶ 68.
Plaintiffs allege that the statement that the success of Autodesk's reorganization
was enabling the company to smooth out its revenue and earnings growth was false
because the continued demand for the R14 was not due to reorganization of the company
into vertical product lines, but was instead due to sales of the R14 VIP Upgrade. Plaintiffs
also allege that the R14 sales were lower than reported because of the duplication of sales
revenues described above with reference to the September 1998 and November 1998
statements and the February 1999 press release.
As for the statement regarding the release of the R15, plaintiffs allege that the
statement that the R15 was selling well, and would be at least as successful as the R14
was false because defendants knew that there was not strong demand for the R15, and,
because the VIP Upgrade program had "effectively cannibalized" the R15, sales of the
R15 would provide little or no benefit to Autodesk during FY00. Plaintiffs claim that the
financial forecast was false because Autodesk was "incapable" of achieving such results.
On April 5, 1999, the first trading day following the April 1st analysts meeting, Piper Jaffray issued a report authored by Nada, allegedly based on information provided by Bartz, Herr, and Tsingos at the April 1st analysts conference, and in follow-up conversations. Piper Jaffray forecast 20%-25% growth over the next three to five years, and stated that "[e]arly indications of the [R15] upgrade are this cycle should [be] successful [and] as strong if not strong[er] than the R14 cycle." The report added that "[w]e believe this is the year Autodesk can break the AutoCAD cycle." Cplt ¶ 69. Plaintiffs allege that this statement was false because Autodesk knew there was not strong demand for the R15.

On April 9, 1999, Piper Jaffray issued another report on Autodesk, in which Nada, allegedly after discussions with Bartz, Herr, and Tsingos, stated that "this cycle will be as strong if not stronger than the R14 cycle." The report also stated that the R15/AutoCAD 2000 was "reliable," adding that "Autodesk's 20,000 seat AutoCAD 2000 beta program appears to have paid off... We believe if AutoCAD 2000 reliability and performance was [sic] at an issue, dealers would begin to be aware by now." Cplt ¶ 70. Plaintiffs allege that these statements were false because Autodesk knew there was not strong demand for the R15.

Plaintiffs allege that "as a result of these positive -- and false -- representations and reassurances, Autodesk's stock "recovered" to $30 15/16 on April 29, 1999." Cplt ¶ 71.

On May 4, 1999, it closed at $28 1/2. After the close of trading on May 4, Autodesk announced that its 1Q FY00 results -- the results for the quarter ending April 30, 1999 -- would be below the levels previously forecast, in part (according to plaintiffs) because the

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5 Plaintiffs do not specify which "positive -- and false -- representations and reassurances" they claim caused the price of Autodesk's stock to "recover" to $30 15/16 on April 29, 1999, or from which point it is alleged to have recovered. The price of the stock began to fall at the end of March 1999, after reaching a high for the month of $43 1/4 on March 29, 1999. By April 1, 1999, the price had fallen to $37 3/6, and it closed at $37 7/8 on April 3, 1999; at $35 3/4 on April 6, 1999; at $30 1/2 on April 7, 1999; at $23 1/2 on April 8, 1999; and at $28 3/4 on April 9, 1999. It reached a low for the month of $24 15/16 on April 22, 1999. The price began to rise again on April 23, 1999, reaching a high for the month of $30 15/16 on April 29, 1999, but dropped into the $20s again on April 30, 1999.
R15 had failed to "achieve commercial success." Plaintiffs claim that "upon this revelation," the price of Autodesk's stock "immediately collapsed -- falling by almost 25% in one day to $22 1/4, and later to as low as $19 3/4."\(^\text{10}\) Cplt ¶ 72.

DISCUSSION

A. Legal Standard

1. Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).

A court should dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim only where it appears beyond doubt that plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Williamson v. Gen'l Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir.), cert. denied, 531 U.S. 929 (2000). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996).

Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). When matters outside the pleading are presented to and not excluded by the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment, and all parties shall be given opportunity to present all material made pertinent to such a motion by Rule 56. See Fed. R. Civ. P. 12(b).

However, material that is properly presented to the court as part of the complaint may be considered as part of a motion to dismiss. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). If a plaintiff fails to attach to the complaint the documents on which it is based, defendant may attach to a 12(b)(6) motion the documents referred to in the complaint to

\(^\text{10}\) Autodesk's stock closed at $28 1/2 on May 4, 1999, and at $23 9/16 on May 5, 1999. The prices cited by plaintiffs -- $29 1/8 on May 4th and $22 1/4 on May 5th -- are misleading because the May 4th price is the high-bid price and the May 5th price is the low-bid price. Moreover, by May 7th, the price had risen again, closing at $26 9/16. The price remained in the range of $23 to $28 until June 25, 1999, when it rose to $29 1/4, remaining in the range of $26-$29 until July 13, 1999, when it dropped back into the $24-27 range. The price slowly declined over the following three months, but did not reach the low of $19 3/4 cited by plaintiffs until October 12, 1999, and that was the low bid price for that date.
show that they do not support plaintiff's claim. Id. at 454; see also Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

2. Federal Rule of Civil Procedure 9(b)

Generally, plaintiffs in federal court are required to give a short, plain statement of the claim sufficient to put the defendants on notice. Fed. R. Civ. P. 8. In actions alleging fraud, however, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Under Rule 9(b), the complaint must allege specific facts regarding the fraudulent activity, such as the time, date, place, and content of the alleged fraudulent representation, how or why the representation was false or misleading, and in some cases, the identity of the person engaged in the fraud. See Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994), cert. denied, 516 U.S. 810 (1995); In re GlenFed Sec. Litig., 42 F.3d 1541, 1547-49 (9th Cir. 1994). A plaintiff may explain why a statement is false or misleading by pointing to facts that were later revealed, but which were, because of their nature, necessarily in existence at the time the statement was made. In re GlenFed, 42 F.3d 1548. Alternatively, a plaintiff may explain that the statement was untrue or misleading when made by identifying inconsistent contemporaneous statements or information made by or available to the defendants. Id. at 1549.

3. Claims under the Securities Exchange Act of 1934

Section 10(b) of the Securities Exchange Act of 1934 provides, in part, that it is unlawful "to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b).

Rule 10b-5 promulgated under § 10(b) makes it unlawful for any person to use interstate commerce

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the 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.

17 C.F.R. § 240.10b-5.

In order to state a claim under § 10(b) and Rule 10b-5, the plaintiff must allege 1) a
misrepresentation or omission 2) of material fact 3) made with scienter 4) on which the
plaintiff justifiably relied 5) that proximately caused the alleged loss. Binder v. Gillespie,
184 F.3d 1059, 1063 (9th Cir. 1999), cert. denied, 528 U.S. 1154 (2000). Scienter is a
"mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v.
Hochfelder, 425 U.S. 185, 193-94 n.12 (1976). A presumption of reliance is available to
plaintiffs alleging violations of § 10(b) based primarily on omissions of material fact, but not
in cases alleging significant misrepresentations in addition to omissions, or alleging only
misrepresentations. Id. at 1063-64.11

Under § 20(a) of the 1934 Act, joint and several liability can be imposed on persons
who directly or indirectly control a violator of the securities laws. 15 U.S.C. § 78t(a).

Violation of § 20(a) is predicated on a primary violation under the 1934 Act. Plaintiffs
alleging a claim that individual defendants are "controlling persons" of a company must
allege 1) that the individual defendants had the power to control or influence the company,
2) that the individual defendants were culpable participants in the company’s alleged
illegal activity, and 3) that the company violated the federal securities laws. See Durham
v. Kelly, 810 F.2d 1500, 1503-04 (9th Cir. 1987).

4. The Private Securities Litigation Reform Act

The Private Securities Litigation Reform Act ("PSLRA") was enacted by Congress in
1995 to establish uniform and stringent pleading requirements for securities fraud actions,
and “to put an end to the practice of pleading ‘fraud by hindsight.’” In re Silicon
Graphics Sec. Litig., 183 F.3d 970, 958 (9th Cir. 1999). The PSLRA added heightened

11 A presumption of reliance is also available in a "fraud on the market" case, where
the plaintiff alleges that a defendant made material representations or omissions concerning
a security that is actively traded in an "efficient market." Id. at 1064 (citing Basic, Inc. v.
Levinson, 485 U.S. 224, 247 (1988)).
pleading requirements for alleging violations of the 1934 Act. If the complaint does not satisfy these pleading requirements, the court, upon motion of the defendant, must dismiss the complaint. See 15 U.S.C. § 78u-4(b)(3)(A).

Under the PSLRA -- whether alleging that a defendant "made at an untrue statement of a material fact" or alleging that a defendant "omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading" -- the complaint must 1) "specify each statement alleged to have been false or misleading," and 2) specify "the reason or reasons why the statement is misleading." In addition, if an allegation regarding the statement or omission is made on information and belief, the complaint must 3) "state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).

In addition, with regard to pleading scienter -- whether alleging that a defendant "made at an untrue statement of material fact" or alleging that a defendant "omitted to state a material fact" -- the complaint must, with respect to each alleged act or omission, "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). In the Ninth Circuit, the requirement that the facts must give rise to a "strong inference . . . [of] the required state of mind" means, for claims under § 10(b), that "the evidence must create a strong inference of, at a minimum, 'deliberate recklessness.'" In re Silicon Graphics, 183 F.3d at 977.

B. In actionable Statements

1. Vague statements of corporate optimism

The court finds that a number of statements alleged by plaintiffs to be false are vague statements of corporate optimism and, as such, are in actionable. If a statement is too vague to qualify as a material misstatement of fact, it cannot be said to "have been viewed by the reasonable investor as having significantly altered the 'total mix' of

12 Matters that are not alleged on personal knowledge are considered to be alleged on information and belief. See In re Secure Computing Corp. Sec. Litig., 120 F.Supp. 2d 810, 816-17 (N.D. Cal. 2000) (citing In re Silicon Graphics, 183 F.3d at 985); see also In re Splash Tech. Holdings, Inc. Sec. Litig., 2000 WL 1727377*12 (N.D. Cal., Sept. 29, 2000).

In this case, statements such as "Autodesk's business appears strong" or "Autodesk is well-positioned in the coming year;" statements that "we are extremely satisfied with our performance" or "we are pretty excited about our business outlook;" and statements that "we affirmed the marketplace consensus" or "we overcame many obstacles this quarter" are too vague to be material. See In re PETsMART, Inc., Sec. Litig., 61 F.Supp. 2d 982, 997 (D. Ariz. 1999) ("[g]eneric forecasts such as 'We believe our prospects for continued growth in 1997 are exciting' . . . and 'We remain optimistic about our long-term revenue and earnings growth prospects as the Company continues to grow its business' . . . simply do not alter the total mix of information available and important to investors"). Similarly, references to "upcoming new market opportunities" and "cost saving opportunities" that "could generate substantial revenue gains" are vague, optimistic statements relating to possible future market demand. See Fitzer v. Sec. Dynamics Tech., Inc., 119 F.Supp. 2d 12, 26 (D. Mass. 2000). Such statements offer no details on which a reasonable investor would rely.

Inactionable statements in the second amended complaint include the following:

- "[Autodesk's] current business appears strong, with Autodesk's product mix shift driving an increase in sales visibility.", Cplt ¶ 52 (September 15, 1998, Piper Jaffray report);

- "[F]actors such as "a stronger more diversified business model, appealing new product shipment schedule, upcoming new market opportunities from the Discreet merger, lean channel inventories, favorable upside given the R15 upgrade is expected to ship early FY00, and cost saving opportunities . . . could generate substantial revenue gains" during the succeeding four quarters.", Cplt ¶ 52 (September 15, 1998, Piper Jaffray report);
-- "AutoCAD cycles are becoming less pronounced. The company continues to benefit from the longevity in the AutoCAD R14 upgrade."

Cplt ¶ 52 (September 15, 1998, Piper Jaffray report):

-- "We overcame many obstacles this quarter such as seasonality and uncertain economic conditions and are extremely satisfied with our performance . . . . Customers are continuing to validate our strategy by integrating vertical products in their business."


-- The "growth in non-AutoCAD business" (50% of sales, compared to 45% in the previous quarter, up from 25% at end of last year) "is testimony that Autodesk's vertical product strategy is working, adding greater revenue growth opportunities."

Cplt ¶ 56 (November 20, 1998 Piper Jaffray report):

-- "In Calendar 1998, Autodesk moderated the boom and bust AutoCAD cycle."

Cplt ¶ 58 (December 28, 1998, Piper Jaffray report):

-- Autodesk is "well-positioned" in calendar year 1999 "to successfully diversify its business, and break the boom and bust AutoCAD earnings cycle."

Cplt ¶ 58 (December 28, 1998, Piper Jaffray report):

-- "For the first time in five years, we are modeling for sequential earnings improvement in each of the quarters in calendar 1999."

13 The reference to the growth in the non-AutoCAD business over the previous quarter and year is a statement of historical fact, and is not actionable because plaintiffs do not allege that defendants falsified Autodesk's reported sales results. Disclosure of accurate historical facts is not misleading. See Wenger, 2 F.Supp. 2d at 1245.

14 The vague reference to Autodesk's having "moderated" the AutoCAD earnings cycle during the calendar year just ending follows the equally vague statement that the cycle "somewhat existed" during that same calendar year.
EXHIBIT E (pp. 26-56)
--"On our last conference call, we affirmed the marketplace consensus and we still do that today."  

Cplt ¶ 59 (January 5, 1999, Bloomberg article) (quoting Tsingos):  

--"We are proud to have achieved revenue growth of twenty percent or better for the second consecutive year. Our goal was to expand our product line with vertical solutions that satisfy the design needs of our customers. We have achieved that goal."

Cplt ¶ 63 (February 24, 1999, Autodesk press release) (quoting Bartz):  

--"Autodesk reported a solid quarter. Results are particularly impressive given the quarter was the final quarter before the R15 upgrade."

Cplt ¶ 64 (February 25, 1999, Piper Jaffray report):  

--"The R15 is "in the hands of 20,000 daily users around the world who are pretty enthusiastic about it, so again, looking forward to a nice Q1 and a great fiscal year that we just started, based on a nice new product cycle."

Cplt ¶ 65 (February 25, 1999, interview in the Bloomberg Forum) (quoting Bartz):  

--"We're pretty excited" about Autodesk's business outlook, and "excited about new product cycles, geographically, things look great."  

Because they consist of statements that are "so 'exaggerated' or 'vague' that no reasonable investor would rely on them," In re Splash, 160 F.3d at 1076, the court finds

15 Although plaintiffs claim that the "marketplace consensus" at the time of this statement was FY00 revenues of $900 million - $1 billion, FY00 earnings per share of $2.45-2.55, and 20%-25% earnings growth over the next three to five years, they allege no facts to support such a conclusion.

16 The vagueness of the phrase "affirm the marketplace consensus" aside, the reference to "our last conference call" is an inactionable statement of historical fact, as plaintiffs do not contend that defendants did not "affirm the marketplace consensus."

17 The reference to Autodesk's release of financial results for the prior fiscal year is an inactionable statement of historical fact, as plaintiffs do not allege that Autodesk falsely reported its financial results.

18 The reference to achieving the goal of expanding Autodesk's product line with vertical solutions is partly a statement of historical fact and partly an assertion of present fact, but is nonetheless too vague and amorphous to be material.

19 To the extent that this statement refers to the financial results released by Autodesk, it is an inactionable statement of historical fact, as plaintiffs do not allege that Autodesk falsified its financial results.
that the following cannot provide a basis for a claim of securities fraud: the two Autodesk
press releases, dated November 19, 1998 and February 24, 1999, Cplt ¶¶ 55, 63; the
Bloomberg article dated January 5, 1999, Cplt ¶ 59; the Piper Jaffray report dated
February 25, 1999, Cplt ¶ 64; the Piper Jaffray reports dated November 20, 1998, and
December 28, 1998, Cplt ¶¶ 56, 58, with the exception of the financial forecasts; and the
Bloomberg interview with Bartz on February 25, 1999, Cplt ¶ 65, with the exception of the
$1 billion revenue projection.

2. Safe harbor for financial forecasts

Defendants argue that any forward-looking statements (including financial
forecasts) attributed to them are protected by the PSLRA's "safe harbor" provision. A
forward-looking statement is "a statement containing a projection of revenues, income
(including income loss), earnings (including earnings loss) per share, capital expenditures,
dividends, capital structure, or other financial items;" or "a statement of the plans and
objectives of management for future operations;" or "a statement of future economic
performance;" or "a statement of the assumptions underlying or relating to" any statement
falling within the above-described categories. 15 U.S.C. § 78u-5(i)(1). Whether a
statement qualifies under the safe harbor provision is an appropriate inquiry on a motion to

A forward-looking statement cannot as a matter of law be the basis of liability under
§ 10(b) either if it is identified as a forward-looking statement and is accompanied by
meaningful cautionary statements identifying factors that could cause actual results to
differ materially from those in the forward-looking statement, or if the plaintiff fails to prove
that the forward-looking statement was made with actual knowledge that the statement was
false and misleading. 15 U.S.C. § 78u-5(c)(1). In this case, defendants contend that any

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26 Defendants do not identify all the forward-looking statements, and the court
addresses only the financial forecasts and revenue projections because either the remaining
forward-looking statements are too vague to be material, or plaintiffs fail to allege the falsity
of such statements with particularity. E.g., Cplt ¶ 52 (statements in September 15, 1998, Piper
Jaffray report that "[w]e believe this odd cycle will be strong" and "we believe that R12 and
R13 users will flock to R15").
forward-looking statements attributed to them are not actionable because in numerous public SEC filings throughout the class period, they provided detailed warnings of risks associated with releasing a new or updated product.

Plaintiffs allege that defendants issued revenue and earnings projections during analysts meetings and conference calls, and in communications with financial analysts and journalists. First, plaintiffs claim that during the September 14, 1998, analysts meeting in Philadelphia; the November 19, 1998, conference call; the February 24, 1999, conference call; and the April 1, 1999, analysts meeting in New York, defendants (Bartz, Herr, and sometimes Tsingos) stated that as a result of the strong sales of the R14, the reorganization into vertical product lines, the smoothing out of the revenue and earnings, and the successful development and testing of the R15, Autodesk was forecasting 20%-25% growth in earnings per share over the next 3-5 years, FY00 revenues of $1+ million, and FY99-FY01 earnings per share of $2.45-$2.55. Plaintiffs also claim that defendants communicated these forecasts to Piper Jaffray financial analyst Hani Nada, who repeated them in reports issued on September 15, 1998, November 20, 1998, and December 29, 1998. Finally, plaintiffs claim that Bartz stated in a February 25, 1999, interview with Bloomberg Forum that the fiscal year beginning February 1, 1999, would be Autodesk's "first billion-dollar year;" and that Tsingos was quoted in an article published by Dow Jones on March 14, 1999, that "Autodesk's revenue continues to grow in the low 20% range."

Plaintiffs assert that these projections were false because Autodesk was "incapable of achieving" these results. They allege that the projections were made based upon the representations that Autodesk had smoothed out its revenue and EPS cycles and had effectively broken the upgrade cycle during the end of 98 due to organization into vertical product lines and that R15 was testing successfully. See Cplt ¶¶ 51(c), 54(c), 62(c), 68(c).

In their opposition to the motion to dismiss, plaintiffs argue that the defendants' forward-looking statements are not protected by the "safe harbor" provision because they were not identified as forward-looking at the time they were made, and because they were not accompanied by any cautionary language. They also contend that the warnings in the
SEC filings were insufficient because they merely warned of generalized possible business risks. They maintain that defendants knew that the R15 actually suffered from a number of significant bugs and that there would be little demand for the product upon its release, and that based on this knowledge, defendants must have known that their forward-looking statements were false at the time they were made.

The court finds that, whether or not the financial forecasts were accompanied by adequate and meaningful cautionary language, plaintiffs fail to allege actual knowledge of falsity, and therefore, as discussed more fully below, fail to establish that the forecasts fall outside the PSLRA's safe harbor.

C. Defendants' Motion to Dismiss

Defendants move to dismiss the second amended complaint on the basis that plaintiffs fail to plead falsity with particularity and fail to plead facts raising a strong inference of scienter. As stated above, pleading in federal courts is governed generally by Federal Rule of Civil Procedure 8 ("a short and plain statement of the claim showing that the pleader is entitled to relief"), and the pleading of violations of the 1934 Act is also governed by Rule 9(b) and the PSLRA. If plaintiffs in this case had any doubt of the appropriate standard at the time they filed the original complaints and the consolidated first amended complaint, they were certainly put on notice of the standard after they read the court's November 14, 2000, order dismissing the first amended complaint.

In that order, the court dismissed the consolidated first amended complaint because it did not allege fraud with particularity. The court granted plaintiffs leave to amend, and provided specific instructions with regard to pleading both falsity and scienter. The court provided those instructions in the hope that the resulting second amended complaint would be clear and coherent, in line with Rule 8; that it would comply with the particularity requirements of Rule 9 and the PSLRA; and that plaintiffs' counsel would abandon the puzzle-style pleading format disapproved by the Ninth Circuit. See In re GlenFed, 42 F.3d at 1554.

Undeterred, however, plaintiffs filed a second amended complaint that fails in
numerous respects to comply with the court's instructions. While plaintiffs do allege the
time and place of the misleading statements, they repeatedly fail to indicate, statement-by-
statement, which statements are alleged to be false, which individual defendant made
each of the allegedly false statements, and why each of those statements was false at the
time it was made. They do not adequately state facts supporting the claims made on
information and belief. And they fail to allege facts sufficient to raise a strong inference of
deliberate recklessness.

1. Pleading Falsity

Under the PSLRA, plaintiffs alleging claims of securities fraud must follow three
steps in pleading falsity. First, they must specifically identify "each statement alleged to
have been misleading;" second, they must specify "the reason or reasons" that each such
statement is misleading; and third, for any allegations made on information and belief,
plaintiffs must "state with particularity all facts on which the belief is formed." 15 U.S.C.
§ 78u-4(b)(1). Defendants argue that the second amended complaint must be dismissed
because plaintiffs satisfy none of these requirements. Defendants contend that plaintiffs
do not specify which defendant made each statement alleged to be false, and that (as in
the first amended complaint), plaintiffs allege, as false, multiple, lengthy statements
containing more than one assertion. Defendants also contend that plaintiffs fail to specify
why each such statement was false at the time it was made, and fail to allege all facts
supporting each allegation of falsity made on information and belief.

The section of the second amended complaint entitled "False and Misleading
Statements During the Class Period" commences with ¶ 51. In that paragraph, plaintiffs
allege that Bartz and Tsingos made false or misleading statements on September 14,
1998, at the Philadelphia analysts conference. The paragraph is separated into three
subparts, the first two of which contain several statements each, and the last of which
contains one statement regarding Autodesk's financial forecasts.

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In ¶ 51, subpart (a), plaintiffs allege that Bartz and Tsingos made the following oral statements to analysts at the conference:

Due to Autodesk's reorganization into vertical product, more of its customers were willing to purchase vertical products based on the R14/AutoCAD technology, rather than wait for the next generation's technology, i.e., R15/AutoCAD 2000. Consequently, Autodesk was seeing unusually strong continuing demand for its R14/AutoCAD product, even though that product was entering the later part of its life-cycle.

Moreover, the reorganization into vertical product lines was enabling the Company to smooth out its revenue and EPS growth and, with the initiation of the R15/AutoCAD 2000 product cycle, would allow Autodesk to achieve more consistent revenue and EPS growth going forward than had historically been the case.

Cplt ¶ 51(a).

Contrary to the instructions in the order dismissing the first amended complaint, plaintiffs fail to allege falsity with particularity. First, they do not separately specify the statements they allege were false or misleading. The passage quoted above contains at least four statements: 1) Because of Autodesk's reorganization into vertical product, more of Autodesk's customers were willing to purchase products based on the R14, rather than wait for the R15; 2) Because of Autodesk's customers' purchase of vertical products based on the R14, Autodesk was seeing unusually strong demand for the R14, even though it was entering the later part of its life-cycle; 3) Autodesk's reorganization into vertical products was enabling Autodesk to smooth out its revenue and EPS growth; and 4) With the initiation of the R15 product cycle, the reorganization into vertical product lines would allow Autodesk to achieve more consistent revenue and EPS growth going forward than had historically been the case. Thus, when plaintiffs assert later in ¶ 51(a) that "[t]his statement is false because . . ." and "[p]laintiffs' belief that this statement was false is based on . . . ," it is not obvious which "statement" plaintiffs are referring to.

Moreover, plaintiffs allege that Bartz and Tsingos made the statements to the "analysts," but do not clarify which defendant made which statement, or to whom. Indeed, they do not identify a single attendee at the conference. Nor do they state any facts supporting their belief that Bartz and/or Tsingos made the statements at all, or that they
made the statements on September 15, 1998, or that they made them in Philadelphia.

Plaintiffs follow the allegations in ¶ 51(a) with the assertion:

This statement is false because the continued demand for Autodesk's R14 product through 9/98 was not due to the Company's move to vertical product lines. Rather the continued demand was based upon Autodesk's VIP Upgrade program which offered deep discounts on use of R15 with the purchase of R14 during the end of 98. This VIP Upgrade program effectively cannibalized Autodesk sales of the R15 when the R15 was officially released in 99 because many of Autodesk's customers had already purchased use of the R15 when they had acquired the VIP Upgrade program in conjunction with purchase of the R14 during the latter half of 98.

This passage, which consists of three sentences, purports to articulate the reasons that the statements attributed to Bartz and Tsingos were false at the time they were made. The first sentence essentially asserts that the statement that Autodesk was seeing a strong demand for the R14 because of the reorganization into vertical product lines was false because it was not true. An assertion that a statement is false because it is not true cannot logically qualify as a "reason" that the statement is false.\(^2\)

The third sentence alleges that the effect of the VIP Upgrade program was to "cannibalize" sales of the R15 when that product was released. Since the release of the R15 did not occur until the last week of March 1999, the third sentence cannot provide an explanation of why the statement that Autodesk was seeing continuing strong demand for the R14 in 1998 was false at the time it was made.

The remaining sentence alleges that the "statement" was false when made because the continued demand was based on the VIP Upgrade program, which offered an incentive to users to buy the R14.\(^2\) This sentence might provide a "reason," but, as discussed below, plaintiffs fail to state facts adequately supporting their belief that the strong demand

\(^{21}\) See T. Edward Damer, Attacking Faulty Reasoning (Wadsworth, 4th ed., 2001) at 98 (defining "arguing in a circle" as a "fallacy [that] consists in either explicitly or implicitly asserting, in one of the premises of an argument, what is asserted in the conclusion of that argument").

\(^{22}\) Plaintiffs do not allege that defendants misrepresented the dollar amounts of R14 sales or Autodesk's revenue or income. Nor do they allege accounting violations or misstatements in SEC filings. Rather, plaintiffs claim that, whatever the sales of the R14 were, defendants misrepresented the reasons that customers were buying the R14.
for the R14 was based on the VIP Upgrade program, rather than on reorganization into
vertical product lines. In their opposition to defendants' motion, plaintiffs maintain that the second
amended complaint alleges how and why defendants' statements concerning "strong
demand" for the R14 were false when made, pointing to assertions in ¶¶ 42-45 that
defendants failed to disclose on September 14, 1998, that Autodesk "was actually
experiencing declining sales and demand for its products and was only able to get product
out the door by giving excessive discounts and extending credit that defendants knew
could not be repaid." However, the paragraphs cited by plaintiffs do not allege facts
supporting a claim that R14 sales were up, were down, or were anywhere in between.

Nowhere in their discussion of Autodesk's system for producing sales reports do
plaintiffs cite to a single individual sales report or indicate a single detail contained in any
sales report, much less explain how the information allegedly contained in these sales
reports was inconsistent with the representations that defendants made throughout the
class period. If unsupported generalized claims such as those alleged by plaintiffs were
sufficient to satisfy the pleading requirements, "plaintiffs could eliminate the falsity
requirement because they could merely identify a given statement by the defendants and
then simply allege that the substance of the statement was contradicted by
contemporaneous information contained in internal reports." Yourish v. Calif. Amplifier,
191 F.3d 983, 994 (9th Cir. 1999).

Additionally, the court cannot determine whether this allegation states a claim for
fraud because the second amended complaint does not clarify what "vertical products" are or
what a "vertical product line" is, or how Autodesk's business was purportedly "reorganized." Nor
is the connection apparent between "vertical product" and the R14 product line. In
particular, the connection between the asserted claim of "reorganization into vertical product"
and the asserted claim of increased R14 sales and sales of "vertical product based on the
R14/AutoCAD technology" is murky at best.

Plaintiffs' position with regard to the sales of the R14 is inconsistent. On the one
hand, they allege that defendants falsely stated that sales of the R14 were strong because
of the reorganization into vertical product lines, when in fact the VIP Upgrade program was
the reason for the continuing sales of the R14 at the end of the product cycle. See, e.g.,
¶¶ 51(a), 54(a), 55, 62, 63 (suggesting that sales were in fact "strong"). On the other hand,
plaintiffs allege that R14 sales were in "severe decline." See, e.g., ¶¶ 45, 46.
In their opposition to defendants' motion, plaintiffs also argue that the allegation that the R14 was still seeing . . . strong . . . demand* was false when made because defendants failed to disclose that Autodesk was able to get product out the door only by giving excessive discounts and extending credit that defendants knew could not be repaid -- a practice that plaintiffs describe as "channel stuffing."25 However, while plaintiffs do allege in the second amended complaint that Autodesk engaged in this practice, see Cplt. ¶¶ 40-42, they do not include this allegation in ¶ 51(a) as a "reason" that defendants' representation of strong R14 sales was false when made. As emphasized in the order dismissing the first amended complaint, the court is unwilling to search through the complaint to match up the allegations of false statements with the "reasons." See In re Autodesk, 132 F. Supp. 2d at 841-42.

A more serious problem is that the allegations made on information and belief are not adequately supported. Plaintiffs assert that their belief that the "statement" in ¶ 51(a) was false when made is "based on several conversations and interviews with former Autodesk employees and resellers." First, plaintiffs allege that "Confidential Witness" ("CW") #6, "a major Autodesk reseller," told plaintiffs that Bartz and Tsingos told him in the second half of 98 prior to the 9/98 analyst conference in Philadelphia that the VIP Upgrade program was the reason for the evenness of revenue and that Bartz and Tsingos made it clear that Autodesk was looking for "cash now" notwithstanding the fact that the R15 had not been officially released.

Second, plaintiffs allege that two "former Autodesk sales representatives," CW #5 and CW #7, "confirmed that the bundling of the VIP Upgrade program with the R14 was the reason that the R14 sales continued well during the second half of 98."

Third, plaintiffs assert that a "former Autodesk designer," CW #1, told plaintiffs that "sales and revenues during the latter half of 98 appeared larger than they actually were

25 Channel stuffing is "the oversupply of distributors in one quarter to artificially inflate sales, which will then drop in the next quarter as distributors no longer make orders while depleting their excess supply." Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998). Plaintiffs do not allege that the practice they describe here as channel stuffing constituted a fraudulent act. In any event, the Ninth Circuit has rejected "channel stuffing" claims. In re Splash, 160 F. Supp. 2d at 1075-76 (citing Steckman).
because of a significant duplication problem in Autodesk's computer program which recorded sales and revenues." CW #1 allegedly reported to plaintiffs that beginning in early 98, "Autodesk began combining its products into suites and selling them as a package," but failed to establish a methodology for how the resulting sales revenue from product suites would be recorded, i.e., which associated product division would receive credit for the sale. As a result, each division would record the same sale as part of its division's total revenue for a given quarter, and the sales were accordingly counted twice.

Cplt ¶ 51(a). CW #1 also allegedly told plaintiffs that "he knew that Bartz, Herr, and Tsingos were aware of this situation and that it was a common topic of discussion between Bartz, Herr, and Tsingos." 26

These allegations are deficient for two reasons. First, the identifying information provided (CW #1 is a "former Autodesk designer," CW #5 and CW #7 are "former Autodesk sales representatives," and CW #6 is a "major Autodesk reseller") is insufficient to constitute the detailed pleading of factual allegations required by the PSLRA as construed by the Ninth Circuit. In Silicon Graphics, the Ninth Circuit interpreted the language "plead all facts with particularity" (referring to the requirement in 15 U.S.C. § 78u-4(b) that a plaintiff alleging securities fraud "state" facts "with particularity") to mean that "a plaintiff must provide a list of all relevant circumstances in great detail." In re Silicon Graphics, 183 F.3d at 984. The court found that the complaint at issue in that case did not comply with the PSLRA because the section entitled "Basis of Allegations" did not provide adequate corroborating details. Id. at 985.

Similarly, in this case, plaintiffs do not identify their sources, except by job titles that are so general as to be almost meaningless. 27 For example, plaintiffs do not indicate when

26 Plaintiffs do not explain the connection between the alleged duplication in the recording of sales and revenues, and their claim that sales of the R14 were strong because of the VIP Upgrade program.

27 Because of the wide variation in the factual circumstances underlying securities fraud actions, the court is not inclined to posit a hard-and-fast rule that plaintiffs must name their sources. That is not to say, however, that it is sufficient under the PSLRA simply to identify informants by a "witness" number and a general job description, as plaintiffs have
the confidential witnesses were employed as resellers, designers, or sales representatives; where the witnesses worked; what their duties were; what regular professional contact they had with Bartz, Herr, or Tsingos; or how the witnesses had access to the information they are alleged to have possessed. Nor do plaintiffs explain how or when they themselves obtained the information from the witnesses, or under what circumstances.

Second, even had plaintiffs provided adequate corroborating details, the statements attributed to the witnesses are at best vague and insubstantial. Both Bartz and Tsingos are alleged to have told CW #6 sometime during the period between July 1, 1998, and September 15, 1998, that the VIP Upgrade program was "the reason for the evenness of revenue," and that Autodesk was "looking for cash now" despite the fact that the R15 had not been released. Plaintiffs do not associate the claims about "evenness of revenue" and "looking for cash now" with any particular date or event. They do not indicate the significance of "looking for cash now," nor do they explain the basis of their suggestion that "looking for cash now" was inconsistent with the fact that the R15 had not been released.

CW #5 and CW #7 allegedly stated to someone (unidentified) that R14 sales continued strong during the second half of 1998 because of the VIP Upgrade program. However, this statement, which refers to sales "during the second half of 1998" cannot provide a factual basis for plaintiffs' belief that statements allegedly made on September 15, 1998, concerning financial results for the quarter ending July 31, 1998, were not true when made. Moreover, plaintiffs provide no indication that these two "Autodesk sales representatives" were in a position to know the details of Autodesk's sales and revenue numbers or the reasons that customers were buying the R14, or even whether customers were buying the R14.

done here. Plaintiffs are required to state with particularity all relevant facts upon which they base allegations made on information and belief. Silicon Graphics, 183 F.3d at 985. Thus, where plaintiffs have obtained information from a non-plaintiff witness, they must allege all facts about the witness that were material to the formation of their belief that the witness gave them accurate information. See In re Secure Computing, 120 F. Supp. 2d at 817. Under some circumstances, it will be necessary that such sources be identified by name.
CW #1 allegedly told plaintiffs at some unspecified time that sales and revenues
during the latter half of 1998 (no indication whether calendar year 1998 or FY98) appeared
"larger" than they actually were because of a duplication problem in the recording of sales.
However, the issue in this case is not whether defendants fraudulently misrepresented
Autodesk's sales figures. The allegation that sales appeared larger than they were does
not provide factual support for the plaintiffs' belief that R14 sales continued strong
because of the VIP Upgrade program -- indeed, the two assertions seem to have little
connection with each other.

In ¶ 51, subpart (b), plaintiffs allege that Bartz and Tsingos stated at the
Philadelphia conference that

Autodesk was successfully completing the development and testing of the
R15/AutoCAD 2000 product. R15/AutoCAD 2000 was now in alpha-testing
at thousands of customers' "seats" and was performing extremely well. This
indicated that there would be strong demand for this product upon its
commercial release.

Because of the successful development of the R15/AutoCAD 2000 product,
including the enthusiastic response it was receiving in alpha-testing,
Autodesk was likely going to be able to advance the commercial release date
of this product to earlier in CY99 than originally planned.

Cplt ¶ 51(b). The quoted passage is followed by the allegation that "[t]his statement" is
false because Autodesk was not successfully developing the R15, and that, "[in fact, the
R15/AutoCAD 2000 had serious glitches and software bugs which would result in the
product release being delayed."

Again, plaintiffs fail to separately specify statements that are alleged to be false,
and do not clarify which defendant made which statement, or to whom, and do not state
any facts upon which they base their belief that Bartz and/or Tsingos actually made the
statements attributed to them. The quoted passage consists of five statements:
1) Autodesk was successfully completing the development and testing of the R15; 2) The
R15 was in alpha testing at thousands of customers' "seats;" 3) The R15 was performing
well in the alpha testing; 4) The fact that the testing was going well indicated that there
would be strong demand for the R15 upon its release; and 5) Because of the successful
development and testing of the R15, Autodesk was likely going to be able to advance the
commercial release date. Thus, it is not obvious which “reason” goes with which
statement.

Plaintiffs allege that their belief that the “statement” is false is based on an interview
with “former Autodesk designer” CW #1, who told plaintiffs that “there were so many bugs
and glitches that Bartz had to chair weekly meetings during 98 to discuss the problems
with the development of the R15/AutoCAD 2000.” These weekly meetings (the “Q/A Bug
Meetings”), which both Bartz and Herr attended, were held at Autodesk’s San Rafael,
California, headquarters. CW #1 allegedly told plaintiffs that during the meetings, Bartz
“constantly ‘harangued’ the engineers about the numerous problems with the development
of the R15/AutoCAD 2000 and was especially troubled by the number of ‘Class A’ bugs in
the R15 which could cause failure in a business trying to use the product.”

Again, plaintiffs do not adequately identify CW #1, the witness alleged as the
source of the information, and the statements attributed to that witness either do not
correlate with the claim of falsity asserted by the plaintiffs, or are irrelevant. Plaintiffs
assert that the statements, attributed to Bartz and Tsingos, that development and testing of
the R15 were proceeding successfully, were false as of September 14, 1998. Setting
aside the question whether references to “successful development” or “testing” in which a
product is “performing extremely well” are too vague to be actionable, the court finds
nothing inconsistent between a claim of “successful development and testing” and the
holding of meetings with engineers to discuss software bugs during the development
process, months before the product release date. Indeed, if there had been no bugs in the
R15 software, the development process would have been complete and there would have
been no need for testing.

As the Seventh Circuit put it, “The heart of a reasonable investor does not begin to
flutter when a firm announces that some project or process is proceeding smoothly, and so
the announcement will not drive up the price of the firm’s shares to an unsustainable level
Eisenstadt v. Centel Corp., 113 F.3d 738, 745 (7th Cir. 1997), quoted in In re
Plaintiffs allege that "weekly reports were sent to Bartz, Tsingos, and Herr during 98 and 99 which reported the numerous problems and bugs in the R15/AutoCAD 2000.* These reports, which were "generated by the Scopus database and were prepared by the Customer Support Department headed by Sanders," allegedly "told Bartz, Tsingos, and Herr that the R15/AutoCAD 2000 was experiencing significant problems in testing."

Plaintiffs claim that the bug reports "reported the numerous bugs and glitches" in the R15, but fail to cite to any specific information in the reports or explain how such information was at odds with the statements attributed to the defendants at the time those statements were made.

Neither the fact that Bartz chaired the meetings, nor the fact that the meetings were held at Autodesk's San Rafael headquarters, nor the fact that Bartz "harangued" the engineers, nor the fact that weekly "bug reports" were generated and circulated among Autodesk executives during 1998 and 1999, nor the fact that many of the bugs were allegedly "Class A bugs" provides sufficient factual support for plaintiffs' assertion on information and belief that defendants lied to the analysts at the September 14, 1998, conference when they discussed the progress of the development and testing of the R15. In addition, plaintiffs provide no facts to support their belief that the release date of the R15 was delayed. Indeed, they do not state what the originally scheduled release date was, when the date changed (if at all), or by how much it was delayed (if at all).

In ¶ 51, subpart (c), plaintiffs allege that Bartz and Tsingos stated during the September 14, 1998, analysts conference that "[a]s a result of the foregoing, Autodesk was forecasting 20%-25% EPS growth over the next three to five years and F00 EPS of $2.45-$2.55, respectively." This passage is followed by the allegation that "[t]his statement is false because Autodesk was incapable of achieving $2.45-$2.55 for F00 EPS and 20%-25% EPS growth over the next three years." Plaintiffs assert that "Bartz and Tsingos made these forecasts based upon the representation that Autodesk had smoothed out its revenue and EPS cycles due to organization into vertical product lines and that the R15 was testing successfully," and that "it was the VIP Upgrade program, not
reorganization into vertical product lines that was the cause of Autodesk’s success during
the latter half of 98.” Cplt ¶ 51(c). They allege further that “by giving customers deeply
discounted use of the R15, the VIP Upgrade program made its success at the expense of
future sales of the R15, when the R15 was officially released in 99,” and also asserts that
the R15 “was not testing successfully as represented by defendants.” Cplt ¶ 51(c).

As in subsections ¶ 51(a) and (b), plaintiffs do not clarify in ¶ 51(c) whether Bartz or
Tsingos made the statement regarding the financial projections, and provide no facts upon
which they base their belief that Bartz and/or Tsingos actually made the statement or that
they made the statement on September 15, 1998. Nor do plaintiffs allege with particularity
the facts upon which they base the allegation that Autodesk was “incapable” (as of
September 14, 1998) of achieving the results forecast for the fiscal year beginning
February 1, 1999, and for the “next three to five years;” or the allegation that Bartz and
Tsingos made the forecast “based upon” the representation that “Autodesk had smoothed
out its revenue and EPS cycles due to organization into vertical product lines and that the
R15 was testing successfully.” Moreover, to the extent that they allege that the reason the
forecast was false when made is dependent upon the facts alleged in ¶ 51(a) and (b), the
inadequacy of the allegations in those subsections negates the asserted basis of the
allegations regarding the forecasts.

Plaintiffs allege in ¶ 52 that “these false statements” made by Bartz and Tsingos at
the Philadelphia analysts conference (referring to the allegations in ¶ 51(a), (b), and (c))
were published in a report issued by Piper Jaffray the day following the conference.

Defendants in securities fraud suits can be liable for intentional misrepresentations to
securities analysts, if the defendants made the false and misleading statements “with the
intent that the analysts communicate those statements to the market.” Cooper v. Pickett,
137 F.3d 616, 624 (9th Cir. 1997). Absent such intentional misrepresentations,
defendants are liable for forecasts made by third-party analysts only if the defendants
have “put their imprimatur, express or implied, on the projections.” In re Stac Elec. Sec.
Litig., 89 F.3d 1399, 1410 (9th Cir. 1996), cert. denied, 520 U.S. 1103 (1997); see also In
In this case, plaintiffs assert that it is unnecessary to plead entanglement because they allege that defendants deliberately lied to the analysts. However, under the PSLRA, plaintiffs must allege that specific individual defendants made specific false statements to specific analysts, and must also allege the reason or reasons the statements were misleading. See In re Splash, 2000 WL 1727377 *17-18. In the order dismissing the first amended complaint, the court found that plaintiffs alleged no facts supporting their belief that the statements alleged to have been made by the individual defendants during the analysts conferences and conference calls were actually made by those defendants. Plaintiffs have not remedied that deficiency.

In addition, as discussed above, the statements alleged to have been published in the September 15, 1998, Piper Jaffray report are, for the most part, too vague to form the basis of a § 10(b) claim. The remaining statements -- that "the acquisition of Discreet Logic would at most be 3% dilutive," that the R15 was expected early in calendar year 1999, that "with only one-third of the installed base upgrading to R14, we believe that R12 and R13 users will flock to R15," and that "given the feedback from some of the early Alpha R15 users, the program is solid with a substantial number of new features and better performance" -- cannot form the basis of a fraud claim as alleged here because plaintiffs do not state who (whether Bartz or Tsingos) made the statements, to whom the statements were made, or why the statements are false; and do not state any facts supporting their belief that the statements were actually made by Bartz and/or Tsingos, or that the statements were false when made. Indeed, plaintiffs provide no information regarding the dilutive effect of the Discreet acquisition, the number of customers upgrading to R14, the experiences and feedback from the R15 alpha-testers, or the features of the R15.

In ¶ 54, plaintiffs allege that Bartz, Herr, and Tsingos made false statements in a November 19, 1998, conference call for analysts, money and portfolio managers, institutional investors, and large Autodesk shareholders, held to discuss Autodesk's 3Q
The allegations in ¶ 54 are substantially similar to those in ¶ 51. As with ¶ 51, plaintiffs divide the paragraph into subsections. In ¶ 54(a), they allege that Bartz, Herr, and Tsingos made a statement identical to the statement attributed to Bartz and Tsingos in ¶ 51(a). The "reason" asserted in ¶ 54(a) is identical to the reason in ¶ 51(a) (except that plaintiffs refer to the demand for the R14 "during the latter half of 98," rather than to the demand "through 9/98"), as is the allegation of facts on which plaintiffs base their belief that the statement was false (referring, again, to sales "through the latter half of 98," rather than to the period up to September 15th).

In ¶ 54(b), plaintiffs allege that defendants made statements similar to those alleged in ¶ 51(b), except that the testing was at a more advanced phase, and defendants allegedly asserted that, based on the successful development of the R15 and the "enthusiastic response" it was receiving in beta-testing, Autodesk had been able to advance the release date of the R15 to early 1999. Plaintiffs claim that this "statement" was false, citing exactly the same reasons as in ¶ 51(b). Plaintiffs do not explain why the statement that the R15 was receiving an "enthusiastic response" in beta-testing was false, if it was, nor do they assert that defendants lied when they stated that Autodesk was advancing the release date of the R15.

In ¶ 54(c), plaintiffs allege that Bartz, Herr, and Tsingos, "during a follow-up one-on-one conversation with Piper Jaffray's analyst Hani Nada," stated that "[a]s a result of the favorable factors benefitting Autodesk's business," Autodesk was projecting FY00 revenues and earnings of $1+ billion and $2.45-$2.55 per share, respectively, and 20%-25% earnings growth over the next three to five years. For the reasons discussed with respect to ¶ 51(c), these allegations do not state a claim because they lack the requisite particularity. Plaintiffs allege that the three individual defendants made the statement during a "follow-up one-on-one conversation," but do not indicate which defendant communicated the information to Nada (or whether all three made identical statements to

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29 This was the quarter ending October 31, 1998.
Nada). Plaintiffs are required to specify which defendant made which statement. As the court noted in the order dismissing the first amended complaint, group liability does not apply to oral statements. In re Autodesk, 132 F.Supp. 2d at 844; see also In re Gupta Corp. Sec. Litig., 900 F.Supp. 1217, 1239 (N.D. Cal. 1994). Nor does it apply to information presented in analysts reports. In re Network Equip. Tech., Inc., Litig., 762 F.Supp 1359, 1367 (N.D. Cal. 1991).

Similarly, with regard to the financial forecast in the December 28, 1998, Piper Jaffray report, alleged in ¶ 58, plaintiffs fail to specify whether Bartz, Herr, or Tsingos spoke to the analyst. To state a claim of fraud based on the communication of false information to analysts, and the subsequent publication of that information in analysts reports, plaintiffs must allege the dates and contents of specific conversations between specific defendants and specific analysts, and must link those conversations to specific analysts reports containing the false information. Having failed to do this, plaintiffs have not alleged falsity with particularity in connection with the December 28, 1998 analyst report. Plaintiffs also fail to provide any reason that the forecast was false when made, and allege no facts to support the allegations made on information and belief.

In ¶ 62, plaintiffs allege that Bartz, Herr, and Tsingos made false statements in a February 24, 1999, conference call for analysts, money and portfolio managers, institutional investors, and large Autodesk shareholders, held to discuss Autodesk's 4Q FY99 results. As with the allegations regarding the September 14, 1998 analysts meeting (¶ 51) and the November 19, 1998, conference call (¶ 54), this paragraph is divided into three subparts. The statements alleged to be false in ¶ 62(a) are identical to the ones in ¶ 51(a) and ¶ 54(a). The "reasons" the statements in ¶ 62(a) are alleged to be false are also essentially the same -- i.e., the continued demand for the R14 during the last half of 1998 was based on the VIP Upgrade program, not on reorganization into vertical product lines. In addition, plaintiffs include allegations concerning a reseller conference --

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This was the quarter ending January 31, 1999.
the "One Team Meeting" -- held in Palm Springs, California, in late January or early February 1999.

Plaintiffs claim that CW #5, variously described in the second amended complaint as a "major Autodesk reseller," Cplt ¶ 45, or as a "former Autodesk sales representative," Cplt ¶ 51, told plaintiffs that the decline in sales of the R14 was "a common theme discussed with Bartz and Tsingos" at the Palm Springs reseller conference, as was the "pre-booking" of the R15 through the VIP Upgrade program." CW #5 allegedly stated that it was "well-known" that because of the VIP Upgrade program, "there was little expectation for any sales of the R15/Autodesk 2000 upon its release" and that "resellers expected little in the way of sales for the R15." Plaintiffs also claim that CW #5 told them that Bartz and Tsingos told him "in the second half of 98" that the VIP Upgrade program was "the reason for the evenness of revenues in the latter half of 98," and that Bartz and Tsingos "made it clear that Autodesk was looking for 'cash now' in the latter half of 98 notwithstanding the fact that the R15 had not been officially released yet." Cplt ¶ 62(a).

These allegations are inadequate for the same reasons as the previously-discussed allegations regarding plaintiffs' confidential witnesses and statements attributed to them. Moreover, allegations that a particular subject "was discussed" with Bartz and Tsingos, or that at an asserted fact was "well-known" do not provide the specificity required by the PSLRA. Such generalized assertions fall far short of satisfying the requirement that plaintiffs "state with particularity all facts" on which they base their belief that these discussions took place at the Palm Springs reseller conference. For example, who discussed these subjects with Bartz and Tsingos? What was the source of the information possessed by the person or persons who related that information to Bartz and Tsingos? And, most importantly, if it was "well-known" that there was "little expectation for any sales of the R15" because of the R14 Upgrade program, why was that knowledge not equally available to the market?

Similarly, in ¶ 62(b), plaintiffs allege that Bartz and Tsingos stated in the February 24, 1999, conference call that Autodesk was completing final development and testing of
the R15, that the R15 was performing well in beta-testing, and that there would be strong
demand for the R15 upon its release. Plaintiffs reiterate the meaningless incantation that
the statement that there would be strong demand for the R15 was false because it was not
true, and assert they know that the statement was false because a confidential witness told
them that the lack of demand for the R15 “was discussed” with Bartz and Tsingos at the
Palm Springs conference. However, plaintiffs allege no facts to support the claim that
there was in fact no demand for the R15. For example, they point to no specific internal
reports or forecasts showing “little interest” or “no demand” for the product. Instead, they
simply assert that an unidentified “major Autodesk reseller” (who may also have been a
“former Autodesk sales representative”) held that opinion. It is impossible to tell from the
complaint whether the opinion about anticipated demand for the R15 was based on some
survey of customers or resellers, or whether it was merely idle speculation. If based on a
survey, when was it conducted, and by whom? Who participated in it? What were the
results?

In ¶ 62(c), plaintiffs allege that Bartz, Herr, or Tsingos, “during a follow-up one-on-
one conversation with Piper Jaffray’s analyst Hani Nada,” stated that “[a]s a result of the
favorable factors benefitting Autodesk’s business,” Autodesk was projecting FY00
revenues and earnings of $1+ billion and $2.45-$2.55 per share, respectively, and 20%-
25% earnings growth over the next three to five years. For the reasons discussed with
regard to ¶¶ 51(c) and 54(c), the allegations do not state a claim because they lack the
requisite particularity. Plaintiffs fail to specify whether Bartz, Herr, or Tsingos spoke to the
analyst. In addition, they fail to provide any reason that the forecast was false when made,
and allege no facts upon which they base their belief that Bartz, Herr, and/or Tsingos
actually made the statement or that they made the statement on February 24, 1999.

Nor do plaintiffs allege with particularity the facts upon which they base the
allegation that Autodesk was “incapable” (as of February 24, 1999) of achieving the results
forecast for the fiscal year beginning February 1, 1999, and for the “next three to five
years;” or the allegation that Bartz, Herr, and/or Tsingos made the forecast “based upon”
the representation that "Autodesk had smoothed out its revenue and EPS cycles and had effectively broken the upgrade cycle during the end of 98 due to the Company's move to vertical product lines and that the R15 was going to be successful." Moreover, to the extent that they allege that the reason the forecast was false when made is dependent upon the facts alleged in ¶ 62(a) and (b), the inadequacy of the allegations in those subsections negates the asserted basis of the allegations regarding the forecasts.

In ¶ 67, plaintiffs allege that Tsingos was quoted in a March 14, 1999, Dow Jones article as stating that the Discreet Logic acquisition "will lower Autodesk's overall fiscal 2000 revenue growth to the high-teens as a percentage," and that "[e]xcluding Discreet, Autodesk's revenue continues to grow in the low 20% range." Plaintiffs claim that "this statement" was false because Autodesk was incapable of achieving 20% growth. As in ¶¶ 51(c), 54(c), and 62(c), plaintiffs claim that Tsingos made this statement "based on the representation that Autodesk had smoothed out its revenue and EPS cycle and had effectively broken the upgrade cycle during the end of 98 due to the Company's move to vertical product lines and that the R15 was successful." For the reasons set forth above, with regard to ¶¶ 51(c), 54(c), and 62(c), these allegations are insufficient to state a claim under the PSLRA.

In ¶ 68, plaintiffs allege that Bartz, Herr, and Tsingos made false statements during an April 1, 1999, analysts conference in New York City. Plaintiffs claim that the three defendants told analysts, money and portfolio managers, institutional investors, brokers, and stock traders that "[t]he success of Autodesk's reorganization" was enabling the company to "smooth out its revenue and EPS growth," and, with the initiation of the R15 product cycle, "would allow Autodesk to achieve more consistent revenue and EPS growth going forward than had historically been the case." ¶ 68(a). This allegation is substantially identical to the second half of ¶¶ 51(a), 54(a), and 62(a). And, as in those paragraphs, plaintiffs assert that this statement was false because the continued demand for the R14 was not due to the reorganization of the company into vertical product lines, but rather on the VIP Upgrade program.
Plaintiffs again assert that CW #5 told plaintiffs that Bartz and Tsingos told him in the second half of 98 that the VIP Upgrade program was the reason for the evenness of the revenues, and that the "bundling" of the VIP program with the R14 was the only reason that R14 sales continued well into the second half of 98; and that they made it clear that Autodesk was looking for "cash now" during the latter half of 98 to the detriment of potential sales in 99. Plaintiffs also repeat the allegation that CW #1 stated that sales and revenues in the latter half of 98 appeared larger than they were because of the duplication in the recording of sales and revenues.

The R15 was officially released during the week immediately preceding the April 1, 1999, New York conference. The statement asserted as false in ¶ 68(a) refers to the "initiation" of the R15 AutoCAD cycle, and does not mention the R14. However, plaintiffs' "reasons" that the statement was false refer to the continued demand for the R14, and to R14 sales during the latter half of 1998 (presumably calendar year 1998). Thus the "reason" proffered by plaintiffs in ¶ 68(a), essentially the same as the "reason" alleged in ¶¶ 51(a), 54(a), and 62(a), has no correspondence with the statement alleged to have been false when made in April 1999. This is yet another example of plaintiffs' tendency to repeat allegations from one paragraph to the next, whether appropriate or not, to the detriment of the intelligibility of the complaint.

In ¶ 68(b), plaintiffs allege that Bartz, Herr, and Tsingos stated that the R15 was "now released and selling exceedingly well," that the R15 upgrade "would be at least as successful as the R14 upgrade," and that the "successful early release date" of the R15 "would significantly benefit Autodesk's revenue and EPS growth" during FY00. Plaintiffs assert that "this statement" was false because defendants knew there was not strong demand for the R15, and that there would be little or no benefit to Autodesk revenue and earnings in FY00, the VIP Upgrade program having "effectively cannibalized" the R15. Plaintiffs claim that their belief that the statement was false is based on an interview with CW #5, who allegedly told plaintiffs that the lack of demand for the R15 was discussed with defendants during the Palm Springs reseller conference, and also on the statement of
a "major reseller," who told plaintiffs that he (the reseller) had "personally" told Bartz in March 1999 that there was little interest in the R15. Again, as explained above in some detail with regard to ¶ 62(b), plaintiffs fail to allege facts sufficient to support their allegation concerning customer demand for the R15.

In ¶ 68(c), plaintiffs allege that Bartz, Herr, and Tsingos made the same representations regarding anticipated revenues and earnings as alleged in ¶¶ 51(c), 54(c), and 62(c). For the reasons stated above with regard to those paragraphs, the court finds that the allegations in ¶ 68(c) regarding financial forecasts do not state a claim. The fact that the forecasts were allegedly made on April 1, 1999, little more than a month before Autodesk announced on May 5, 1999, that the results for 1Q FY00 (the quarter ending April 30, 1999) would be below the level previously forecast, is not sufficient to support the allegation that the April 1st statement was false when made. Temporal proximity between positive statements regarding a company's strengths and an announcement of poor performance, without more, does not create an inference that the earlier statement was fraudulent. 

In ¶ 69, plaintiffs allege that a Piper Jaffray report issued April 5, 1999, stated that "early indications" were that the R15 cycle would be successful -- "as strong if not strong[er] than the R14" -- and that "[w]e believe that this is the year that Autodesk can break the AutoCAD cycle." In ¶ 70, plaintiffs allege that a Piper Jaffray report issued April 9, 1999, reiterated that "we believe that this cycle will be as strong if not stronger than the R14 cycle." The same report also stated that "Autodesk's 20,000 seat AutoCAD 2000 beta program appears to have paid off . . . We believe if AutoCAD 2000 reliability and performance was at an issue, dealers would begin to be aware by now."

As with the allegations in ¶ 68(b) regarding the statements allegedly made at the April 1, 1999, New York conference, plaintiffs allege that the statements in ¶¶ 69 and 70 were false because Autodesk knew there was not strong demand for the R15. Plaintiffs claim that their belief that the statements were false is based on an interview with CW #5, who allegedly told plaintiffs that the lack of demand for the R15 was discussed with
defendants during the Palm Springs reseller conference, and also on the statement of a "major reseller," who told plaintiffs that he (the reseller) had "personally" told Bartz in March 1999 that there was little interest in the R15. For the reasons set forth above with regard to ¶¶ 62(b) and 68(b), the court finds that these allegations do not state a claim.

2. Pleading scienter

Defendants argue that the second amended complaint must be dismissed because plaintiffs fail to state sufficient facts giving rise to a strong inference of scienter. Under the PSLRA's heightened pleading standard, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). In the Ninth Circuit, the heightened standard requires plaintiffs to plead actual knowledge, or, "at a minimum, facts giving rise to a strong inference of deliberate or conscious recklessness," a degree of recklessness that strongly suggests actual intent. In re Silicon Graphics, 183 F.3d at 977-79. Defendants contend that plaintiffs' claims that defendants knew their statements were false when made are unsupported by facts, and that they fail to allege any economic motive for or benefit derived from the alleged fraud sufficient to establish scienter. The court must consider the complaint in its entirety in order to determine whether plaintiffs have adequately pled scienter. Id., at 985. The court finds that plaintiffs fail to allege the required state of mind with regard to each statement alleged to be false.

a. Actual knowledge

In their opposition to defendants' motion, plaintiffs argue that the second amended complaint is "replete with detailed factual allegations" that demonstrate actual knowledge. Plaintiffs assert that defendants had actual knowledge that the alleged misrepresentations were false at the time they were made, either because they had access to contemporaneous reports containing relevant information, or had access to information by virtue of their status as "hands-on" executives, or because someone told them. Specifically, plaintiffs allege that defendants knew that sales of the R14 were declining because of information in daily and weekly sales reports, that they knew that the R15 had
technical problems because of information communicated to them in the bug meetings and the bug reports, and that they knew that there would be no demand for the R15 because of statements that were made to them by various confidential witnesses and because of matters that were "discussed" at the 1999 Palm Springs reseller conference.

For example, plaintiffs allege that defendants "knew of the substantial decline in R14 sales" and that both before and throughout the class period, Bartz, Herr, and Tsingos closely monitored the sales of Autodesk's products via Autodesk's SAP/EIS program, "an integrated system that provided real-time data on actual revenues from product orders, shipment status, and product shipments." Cplt ¶ 31. Plaintiffs provide a detailed explanation of how the SAP/EIS system functioned to produce daily and weekly sales reports, Cplt ¶¶ 32-33, concluding with the assertion:

Thus, Bartz, Herr, and Tsingos were apprised of the status of orders for and sales of every Autodesk product, including the R14/AutoCAD and R15/AutoCAD 2000 products, so that they knew precisely where Autodesk stood in terms of the sale of and demand for the R14/AutoCAD and R15/AutoCAD 2000, as well as Autodesk's actual results compared to budget.

Cplt ¶ 34.

With regard to the progress of the development and testing of the R15, plaintiffs allege that Bartz was familiar with the nature and extent of the bugs identified during the testing phase of the R15 during the summer of 1998 because she participated in the weekly bug meetings, which Herr also attended, and because she received and reviewed the bug reports. Cplt ¶¶ 20-22, 27-29. Plaintiffs also claim that defendants "knew" that in early 1999 that sales of the R15 release would not be strong because "there was simply no demand" for the R15. Plaintiffs base this assertion on information obtained from CW#5, "a major Autodesk reseller," who allegedly stated that "dealers had been discussing a total lack of interest in the market" for the R15 release, and "this was certainly a topic of discussion" during meetings attended by Bartz and Herr at the "One Team" meeting in Palm Springs, held in January or February of 1999. Cplt ¶¶ 45-46.

None of these allegations are sufficient to establish actual knowledge. Apart from
their verbosity, the allegations in ¶¶ 31-34 (R14 sales reports) and ¶¶ 20-22, 27-29 (bug
meetings and bug reports) differ little from the allegations in the first amended complaint
that defendants knew adverse non-public information about the slowing sales of the R14
based on their review of internal reports, and by virtue of their executive positions with
Autodesk and their involvement in the day-to-day management of the business. See In re
Autodesk, 132 F. Supp. at 844 ("plaintiffs must do more than allege that these key officers
had the requisite knowledge by virtue of their ‘hands on’ positions, because that would
eliminate the necessity for specially pleading scienter, as any corporate officer could be
said to possess the requisite knowledge by virtue of his or her own position").

The second amended complaint merely alleges that Bartz, Herr, and Tsingos
“continued to closely monitor the sales of Autodesk’s products via the SAP/EIS (Executive
Information System) program . . . [which] broke down real-time orders, shipments, and
sales revenue day by day, month-to-date, and quarter-to-date . . . [and] was the most
complete database for Autodesk’s sales.” Cplt ¶ 31. Similarly, regarding the bug reports,
plaintiffs merely allege that “weekly reports were prepared . . . and went to Autodesk’s
executives, including Bartz and Herr,” Cplt ¶ 29, and that the reports documented technical
difficulties encountered by the company during the development and testing of the R15.
Cplt ¶¶ 20-22. Nowhere, however, do plaintiffs identify any portion of any specific report
that demonstrates that defendants knew that the statements they made publicly about the
R14 or the R15 were false at the time they were made.

The second amended complaint also contains conclusory assertions that
defendants “knew,” “believed,” “hoped,” “feared,” “were well aware,” and “realized” various
facts. For example, plaintiffs claim that defendants “hoped” the acquisition of Discreet
Logic would diversify Autodesk’s revenues away from the AutoCAD, and “feared” that if
they did not move quickly, Discreet Logic would be sold to someone else, Cplt ¶ 1; and
that defendants “knew” that any significant acquisition of the size that would enable
Autodesk to lessen its dependence on AutoCAD would be so expensive that Autodesk
could make such an acquisition only by using Autodesk’s common stock as “currency” to
Plaintiffs allege that defendants “knew” that analysts and investors would be focused during 1998 on the pending R15 product upgrade because, as an odd-numbered upgrade, the R15, like the R13, was a major product upgrade involving a large number of new features that would carry a risk of technological problems that could adversely impact its commercial success; that defendants “knew” that it was imperative that they assure analysts and investors that Autodesk was taking all necessary steps and time to properly evaluate and test the R15 prior to its commercial release to assure that the product would deliver the levels of performance promised and not contain an excessive number of bugs and operational deficiencies; and that defendants “knew” that the development of the R15 was following a course “eerily similar to the disastrous R13 upgrade release.” Cplt ¶ 24.

Plaintiffs also claim that defendants “knew” that the only way to inflate Autodesk stock to a level where they could force Discreet Logic to accept a lower exchange ratio for the acquisition and, at the same time, sell off 3 million shares of Autodesk stock on a nondilutive basis, was to persuade investors that the development of the R15 was proceeding so successfully that the product would be launched early, and as a result, Autodesk would achieve substantial growth in revenue and earnings per share in FY00 - FY02, Cplt ¶ 30; that defendants “were determined” to proceed with the Discreet Logic acquisition because they “believed” it represented an excellent fit with Autodesk’s Kinetix division and would diversify Autodesk’s business away from its dependence on AutoCAD, Cplt ¶ 35; that defendants “knew” that Discreet Logic was being actively shopped by its investment banker, and that if Autodesk did not move quickly with the acquisition, defendants’ opportunity to make what they “believed” to be an extraordinarily desirable acquisition for the company in the long term would be lost forever, Cplt ¶ 35; and that defendants “realized,” in light of the “collapse” of Autodesk’s stock following the August 1998 announcement of the Discreet Logic acquisition, that something had to be done quickly to halt the decline in Autodesk stock and push the stock back up to much higher levels so the acquisition would occur, Cplt ¶ 38.
Such allegations contribute nothing to the complaint because defendants do not state any facts giving rise to a strong inference that defendants in fact "knew" any of these things. Moreover, none of these assertions are relevant to the primary issue in the case -- whether defendants made false material statements during the class period. Plaintiffs apparently seek to create an impression of actual knowledge in the second amended complaint by repeatedly asserting that defendants acted knowingly, but such allegations are insufficient to satisfy the requirements of the PSLRA. See In re Silicon Graphics, 183 F.3d at 985. Lengthy and irrelevant speculations about defendants' mental state cannot substitute for the requirement that plaintiffs "state with particularity facts giving rise to a strong inference" that defendants acted with deliberate recklessness. Id. (citing 15 U.S.C. § 78u-4(b)(2)).

b. Motive and opportunity

Plaintiffs assert that deliberate or conscious recklessness is also shown by the "strong financial motives" that drove defendants to engage in "the scheme to defraud." Cplt ¶ 48. Under Ninth Circuit law, however, motive and opportunity, standing alone, are insufficient to establish the required state of mind under the PSLRA. In re Silicon Graphics, 183 F.3d at 974 ("although facts showing mere recklessness or a motive to commit fraud and an opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness") (emphasis in original).

Plaintiffs allege that defendants were motivated by the desire to inflate the price of Autodesk's stock so that Discreet Logic could be acquired using the fewest possible Autodesk shares as "currency," and the related desire to obtain monetary bonuses as a reward for completing the acquisition at terms favorable to Autodesk. Cplt ¶ 48. Plaintiffs assert that "[t]his put tremendous pressure on Autodesk's executives to present Autodesk's business in a very favorable light to the investment community to inflate Autodesk's stock, thereby increasing or at least maintaining its value for use as consideration in acquisitions." Cplt ¶ 48.
These allegations do not create a "strong inference" of deliberate recklessness, but rather simply suggest a motive for committing fraud — a motive that is weak, at best, because every corporation and large shareholder would have such a motive. See In re PETsMART, 61 F. Supp. 2d at 999 (allegation of motive to facilitate acquisition of another company was not sufficient pleading of scienter); Malin v. IVAX Corp., 17 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 1998) (allegation of general motive of maintaining stock price to maintain reputation of company and to facilitate mergers and acquisitions failed to raise strong inference of knowing or reckless conduct because such motives can be ascribed to virtually all corporate officers and directors). 31

Where a plaintiff alleges that motive to maintain stock price at an artificially inflated level establishes the inference of conscious recklessness, courts generally require that plaintiff allege that insider defendants sold their own stock or personally profited from the alleged inflation in the stock price during the relevant period; moreover, to constitute circumstantial evidence of scienter, stock sales by corporate insiders must be "unusual" or "suspicious." In re Silicon Graphics, 183 F.3d at 986. The present case is not one where corporate insiders made "rosy characterizations of company performance to the market while simultaneously selling off all their stock for no apparent reason." Ronconi v. Larkin, 253 F.3d 423, 435 (9th Cir. 2001). Indeed, although Autodesk's SEC filings indicate that the individual defendants held large numbers of shares and vested options of Autodesk stock, plaintiffs do not allege that defendants sold any stock at all during the class period. Absent allegations of some tangible economic benefit, the court can find no basis for inferring from circumstantial evidence that defendants engaged in conscious or deliberate wrongdoing.

Rather than allege that Bartz, Herr, or Tsingos profited from the sale of their own

31 Moreover, Autodesk's SEC filings suggest that when the terms of the Discreet acquisition were ultimately modified in January 1999, the changes were not based on an increase in the value of Autodesk's stock, but on the fluctuating price of Discreet's stock resulting from lower-than-anticipated quarterly results in October 1998 and January 1999. See, e.g., Autodesk's Form S-4/A, filed February 5, 1999.
shares, plaintiffs assert that the opportunity of receiving bonuses provided the financial
motive. Plaintiffs claim that Autodesk's executive compensation program provided for
Bartz and Herr to receive a cash bonus each year, the size of which depended on whether
they had caused Autodesk to achieve specific corporate goals for that particular year.

Plaintiffs assert that Autodesk's primary corporate objective in FY99 was to make a large
acquisition that would assist the company in its goal of diversifying its business. Plaintiffs
allege that "[b]ecause of how Bartz pulled off the Discreet Logic acquisition, Autodesk's
board rewarded her with an $800,000 cash bonus" for FY99 -- the largest cash bonus any
Autodesk executive had ever received. Cplt ¶ 49.

Courts have commonly rejected the "bonus-as-motive" argument. See, e.g., In re
PETsMART, 61 F.Supp.2d at 996-99. "Companies routinely provide their executives with
compensation packages that are tied to the price of their stock as an appropriate means of
linking pay to performance." In re Orbital Sciences Corp. Sec. Litig., 58 F.Supp. 2d 682
(E.D. Va. 1999) (citing Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068-69
(5th Cir. 1994)). Characterizing incentive compensation as a substantial motive for fraud
"would effectively eliminate the state of mind requirement as to all corporate officers and
defendants." Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994), quoted in In re

Moreover, plaintiffs' allegations are not supported by detailed facts that "constitute
strong circumstantial evidence of deliberately reckless or conscious misconduct." Silicon
Graphics, 183 F.3d at 974. Plaintiffs claim that Bartz received the bonus "because of how
[she] pulled off the Discreet . . . acquisition." Plaintiffs offer no further explanation of what
part of "pulling off the acquisition" Bartz was rewarded for, and provide no facts to support
a claim that Bartz made false statements because of her desire for a bonus. Nor do
plaintiffs allege that either Bartz or Herr was promised a bonus if the price of Autodesk's
stock rose to a certain point or did not fall below a certain point, or if the Discreet Logic
acquisition was completed on certain terms. In short, plaintiffs fail to allege facts that
create a strong inference that defendants acted with deliberate recklessness, let alone
facts creating such an inference "with respect to each act or omission alleged to violate

3. Section 20(a) claims

Plaintiffs also allege violations of § 20(a) of the Securities Exchange Act of 1934,
as to the individual defendants. Under § 20(a), "[e]very person who, directly or indirectly,
controls any person liable under any provision of this chapter . . . shall also be liable jointly
and severally with and to the same extent as such controlled person." 15 U.S.C. § 78t(a).

To establish liability under § 20(a), plaintiffs would be required to show, as to each
defendant, that he or she controls a person upon whom liability could be imposed for a
violation of the 1934 Act. Plaintiffs allege that Bartz, Herr, and Tsingos are liable under
§ 20(a) as controlling persons of defendant Autodesk. Because the court finds that
plaintiffs have failed to state a claim under § 10(b) and Rule 10b-5, there can be no liability
under § 20(a) and the claim must be dismissed.

CONCLUSION

In accordance with the foregoing, the court finds that defendants' motion to dismiss
the second amended complaint must be GRANTED for failure to allege fraud with
particularity. Moreover, based on plaintiffs' failure to file a second amended complaint
complying with the instructions in the order dismissing the first amended complaint, the
court finds that granting further leave to amend would be futile. Therefore the dismissal is
WITH PREJUDICE.

IT IS SO ORDERED.

Dated: November 21, 2001

[Signature]
United States District Judge